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CUSTOMARY LAW: 2010

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. Non attendance 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

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 the Cape Province

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

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. This book will be available in 2010. In the meantime I have revised the contents of the old chapters 1, 2 and 5 which deal with the problem areas of the course.

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 for 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. The test counts 50% of the class work.

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 be 25% and tutorial will count 5%.

1. Customary Law 2009

- 1.1 Definition: See s 1 of the Recognition of Customary Marriages Act 120 of 1998 and s 1 of the Traditional Leadership and Governance Framework Act 41 of 2003 and *Mthembu v Letsela and Another* 1997 (2) SA 936 (TPD)
- 1.2 Nature of Customary Law: See *Alexkor and Another v Richterveld Community others* 2003 (12) BCLR 1301 (CC) paras 51 and 52 and, *Bhe and Others v the Magistrate Khayelitsha and Others* 2005 (1) BCLR 1 (CC) Langa DCJ paras 41, 42, 43, 44, 45, 46, 89 and Ngcobo J at paras 148, 149, 150, 151, 152, 153

- 1.2.1 Customary law as part of African Culture: see the first *Mthembu* case and *Bhe* (Supra)
- 1.2.2 Customary law as a living law: *Bhe* case and *Mabena v Letsoala* 1998 2 SA 1068 (T). The notion of the living law is often associated with the Austrian jurist Eugen Ehrlich 1862-1922. See a good commentary on Ehrlich's views on Comparative law in a global context: *The legal systems of Asia and Africa* by Dr Werner Menski, Platinum Publishing Limited, London. We have a copy in the library pp 114-118; see again the analysis of this concept by Himonga and Bosch 2000 SALJ 306.
- 1.3 Main features of customary law: chapter two of *Customary Law and The New Millennium*.
- 1.4 Place of customary law in our legal system (*Mthembu*, *Alexkor* and *Bhe* cases). See also Chuma Himonga "Taking Stock of changes to customary law in a New South Africa" in Dr G Glover (ed) *Essays in Honour of AJ Kerr* LexisNexis Butterworths (2006) 215.
- N.B In both *Alexkor and Another v Richtersveld Community and Others* and *Bhe and Others v The Magistrate Khayelitsha and Others* the Constitutional Court referred to three meanings of Customary law. On the notion of what the court called 'academic law' see AJ Kerr "The Constitution, The Bill of Rights and Law of Succession" (2005)19 Speculum Juris 181 at 194 et seq.

SOURCES OF CUSTOMARY LAW

This is also contained in chapter 1.

On the relevance of sources of Customary law see, inter alia, the **Alexkor** case, below, and the judgment of Albie Sachs J **S v Makwanyane and Another** 1995 (3) SA 391 (CC).

1.1 Custom

See the books indicated in the reading list. Read Chapter 1 Customary Law and the New Millennium and cases noted in R.B Mqoke Basic Approaches to problem solving in Customary law Grocotts & Sherry (1997) pp 155 and 197.

The following cases must be read: **Alexkor and Another v Richtersveld Community and others** 2003 (12) BCLR 1301 (CC); **Mabuza v Mbatha** 2003 (4) SA 218 (C) and **Sigcau v Sigcau** 1944 AD 67. On the statutory provisions entrenching customary practices. See Inter alia, The Traditional Leadership and Governance Framework Act 41 of 2003 and Recognition of Customary Marriages Act 120 of 1998.

1.2 Legislation as a source: Law of Evidence Amendment Act 45 of 1988 – repugnancy clause interpreted in the **Mabuza** case, Supra.

1.3 Precedent: This refers to the judgment of the superior courts (High Court, SCA and the Constitutional Court)

This includes the decisions of the Native Appeal Court

1.4 Commission Reports

Two such reports are important, namely, the 1883 Commission Report (See AJ Kerr 1986 Transkei Law Journal) and South African Native Affairs Commission 1903-5. The two commissions made specific recommendations with regard to land tenure rules. See the relevance of both commission reports in the area of intestate succession in AJ Kerr 2006 Speculum Juris.

