

CUSTOMARY LAW: 2013

1. Introduction

1.1 Overview

Customary law is a self-standing course in the Faculty of Law in LLB 2 as well as comprising one of the six component courses in the Legal Theory major in the Faculties of Humanities, Commerce and Science. Students who pass Customary law as part of the Legal Theory major are exempted from the course in the LLB curriculum.

The purpose of the course is to introduce students to the history of recognition and application of customary law as part of the national legal system. Students are also introduced to the notion of legal and cultural pluralism and the impact of the new Constitution on some aspects of Customary law. Since the advent of the new constitutional dispensation there has been numerous legal challenges regarding the constitutionality of some customary law rules and practices.

- ❖ To assist students to gain a better understanding of the application of choice law rules in the resolution of civil disputes in the lower and superior courts in terms of s 211(3) of the Constitution r/w 1(1) of the Law of Evidence Amendment Act 45 of 1988.
- ❖ To assist students in extracting legal principles from the law reports and other source materials.

1.2 Credit values

1.3 Assumptions of prior learning

To enable students to know and benefit from this course, students should be able to:

- ❖ Have the ability to read and research
- ❖ Know how and where to access resources such as articles in the various law Journals, textbooks (old and new); statutes and law reports
- ❖ Be capable of independent reading
- ❖ Read, analyse and extract principles from law reports and other source materials
- ❖ Understand the system of judicial precedent
- ❖ Understand the notion of judicial development of customary law to meet the objectives of s 39(2) of the Constitution

2. Outcomes

2.1 Critical Outcomes

This course will assist students to attain the following critical outcomes:

- 2.1.1 Organise and manage themselves;
- 2.1.2 Identify and solve practical legal problems
- 2.1.3 Communicate effectively in class and written assignment;
- 2.1.4 To understand the nature of customary and how it is applied in courts;
- 2.1.5 To be culturally sensitive;

2.2 Intended specific outcomes

A. Knowledge Outcomes

- ❖ The Customary law course is designed to enable students, on the completion of the course, to be conversant with the objects of section 39(2) of the Bill of Rights and how the courts in practice use the section to develop the outdated principles of Customary law in order to be in harmony with the Bill of Rights.

- ❖ To understand the resolution of internal conflict problems.
- ❖ To apply the knowledge acquired during the course in the resolution of legal disputes arising in Customary law contexts.
- ❖ To understand the nature of customary law and how it is applied in courts.
- ❖ To deal with issues of diversity.

B. Skills Outcome

At the end of course students should be able to:

- ❖ Identify and understand the notion of legal pluralism and how it is given effect to in the judgments of the courts.
- ❖ To understand the concept of the judicial development of customary law in the context of s 39(3) of the new Constitution.
- ❖ To be able to apply legal principles of customary law to specific situations.
- ❖ To research and write case note on a case dealing with an aspect of customary law.

C. Values Outcomes

- ❖ It is intended that students will demonstrate an appreciation of academic integrity in acknowledging sources in research.
- ❖ Ethics of disclosing all relevant law, whether favourable or not, to a given factual situation.
- ❖ Acknowledge the value of old authorities in dealing with the harmonization of customary law principles with the values of the Bill of Rights.

3. TEACHING METHODS

The course will be presented by means of the discussions of the topics indicated in the course outlines in the lecture periods. Students are only provided with a synopsis covering the nature of the law, recognition and application. Students will also be referred to recent decisions of the superior courts dealing with the judicial development

of some aspects of customary law. Students will be referred, from time to time, to recent publications dealing with some areas of contestation. Students will be expected to participate in class discussions. Tutorial attendance is compulsory. Nonattendance will result in a student losing the 5% component of the tutorial.

4. COURSE CONTENT

Sources of customary law; history and application of customary in South Africa since 1927; Customary Law and the Constitution; Customary Law of Persons and Family; Law of Property and Succession and Law of Obligations.

