

# **CUSTOMARY LAW: 2011**

## **1. INTRODUCTION**

### **1.1 Overview**

Welcome to African Customary Law. This course is a stand-alone semester course that counts for credit in the Faculty of Law for LLB 2 as well as one of the courses in the Legal Theory 2 in the Faculties of Humanities, Commerce and Science. Students who pass Customary Law are exempted from the course in the LLB curriculum.

The purpose of the course is

- a) To introduce students to the history of recognition and application of customary law as part of the national legal system.
- b) Introduce students to the notion of legal and cultural pluralism and the impact of the new Constitution on some aspects of Customary Law.
- c) 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
- d) To assist students in extracting legal principles from the law reports and other source materials.

### **1.2 Assumptions of prior learning**

For students to benefit from this course, they should be able to:

- a) Have the ability to read and research
- b) Know how and where to access resources such as articles in the various law Journals, textbooks (old and new); statutes and law reports
- c) Be capable of independent reading
- d) Read, analyse and extract principles from law reports and other source materials
- e) Understand the system of judicial precedent
- f) 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:

- a) Organise and manage themselves;
- b) Identify and solve practical legal problems
- c) Communicate effectively in class and written assignment;

- d) To understand the nature of customary and how it is applied in courts;
- e) To be culturally sensitive;

## 2.2 Intended specific outcomes

### A. Knowledge Outcomes

- a) To acquire an understanding of the nature and characteristics of African Customary Law.
- b) To be able to demonstrate an understanding of the historical development of African Customary law and problems associated with the process.
- c) To enable students 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.
- d) To understand the resolution of internal conflict problems
- e) To apply the knowledge acquired during the course in the resolution of legal disputes arising in Customary Law contexts.
- f) To understand the nature of customary law and how it is applied in courts.
- g) To deal with issues of diversity.

### B. Skills Outcome

- a) Identify and understand the notion of legal pluralism and how it is given effect to in the judgments of the courts.
- b) To understand the concept of the judicial development of customary law in the context of s 39(3) of the new Constitution.
- c) To be able to apply legal principles of customary law to specific situations.
- d) To research and write case note on a case dealing with an aspect of customary law.
- e) To be able to show how conflict of law (choice of law) rules contained in statute and also abstracted from court decisions apply in contemporary situations

### C. Values Outcomes

- a) It is intended that students will demonstrate an appreciation of academic integrity in acknowledging sources in research.
- b) Ethics of disclosing all relevant law, whether favourable or not, to a given factual situation.
- c) 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 outline. There is no comprehensive handout for the course. Students are therefore expected to take their own notes during class. From time to time, may be supplied with supplementary materials. During lectures and tutorials, students will be

referred to recent decisions of the superior courts dealing with the judicial development of some aspects of customary law and recent publications dealing with some areas of the law relevant to certain areas of contestation.

Students are expected to assume responsibility for their own learning by reading ahead of each lecture and consolidating afterwards. Lectures are compulsory and students may not miss more than six lectures or fails to perform any other tasks related to the course without valid Leave of Absence. **[DPs will be enforced strictly because attendance and discussions in class are considered to be an important part of the course]**.

#### 4. COURSE CONTENT

Students should note that the choice of topics is related to the understanding of how the principles of customary Law are affected by the interaction of norms in modern South African society

- 4.1 Introduction
- 4.2 The place of customary law in the national legal system
- 4.3 Recognition and application
- 4.4 Customary Marriage
- 4.5 Law of Property
- 4.6 Succession under Customary Law
- 4.7 Law of Delict
- 4.8 Law of Contract

#### 5. RESOURCES

The core reading and study materials are textbooks (old and new), law reports, statutes and the various articles published in the law Journals. There is no prescribed text for the course.

The following books are recommended and will be referred to from time to time:

1. Olivier et al, *Indigenous Law*, Lexis Nexis Butterworths (1995).
2. RB Mqoke, *Customary Law and The New Millenium*, Lovedale Press (2003).
3. TW Bennett, *Customary Law in South Africa*, Juta (2004)
4. Koyana, *Customary Law in a Changing Society*, Juta (1980)
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).

L Mofokeng, *Legal Pluralism in South Africa*, Van Schaik (2009)

J C Bekker, *Seymour's Customary Law in Southern Africa* 5 ed (1989)

## 6. 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?<br>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.<br><br>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.                                   |

## **7. ASSESSMENT STRATEGY**

The final mark for the course comprise of the following components:

Examination: out of 70 marks

Class work: out of 30 marks

Total: 100 marks

### *Test*

There is a one hour test in this course which is written in the fourth term. The exact dates will be announced during lectures and the notice posted on RUConnected. The test will contribute to 50% of the class work mark.

### *Assignment*

There will be one assignment written in the third term. The assignment question will be made available at the beginning of the term and must be submitted on or before 19 August 2011. The length of the assignment should not exceed 1 000 words. The students will be required to follow the referencing conventions used in the Survival Guide. The assignment will be out of 20 marks and counts for 45% of the class work marks. The other 5% will be from tutorial work.

### *Examination*

In November there will be two-hour paper that will be out of 70 marks. The class component will count 30 marks. There will be three questions on the paper and the student will have to choose two questions to answer. Each question carries 35 marks and they will require students to be able to explain legal rules and principles in a theoretical sense, to write a case note on leading precedents, as well as apply their knowledge to solving practical problems.

The examination is compulsory and an external examiner assesses the quality of both the examination paper and students' answers.

## **8. EVALUATION**

Students will be required to complete evaluation questionnaires according to the Law Faculty's evaluation cycle. Student responses to these questionnaires assist the faculty in improving the quality of teaching as well as for curriculum development. An external examiner will assess the quality of the exam paper and student answers and will complete a report on the course. Nonetheless, students are encouraged to discuss difficulties and problems regarding the course with the lecturer – either personally or through a class representative