



# LEGAL PLURALISM

Lecturer:

**Ms N Nxumalo**

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**The politics of legal diversity in South Africa.**

## **1 Overview**

Legal Pluralism is a stand-alone semester course that counts for credit in the Faculty of Law for LLB2, as well as one of the courses for Legal Theory 3 under the Faculties of Humanities, Commerce and Science. Legal Pluralism is a normative subject matter based on the study of custom, customary practices, and in general, customary law. The subject's aim is to provide in-depth theory and methodology into South African customary law with emphasis to legal reform and constitutional interpretation. Under the subject matter you will get to analyse the recognition and advancement of customary law under the constitutional lens. The main themes that will be highlighted will be customary law of succession; delict, marriages; incorporation of other customary law systems and practices, and in specific, Hindu, and Jewish customary practices; and traditional court systems that are currently observed in South Africa. Under the above-mentioned themes, students will be able to examine the interaction between the Constitution and customary law and how courts interpret, apply, and develop customary law. Students will be encouraged to develop critical perspectives considering their diverse historical, cultural, and socioeconomic backgrounds.

## **2 Module Credits**

10 credits at NQF level 7 equates to 100 notional hours in a semester

## **3 Assumptions of prior learning**

In order to successfully complete this course, students should:

- o Be capable of writing and communicating in coherent English.
- o Be capable of accessing resources such as textbooks, law reports and statutes in the Law Library and online
- o Be familiar with basic legal concepts and terminology.
- o Be capable of independent research and learning
- o Be capable of reading, critically analysing and extracting relevant legal principles from law reports and other source material.
- o Understand the system of judicial precedent
- o Have a basic understanding of legal problem-solving techniques, and how to apply these to solve legal problems.
- o Have a working knowledge of the legal referencing conventions and techniques prescribed by the Faculty of Law and be able to apply these to their written work.

- o Be familiar with core constitutional principles, values, and ideas

#### **4 Critical outcomes**

Students will be able to:

- o Identify and solve practical legal problems
- o Organise and manage themselves and their workload

- o Collect, analyse, and evaluate information from various sources, as well as information conveyed in lectures
- o Communicate effectively in class, written assignments, and tests
- o Use technology in legal research and accessing prescribed material
- o Understand the nature of legal pluralism and how customary and/or religious law is applied by the courts

## 5 Expected outcomes

Students who have studied the course are expected to be able to:

- o Identify the socio-legal systems of the South African normative order.
- o Understand the operation of and tensions within a plural-legal society such as South Africa.
- o Demonstrate an understanding of the historical development of African customary law and problems associated with its application in the legal system.
- o Acquire capacity to conceive law in plural ways and understand law in comparative perspective, exceeding the level of formal law.

## 6 Responsibility of the student

During the current academic setting. It is expected that students must engage with the course content posted on RUconnected, this includes and not limited to, recommended readings, tutorial questions, PPT slides, and lecture recordings. Note that the module has 7 credits and requires that you spend at least seven hours per week to master and engage with the learning content. That means you are required to work ahead and prepare readings ahead of time. Reading that will be recommended creates the essence and overall view of the entire content to be taught in the module/course. Do not neglect your readings in hope that it will not be covered in your assessments.

## 7 Contact Details

You may contact **Ms Nxumalo** for any course content or course admin related issues. If you require a consultation, kindly send an email with an “*re: request for consultation and include your module code*”. In the body of your email, kindly include the **subject matter** you wish to discuss and then the **times & dates** of your availability.

Should you wish to contact the Legal Theory 3 course coordinator, you may do so via e-mail:

**Graham Glover**

[g.glover@ru.ac.za](mailto:g.glover@ru.ac.za)

Problems of an administrative nature should first be directed by email to the course coordinator. Queries regarding the CONTENT of the course should be directed to the relevant lecturer who teaches the course. The course coordinator does NOT keep copies of various handouts / modules taught by other lectures, so please ensure that you consult with the relevant lecturer.