4.1 The place of customary law in the national legal system.

4.1.1 Definition, nature and the main features of customary law and the notion of legal and cultural pluralism.

4.1.2 Sources

4.1.2.1 Custom

4.1.2.2 Legislation (See the Traditional Leadership and Governance Framework Legislation attached as Annexure II)

4.1.2.3 Precedent

4.1.2.4 Constitution

4.2 Recognition and application

4.2.1 Brief history of recognition of customary law in South Africa

4.2.2 Customary law under the New Constitution

4.2.3 Compatibility with human rights

4.3 Application of customary law in the courts

4.3.1 “Unofficial Courts”

4.3.2 Customary Courts

4.3.3 Magistrates’ Courts

4.3.4 High Court

4.4 Law of persons and the family

4.4.1 General principles

4.4.2 Matters of status

4.4.3 Adoption

4.4.4 Disinheritance

4.4.5 Family law

4.4.5.1 Relationship within the family

4.4.6 Customary marriages

4.4.6.1 Statutory development (Recognition of Customary Marriages Act 120 of 1998)

5. Property and succession (on succession, read AJ Kerr “The Constitution, The Bill of Rights and the law of succession” (2006) 20 *Speculum Juris* p1

5.1 Development affecting the law of property (Land reform process)

5.2 Customary law of property

5.3 Customary law of succession after *Bhe*

5.4 Administration and distribution of the estates of deceased Blacks. The Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009

6 Customary law of obligations

6.1 Delict and procedural requirements

6.2 Specific delicts

6.3 Contracts

6.4 General principles and quasi contractual relations

7 Resources

The core reading and study materials are textbooks (old and new), law reports, statutes and the various articles published in the law Journals.

The following books are recommended for further reading

1. The Law of South Africa – First Reissue, 32 Indigenous Law, Lexis Nexis Butterworths (2004).
2. RB Mqoke Customary Law and The New Millennium. Lovedale Press (2003).
3. TW Bennett Customary Law in South Africa Juta (2004)
4. JC Bekker et al (eds) *Introduction to Legal Pluralism in South Africa. Part 1 Customary Law* Butterworths (2006).
5. AJ Kerr *Customary Law of Immovable Property and of Succession*, Grocott & Sherry (1990).

I have included notes from the revised chapters of Customary Law and the New Millennium.

STUDENT ASSESSMENT

Specific outcomes	Assessment criteria	Assessment tasks
(on completion of this course the students will be able to:	What evidence must the student provide to show that they are competent? The student must be able to:	The evidence will be gathered in the following way. The student may be expected to:
To understand the nature of customary law and how it is applied in the courts.	Describe the recognition and application of customary law. Describe how the courts develop customary law in terms of s 39(2) of the Constitution r/w s 1(1) of the Law of Evidence Amendment Act 45 of 1988.	Write an essay showing how the courts have harmonized the rules of customary family law with the objects of the Bill of Rights.
To understand the notion of choice of law rules.	Explain how the courts resolve internal conflicts problem in terms of s 211(3) of the Constitution.	Setting problem question in which the student will be required to discuss the choice of law factors in the light of the recent court decisions
To have the ability to resolve legal disputes arising in customary law contexts.	Describe the various stages of dispute resolution in customary law in matters involving delictual and contractual claims.	Set a test in which the problem type question will be asked and which requires the application of knowledge.

Assessment Strategy

The final mark of the course is comprised of the following components:

Examination:	out of 70 marks
Class work:	out of 30 marks
Total:	100 marks

Test

There is one test for this course which is written in the fourth term. The test will be out of 35 marks written during the lecture period. The test will contain questions equivalent to that which may be found in the November examination.

Assignment

There will be one assignment written in the third term. The length of the assignment will not be more than 1 000 words. The students will be required to follow the referencing conventions used in the Survival Guide. The assignment will be out of 35 marks. Assignment and test will count 25% and tutorial mark will count 5%.

Lecture Distribution

1. Definition

In Section 1 of the Recognition of Customary Marriages Act 120 of 1998, customary law means the customs and usages traditionally observed among the indigenous African peoples of South Africa which form part of the Culture of those peoples. In the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009 there is slight change in that the word usages has been replaced by practices and the word peoples has been replaced by people. In *Gumede v President of the Republic of South Africa and others* 2009 (3) SA 152 (CC) Moseneke DCJ raised the issue of the “reach of Customary Law, whom it binds and, in particular whether other people other than indigenous African people may be bound by Customary Law”. See also AJ Kerr “The Constitution, the Bill of Rights and the Law of Succession (1) 2009 (19) *Speculum Juris* 181 where the author raises the same questions in the light of the comments appearing in both the minority and majority judgments in *Bhe v Magistrate Khayelitsha* 2005 (1) SA 580 (CC).