- 1.5 Textbooks: See Comments in this regard in both the ***Bhe*** and ***Alexkor*** cases.
- 1.6 Articles published in the South African Law Journals: Recent cases and new legislation dealing with customary law will be commented upon in the law journals. The following journals usually carry either full length articles or case notes on customary law: De Jure; The Journal of the Faculty of Law University of Pretoria appears twice a year and is published by LexisNexis Butterworths; THRHR which stands for Tydskrif vir Hedendaagse Romeins-Hollandse Reg (Journal of Contemporary Roman-Dutch law) also published by LexisNexis Butterworths. OBITER, The Journal of the Faculty of law, Nelson Mandela Metropolitan University, appears twice a year; Acta Juridica, the Journal of the Faculty of law, University of Cape Town, appears once a year; Speculum Juris, a Joint publication of the Nelson Mandela School of law, Fort Hare and Faculty of law Rhodes University also appears twice a year and South African Law Journal (SALJ).

From time to time students will be referred to articles published in these Journals all of which can be accessed in the Law Library. Quite often the superior courts when dealing with customary law related problems rely on articles published in the law journals.

HISTORY OF RECOGNITION

1. Brief history of recognition and application of customary law in South Africa since 1927. For a full account on the history of recognition and Application see, *inter alia*, GMB Whitfield South African Native Law (1946) and the sources listed in your course outline particularly TW Bennett 2004 Chapter 2.
 - 1.1 Black Administration Act 38 of 1927 created a parallel system of Special Courts, which functioned until they were abolished in terms of the Special Courts for Blacks Abolition Act of 1986.
 - 1.2 Civil and Criminal Jurisdiction of courts of traditional leaders: sections 12 and 20 of Act 38 of 1927. For the legal position in the former independent homelands see J C Bekker Seymour's Customary Law in Southern Africa (1989) pp. 18 – 28. These two sections still apply.
 - 1.2.1 Civil Courts Rules G N R 2082 of 29 December 1967 were promulgated in terms of the Black Administration Act 38 of 1927. These rules are still in force.
2. Customary law under the New Constitution: see chapter 12 of the Constitution and comments thereon in the Bhe case. The Black Administration Act received adverse comments in *Moseneke v The Master* 2001 2 SA 18 (CC) and in the *Bhe* case.
 - 2.1 Constitutional challenges of some aspects of customary law: see the cases *Mhlekwana v Head of the Western Transvaal Regional Authority* 2000 9 BCLR 979 (TK); *Mthembu and Bhe* cases referred to at page 7 above.

2.2 Compatibility of customary law with human rights: see again the sources on page 2. See p 40 – 42 of *Customary law and the New Millennium*.

Application of customary law in South Africa

This is also dealt with in chapter 5.

1. Community Courts

The application of customary law at the level of unofficial courts. In the townships these tribunals are called community courts whereas in the rural areas they are ward courts or courts of subhead men. In the post apartheid era some community courts see, inter alia, Sanette Nel “Community courts: official recognition and criminal jurisdiction – a comparative analysis” 2001 CISA p 87 and Wilfred SCHÄRF & Daniel Nina (eds) *The Other Law, Non-State Ordering in South Africa, Juta (2001)*. The South African Law Commission Discussion Paper 87 Project 94 Community Dispute Resolutions Structures made certain proposals. Again Professor Nel 2001: 89 expresses the view that community courts should be retained as they fulfill a specific need in the community. How does one reconcile this proposal with s 166 (e) read with s 170 of the new Constitution. See also s 34 of the 1996 Constitution. These community tribunals are examinable. Chapter 5 of Bennett 2004 is very important on the court system.

2. Customary Courts¹

These are the official courts of traditional leaders. On these see, inter alia, *Customary Law and the New Millennium Chapter 5*; CRM Dlamini “The effects of customs, religions and traditions on the right to a fair trial in Africa” 2000 CILSA 318 at 324 et seq and Francios de Villiers Selected South African Legislation on Customary Law and Traditional Authorities,

¹ On nomenclature see footnote 2 at page 11 below.