## 8 Teaching Method

The course will run for 13 weeks and will be presented live with specific topics covered in weekly lectures. The various topics will be covered in live lectures and slides, writing opportunities and other formative tasks. Students are expected to take responsibility for their own learning by ensuring that the prescribed readings are completed before each lecture, taking their own notes on the content covered in lectures and supplementing this using the prescribed readings. Problem solving scenarios, theoretical discussions, and critiques, as well as case-based analyses will be put before students throughout the course and assessment. Supplementary instruction in forms such as videos, worksheets, quizzes, and forum discussions will take the place of conventional face-to-face tutorials.

## 9 Course Content

1. Theories of legal pluralism and challenges to the concept of law
2. The origins and evolution of legal pluralism in South Africa
  - 2.1. History and application of African customary law and other socio-legal norms
  - 2.2. Transformative constitutionalism, the legitimisation of new forms of authority, issues of recognition
3. Bill of Rights and customary/religious normative systems (theoretical debate and case analysis)
4. Marriage laws in comparative perspective (customary, Hindu, and Muslim norms)
5. Dispute settlement in plural legal settings
  - 5.1. Traditional courts and the role of traditional institutions
  - 5.2. The relationship between state institutions and local institutions
  - 5.3. Informal systems of alternative dispute settlement
6. Matrilineal Customary Law

## 10 Assessments

The final mark for the course is comprised as follows:

Continuous assessment: 30 (Test) **12 Sep 6pm, Barratt 2.**

Summative assessment: 70 (sit down exam)

**Total: 100 marks**

Continuous Assessment:

Further details on the structure of the assessment will be supplied closer to the assessment date.

Both assessments are compulsory.

Summative Assessment:

***The Assessment dates will be confirmed shortly.***

marks and all questions will be compulsory. An external examiner assesses the quality of both the examination paper and the students' answers.

## 11 Resources

The core readings and materials for this course are the leading judgments on the various aspects of customary and religious law and the textbooks. Articles serves as holistic interpretation of the judgments and the enacted laws.

Prescribed textbook:

C Rautenbach (ed), JC Bekker, NMI Goolam *Introduction to Legal Pluralism in South Africa* 5 ed (2018) LexisNexis: Durban

Other relevant works where accessible:

C Himonga (ed), T Nhlapo (ed), IP Maithufi, SM Weeks, L Mofokeng, D Ndimba *African Customary Law in South Africa* (2014) OUP: Cape Town

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

TW Bennett *Customary Law in South Africa* (2004) Juta: Cape Town

## 12 Recommended readings

You will have to access readings directly from the library website using your login details for full texts, alternatively and for ease of access, I will provide the links to access the readings under the course page. The readings are composed of judgments and journal articles. Note that and as stated above, readings provide a holistic and supplementary essence of the entire learning content. Do not neglect your readings they are examinable. You are strongly encouraged to read wider than the recommended list and keep abreast with the change's law.

Week 2

- o S Moore Law and Social Change: The Semi-autonomous Social Field as an Appropriate Subject of Study (1973) 7(4) Law & Society Review 719
- o J Griffith 'What is Legal Pluralism' (1986) 24 Journal of Legal Pluralism and Unofficial Law 1
- o B Tamanaha 'Understanding Legal Pluralism: Past to Present, Local to Global' (2008) 30(3) Sydney L Rev 375
- o C Rautenbach 'Deep Legal Pluralism in South Africa: Judicial Accommodation of Non-State Law in South Africa' (2010) 60 Journal of Legal Pluralism and Unofficial Law 143