In response to Moseneke DCJ’s query in the *Gumede* case *Supra*, Kerr in the article referred to above at 186 thinks that Nama, Khoi and San people should be included. In *Alexkor Ltd v Richtersveld Community* 2004 (5) SA 460 (CC) the court dealt with Nama indigenous law. As Customary Law has been defined from a cultural context, it is important to read the relevant sections of our Constitution which deal with culture such as sections: 6 (languages), 30 (language and culture), 31 (Cultural, religious and linguistic communities) and section 185 (Commission for the Promotion and Protection of the Rights of Cultural Religions and Linguistic Communities).

Students should read Sachs J’s comment on section 31 in *Christian Education South Africa v Minister of Education* 2000 (10) BCLR 10 51 (CC)

- Meaning and legal significance of culture in Customary Law context. To this end the following sources should be consulted:

M J Maluleke “Culture, Tradition, Custom, Law and Gender Equality” PER/PELJ¹ 2012 (15) 1 428;

N Ntlama “The Application of section 8 (3) of the Constitution in the Development of Customary Law values in South Africa’s New Constitutional Dispensation” PER/PEL (2012) (15)

Obeng Mireku “Culture and South African Constitution” An overview 2002 Speculum Juris 91

The Right to Culture

i. In Case Law the right to culture has been juxtaposed with the right to equality. See the following cases:

Mthembu v Letsela and another 1998 (2) SA 6 75 (T); Anne Prior v Donald Battle and others 1998 (8) BCLR 10 13 (TK); Shilubana v Nwamitwa 2008 (9) BCLR 914 (CC); Bhe v Magistrate Khayelitsha 2005 (1) BCLR 1 (CC)

ii. The Nature of Customary Law (features which distinguished it from the Common Law).

The following cases contain useful comments on the distinguishing features of Customary Law:

S v Makwanyane and Another 1995 (3) SA 391 (CC); Sijila v Masuku 19 37 NAC (N&T) 121; Alexkor and Another v Richtersveld Community and others 2003 (12) BCLR 13 01 (CC) paras 51 and 52; Bhe v Magistrate Khayelitsha and others 2005 (1) BCLR 1 (CC); Mthembu v Letsela and Another 1997 (2) 2SA 936 (T) and Chuma Himonga “The

¹ PER/PELJ stands for Potchefstroom Electronic Journal

Future of Living Customary Law in African Legal Systems in 21st Century and Beyond with specific Reference to South Africa” in The Future of African Customary Law by Jeanmaré Jenrid, Galizzi & Higgisio (ed)’s Cambridge University Press 31.

iii. Main features

- Not a single system but consists of a multiplicity of Customary Laws
- Statutory and non-statutory Customary Law
- Judicial notion of three streams of Customary Law, namely: Official Customary, Living Customary Law and Academic Customary Law. See Kerr’s comment on these streams in “The Constitution, Bill of Rights and the Law of Succession (1)” 2005 Speculum Juris 192 – 197

iv. The notion of legal pluralism

- State Law pluralism. Students should read Introduction to Legal Pluralism in South Africa by J C Bekker et al Lexis Nexis (2006) chapter 1. A discussion of the notion of legal pluralism is contained in the hand-out entitled Chapter 1.
- Deep Legal Pluralism (Unofficial Customary Law, Islamic Law, Peoples Law, Hindu Law)
- Outline of religious Family Laws in South Africa (Hindu Law, Jewish Law and Muslim Law). See generally chapter 10 and Gordon Woodman “Legal Pluralism in Africa: The implications of state recognition of customary laws illustrated from field of land law” 2011 Acta Juridica 35 and Razaana Denson “Non-recognition of Muslim Marriages: Discrimination and Social injustice” 2009 Obiter 243.

2. **The place of Customary Law in the National Legal System.** See again the hand-out entitled chapter 1 page 1 – 25 and Ntlama’s article page 27 – 38.

3. **Ascertainment of Customary Law.** See generally the hand-out entitled chapter 2.

4. Brief history of recognition in South Africa: see pages 34 – 36 of the Handout.
5. Application of Customary Law in both official and non-official courts: see chapter 5 of the Handout.
6. Development of Customary Law chapter 5 of the Handout.
7. Chiefs' Courts Rules: see a summary of these rules in Francois de Villiers Selected South African legislation on Customary Law and Traditional Authorities kept on short loan.
8. Part B Customary Private Law
 - 8.1 Law of Persons and Family see separate Handout entitled Chapter 6. See also 2010 THRHR 679
 - 8.2 Property and Succession (see the separate Handout to be handed out). See also *Ingonyama Trust v Radebe & Others* (2012) 2 ALL SA 2012 (KZP)
 - 8.3 Customary Law of obligations (separate Handout)