Konrad- Adenamer- Sliftung, on the current rules of chief's courts (Rules 1 to 12). These rules are also examinable.

3. **Application of customary law in the Magistrate's Courts: choice of law rules**

See 211 (3) of the new Constitution. Some choice of law rules were formulated in *Ex Parte Minister of Native Affairs; in re Yako v Beyi* 1948 1 SA 388 (A); *Maisela v Kgolane* No 2000 2 SA 370 (TPD). See also *Makholiso and Others v Makholiso and Others* 1997 4 SA 509 (TK). Some of the choice of law factors identified under s 11 of the Black Administration Act are noted in NJJ Olivier et al *Indigenous law*, Butterworth (1995) pp 201 – 215. See also TW Bennett "Conflict of Laws" in JC Bekker et al *Introduction to legal Pluralism*, LexisNexis Butterworths (2006).

4. Application in the High Court: Development of Customary Law

To achieve the objects of s 39 (2) of the Constitution, see the approach of the Constitutional Court in *Carmischele v Minister of Safety and Security and Another* 2001 4 SA 938 (CC) and *Mabena v Letsoalo* 1998 2 SA 1068 (TPD). Study the reasons why the Constitutional Court did not develop the customary law principle of *primogeniture* in the *Bhe* case.

Procedure and Evidence

1. Introduction

Since the passing of the Black Administration Act² 1927 and the regulations passed under it the procedure to be observed in connection with the hearing of both civil and criminal matters in the traditional³ courts has always been in accordance with the laws and customs of the traditional community in question. At the level of the unofficial⁴ courts the procedure in connection with the notification of the date of trial and the execution of judgment is still in accordance with the pre-colonial procedure of using *imisila yenkundla*⁵ (court messengers). In the official Courts⁶

² Act 38 of 1927. The current regulations were promulgated in G Notice R2082 of 29 December 1967. Rule 1 of the current regulations sanctions the observance of laws and customs of the respective tribes. The term “tribe” has been replaced in recent legislation by the phrase traditional community. See the definition section of the Communal Land Rights Act 11 of 2004. In *Ex Parte Chairperson of the Constitutional Assembly : in Re Certification of the Constitution of the Republic of South Africa*, 1996, 1996 (4) SA 744 (CC) it was held that traditional courts are included in S 166 (E) of the Constitution.

³ The South African Law Commission Report on traditional courts and The Judicial Function of Traditional Leaders of 21 January 2003 refers to these Courts as *Customary Courts*. See p xi This document will hereafter be referred to as the Commission Report (2003).

⁴ This refers to the courts of a sub headman (*inkundla yenkosana* (Nguni); induna (Zulu) and kgosana (Sotho). See further RB Mqoke “Traditional and Modern Law of Procedure and Evidence of the Cape Nguni – A Re-appraisal” (1982) 11 *Speculum Juris* 46 of 50 in N9. Since the early days traditional court messengers are referred to as imisila and the summons is known in the vernacular as Umsila wengwe (tigers tail)

⁵ Umsila literally means a tail. In the Eastern Cape a court messenger used to carry a tiger’s tail (*umsila wengwe*) as a badge of authority when he went to inform a defendant about the date of trial. It would seem that what Africans thought to be a tiger was, in fact, a cheetah. See in this connection the present writer in 1982 *Speculum Juris* in Note 3 above

⁶ Headmen and Chiefs’ Courts. In the Commission Report 2003:43 there is a proposal for these courts to be empowered to punish for contempt of court any person who without lawful excuse disobeys an order given by customary court or who insults a customary court or any of its members during a sitting of the court or who wilfully disturbs the peace or order of the proceedings in the court (S 14)

messengers of the traditional Council (former tribal authorities) are issued with subpoenas to be given to defendants or accused persons. From early on till to date traditional courts have never had a clear distinction between civil and criminal matters when hearing cases but deal with all aspects of the case in the same proceedings by the simple expedient of imposing on the defendant a fine which incorporates the compensation considered to be due to the plaintiff. The only distinction which seems to be peculiar to the Cape Nguni was in regard to the onus of proof in criminal matters when there were very strong grounds of suspicion against the accused⁷. For example, if during a house to house search for a stolen animal some meat was found concealed within the premises of the accused, the onus would be on him to explain that the meat was not from the missing animal. In the vernacular it will be said “*gqithisa umkhondo*”, that is, to explain the spoor⁸.