Week 3 – 4

- o Constitution s 211 (3); 39 (2)
- o *Ngqobela v Sihele* 10 SC 346



- o *Maisela v Kgolane* NO 2000 (2) SA 370 (T)
- o *Mabuza v Mbatha* 2003 (4) SA 218 (C)
- o *Chinese Association of South Africa v The Minister of Labour* (2008) ZAGPH 174 (18 June 2008)
- o *Mabena v Letsoalo* 1998 2 SA 1068 (T)
- o Juma, From Repugnancy to Bill of Rights: African Customary Law and Human Rights in Lesotho and South Africa' in P. Osode & G. Glover eds., *Law and Transformative Justice in Post-Apartheid South Africa* (Spekboom Publishers, 2010), 459 [Also published in (2007) 21 (1) *Speculum Juris* 88-113].
- o Law of Evidence Amendment Act 45 of 1988
- o Recognition of Customary Marriages Act 120 of 1998

#### Week 5

- o *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC)
- o *Alexkor Ltd v Richtersveld Community* 2004 (5) SA 460 (CC)
- o *Ramuhovhi and Others v President of the Republic of South Africa and Others* 2018 (2) SA 1 (CC)

#### Week 6

- o J Cobbah African Values and the Human Rights Debate: An African Perspective (1987) 9(3) *Hum. Rts. Q.* 309
- o J Donnelly The Relative Universality of Human Rights (2007) 29(2) *Hum Rts Q* 281
- o B Ibhawoh Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State (2000) 22(3) *Hum. Rts Q* 838
- o M Pieterse, "The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: Final Nail in the Customary Law Coffin" (2000) 117(3) *SALJ* 627
- o B Mmusinyane The role of traditional authorities in developing customary laws in accordance with the constitution: *Shilubana and others v Nwamitwa* 2008 (9) *BCLR* 914 (CC) (2009) 12 *PELJ* 136
- o L Juma Dignified Existence: Reflections on Aspects of Culture and Cultural Rights Debate in Africa (2008) 22(2) *Speculum Juris* 1
- o *MEC for Education: Kwazulu-Natal v Pillay* 2008 (1) SA 474 (CC)
- o *Prince v President of the Law Society of the Cape of Good Hope* 2002 (2) SA 794 (CC)
- o *Department of Correctional Services v POPCRU* [2013] ZASCA 40
- o *Bhe v Khayelitsha Magistrate* 2005 (1) SA 580 (CC)URL

- o *Gumede v President of the Republic of South Africa* 2009 (3) SA 152 (CC)

Week 7

- o *MEC for Education: Kwazulu-Natal v Pillay* 2008 (1) SA 474 (CC)
- o *Prince v President of the Law Society of the Cape of Good Hope* 2002 (2) SA 794 (CC)
- o *Department of Correctional Services v POPCRU* [2013] ZASCA 40
- o *Bhe v Khayelitsha Magistrate* 2005 (1) SA 580 (CC)
- o *Gumede v President of the Republic of South Africa* 2009 (3) SA 152 (CC)

- o *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC)

#### Week 8 – 9

- o *Ngwenyama v Mayelane* 2012 (4) SA 527 (SCA)
- o *Mayelane v Ngwenyama* 2013 (4) SA 415 (CC)
- o *Tsambo v Sengadi* [2020] ZASCA 46
- o *Gumede v President of the Republic of South Africa & Others* 2009 (3) SA 152 (CC)
- o *Moropane v Southon* [2014] ZASCA 76
- o *Women's Legal Centre Trust v President of the Republic of South Africa* [2018] ZAWCHC 109URL
- o *Mbungela v Mkabi* 2020 (1) SA 41 (SCA)
- o *Mabuza v Mbatha* 2003 (4) SA 218 (C)
- o *Mthembu v Letsela* [2000] 3 All SA 219 (A)
- o SALRC issue paper 35: Single Marriage Statute
- o *Singh v Ramparsad* 2007 (3) SA 445 (D)

#### Week 10

- o W Amien 'Reflections on the recognition of African Customary Marriages in South Africa: Seeking Insights for the Recognition of Muslim Marriages' (2013) 1 Acta Juridica 357
- o *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC)
- o W Amien 'Judicial Intervention in Facilitating Legal Recognition (and Regulation) of Muslim Family Law in Muslim-Minority Countries' (2020) 1 Journal of Islamic Law