2. Lodgement procedure

Perhaps another difference between criminal and civil matters lies in connection with the initiation of legal proceedings. In civil matters as soon as a civil wrong has been committed the plaintiff, accompanied by his or her kin group, would proceed to the homestead of the wrongdoer to report the matter and open negotiations⁹. This would invariably be the case in seduction and pregnancy matters. A litigant's failure to comply with the recognised customary procedure renders his or her evidence suspect¹⁰. Our courts are reluctant to interfere with the procedure followed in the traditional courts¹¹. It is only when the traditional court has flouted the prescribed procedure that the court proceedings would be set aside¹².

⁷ See Charles Brownlee “Notes by the Gaika Commissioner” GH8/23 March 19, 1863. This was a Draft of an Ordinance to amend and declare the law relating to Natives. These were handwritten notes which are kept at Government Archives, Cape Town. These are quoted in full by the present writer in *Customary law and the New Millennium*, Lovedale Press (2003) at 26.

⁸ See AJ Kerr *The Customary Law of Immovable Property and of Succession*, Third Edition, Grocotts & Sherry at p 82. The author states that the phrase “spoor law” came into being because most of the cases in the nineteenth century concerned stolen stock. In Kerr's own words, even in such cases, however, it is not necessary to find evidence of the “spoor” in the sense of the imprint of a hoof. “Other satisfactory evidence, whether of previous presence of an animal or of other goods, will suffice...” at 82

⁹ In criminal matters a charge will be laid at the Headman's or Chief's place. In the proposed Traditional Courts Bill the distinction between civil and criminal matters will be delineated on the record of proceedings.

¹⁰ See *Bilitani v Kwini* 1962 NAC (S) 8.

¹¹ See *Makapan v Khope* 1923 AD 551 at 561

¹² See *Masenya v Seleka Tribal Authority And Another* 1981 (1) SA S22 (T) cited by AJ Kerr (1981) 98 SALJ 320.

The conclusion of the negotiation stage is seen as being an equivalent of *litis contestatio*¹³.

If the negotiations do not produce any acceptable outcome the plaintiff would proceed at once to institute his or her claim in the ward court and from there to the court of the Headman or that of the senior traditional leader. At the level of the official courts the procedure would be slightly different as a traditional leader is expected to summon before it any person who is a defendant in an action or is required to give evidence. The Traditional Courts Bill is silent about the method of notification of a defendant to attend a trial. This is regrettable as there is no indication of whether a Traditional Court may give a default judgment and whether non appearance by a party on a date set aside for the hearing of his or her case may result in a court imposing a sanction for contempt of court.

3. Trial Procedure

3.1 Features of the traditional procedure.

3.1.1 Inquisitorial and arbitrational

The court procedure is court centred and the court and the members in attendance take a leading role in the conduct of trial. The primary aim of the traditional procedure is to obtain reconciliation between the parties hence the use of arbitration.

3.1.2 Trial takes place in an open court and is informal. This means that there is less emphasis on the mechanical rules of exclusion.

3.1.3 Both parties must be present. Both features of the traditional court procedure feature prominently in the proposed Bill. The latter goes further and promotes full participation of all interested parties without discrimination on grounds of race, sex or gender.

3.1.4 Prohibition of legal representation. Litigant would, however, be assisted by relatives. Again it would seem that this tradition would be continued in the future if the proposed Traditional Courts Bill becomes law. In terms of the relevant section of the bill any person who is a party to a matter before a Customary Court¹⁴ may be represented by any other person of his or her choice in accordance with customary law.

¹³ See the present writer's *Customary law and the New Millennium* op cit at p 116 N11

¹⁴ The proposed Bill refers to Customary Courts. In this Chapter, traditional courts and customary courts will be used interchangeably.

The Traditional Courts Bill is attached here for your convenience. The Bill covers, inter alia, designation of a king, queen, senior traditional leader, headman or headwoman as the presiding officer of the traditional court, procedure during the trial and the matters excluded from court's jurisdiction.

4 Evidence

4.1 Oral evidence. Evidence in traditional courts is given orally.

These courts may also receive documentary evidence.

4.2 Taking of oath. There is no taking of oath and as such no perjury is punishable.

4.3 Exclusionary rules. Traditional Courts are not bound by any mechanical rules of exclusion.

4.4 Opinion evidence

In the Eastern Cape¹⁵ the well-known case of *Ityala lamawele* (a case of twins) provides precedent regarding the extent to which the Xhosas made use of opinion evidence in intricate cases on some obscure points of law where no precedent could be found. It seems that one has to be an old sage of repute before one can be regarded as an expert. Again in disputed paternity cases, opinion evidence relating to the degree of physical resemblance of the child to the alleged father was admitted.

7.1 Real evidence

Real evidence as well as evidence of an eye witness was very important. In *Maqutu v Sancizi*¹⁶ it was held that the custom of taking *intlonze* (exhibit in the nature of an article belonging to the wrongdoer from the scene of crime) was not confined to adultery cases only and that *intlonze* could be taken by force from any wrongdoer. In *Maqutu's* case the defendant had taken plaintiff's blankets as *intlonze* when he found him stealing in his (defendant's) garden.

7.2 Circumstantial evidence

¹⁵ See, inter alia, J.H Soga *The AmaXhosa: Life and Customs* Witwatersrand University Press, (1932): 42 and S.E.K Mqhayi *Ityala lamawele*, Lovedale Press (1914)

¹⁶ 1936 NAC (C & O) 86

In adultery cases the court would receive evidence of a “catch”¹⁷. The Native Appeal Court later modified the rule relating to “catch” by holding that “proof of a catch” which has no connection with any alleged act of intercourse merely shows intimacy between the wife and the alleged adulterer and as such may be accepted as evidence *aliunde* in support of her testimony”¹⁸

8. Law of Persons and Family

8.1 Persons: see, inter alia, the following LAWSA Volume 32 “Indigenous law” paragraphs 97 – 103 and Customary law and the New Millennium.

8.2 Family Law: See, inter alia, chapter 3 of Introduction to Legal Pluralism and LAWSA Volume 32 paragraphs 104 – 157 and Bennett 2004 chapters 7 & 8.

9. Property and Succession

9.1 Property: see generally chapter 4 Introduction to Legal Pluralism, AJ Kerr *The Customary Law of Immovable Property and of Succession* (chapters 7, 8, 9, 11). These chapters are very short. See also, Customary Law and the New Millennium; Ben Cousin 2005 Stellenbosch Law Review 488 and Annika Claasens 2005 Acta Juridica 42.

9.2 Succession: See AJ Kerr 2006 Speculum Juris p1 – 16; Chapter 7 of Introduction to legal Pluralism, LAWSA Volume 32 paragraphs

¹⁷ “Catch” referred to situations where a defendant was found in sexually compromising circumstances with the plaintiff’s wife. See also examples given in J.C Bekker (ed) **Seymour’s Customary Law in Southern Africa**, Fifth Edition, Juta & Co (1989): 371 - 372

¹⁸ *Myataza v Macasa* 1952 NAC (S) 28, quoted with approval in **Seymour’s Customary Law** opcit at 372

223 – 247. On succession to the position of a traditional leader see the recent decision of the Constitutional Court dealing with the matter of Tinyiko Phillia Namitwa Shukubana and Others v Sidwell Nwamitwa and Others case CCT0

10. Law of Obligations

10.1 Delict: See generally JC Bekker Seymour's Customary Law in Southern Africa and chapter 6 of Introduction to Legal Pluralism.

10.2 Contract: See JC Bekker Seymour's Customary Law in Southern Africa.