

Tutorial Letter 201/2/2018

African Customary Law

IND2601

Semester 2

**Public, Constitutional and International Law
Department**

This tutorial letter contains important information
about your module.

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1 INTRODUCTION

Dear Student

This is the last tutorial letter for the semester. The main aim of the tutorial letter is to give you some feedback on your assignments. We trust that you will find this tutorial letter useful for your studies and in your preparation for the examination.

2. COMMENTARY ON THE MULTIPLE-CHOICE ASSIGNMENT 01/2018

Question 1

The most accurate statement is (1). *“Customary law means the customs and usages traditionally observed among indigenous African peoples of South Africa and which form part of the culture of those people”*. This definition is found in Section 1 of the Recognition of Customary Marriages Act 120 of 1998.

Question 2

The most accurate statement is (3). The characteristic of customary law that is expressed as group versus individual orientation means that individuals function within the context of the group to which they belong.

Question 3

The most accurate statement is (1). The section in the Constitution of South Africa that does not signify recognition of customary law is Section 2.

Question 4

The most accurate statement is (1).

Question 5

The most accurate statement is (2). The group may approach the Premier of their province to make the appointment.

Question 6

The most accurate statement is (2).

Question 7

The most accurate statement is (4). Section 4(1) of the Traditional Leadership and Governance Framework Act 41 of 2003 lists 12 functions of traditional councils.

Question 8

The most accurate statement is (1). The conflict between customary law norms and provisions of fundamental rights outlawing discrimination is not specifically resolved by the Constitution.

Question 9

The most accurate statement is (4). The effect of the decision taken in the Moseneke case was that between 2002 and 2004, an intestate estate of a black person reported to the Master was administered in terms of common law.

Question 10

The most accurate statement is (2). *Ukuvusa* custom may be applied if an unmarried male dies.

Question 11

The most accurate statement is (2). The Recognition of Customary Marriages Act 120 of 1998 recognizes polygynous marriages, defined as a man marrying more than one woman.

Question 12

The most accurate statement is (3). Indigenous African people observe legal rules and most rules for living, due to factors such as public opinion and the fear of punishment.

Question 13

The most accurate statement is (2). Specialised and unspecialised systems are similar because the relations governed by law are the same.

Question 14

The most accurate statement is (4). Rank influenced a person's status in customary law.

Question 15

The most accurate statement is (1). A customary marriage can only be dissolved on the ground of the irretrievable breakdown of the marriage.

Question 16

The most accurate statement is (3). Labour Courts are not recognised in terms of the Constitution to apply indigenous law in South Africa.

Question 17

The most accurate statement is (4). In terms of the court decision in the case of *Shilubana v Nwamitwa*, traditional authorities should make sure that customary law is aligned with gender considerations.

Question 18

The most accurate statement is (4). See pages 117-119 in your study guide for the main principles of court procedure.

Question 19

The most accurate statement is (3). Succession to traditional leadership in African customary law is a hereditary system which follows the patriineage.

Question 20

The most accurate statement is (4). The allocation of date to families for burial permission is not an example of a traditional leader's determinations in indigenous law.

3. COMMENTARY ON THE WRITTEN ASSIGNMENT 02/2018

Question 1

1. Discuss the court's interpretation of section 7(6) of the Recognition of Customary Marriages Act 120 of 1998 for polygynous marriages (15)

Section 7(6) of the Recognition of customary marriages Act of 1998 basically provides that a husband to an existing customary marriage must apply to court to have a written contract approved which will regulate the future matrimonial property system of his marriages when he wishes to contract another customary marriage.

Compliance – and, particularly, non-compliance – with section 7(6) was the subject of debate by the courts in the case of **Mayelane v Ngwenyama [2012] 3 All SA 408 (SCA), 2013 4 SA 415 (CC)** when considering whether or not section 7(6) of the Act must be complied with to contract a subsequent customary marriage.

Miss Mayelane alleged that she concluded a valid customary marriage with Hlengani Dyson Moyana (Mr Moyana) on 1 January 1984. Ms Ngwenyama alleged that she married Mr Moyana on 26 January 2008. Mr Moyana passed away on 28 February 2009. Both Ms Mayelane and Ms Ngwenyama subsequently sought registration of their respective marriages under the Recognition of Customary Marriages Act (hereinafter "the Recognition Act"). Each disputed the validity of the other's marriage. Ms Mayelane then applied to the High Court for an order declaring her customary marriage valid and that of Ms Ngwenyama null and void on the basis that she (Ms Mayelane) had not consented to it. The High Court granted both orders. Ms Ngwenyama took the matter on appeal to the Supreme Court of Appeal (SCA). The SCA confirmed the order declaring Ms Mayelane's customary marriage valid, but overturned the order of invalidity in relation to Ms Ngwenyama's customary marriage. It found the latter customary marriage to be valid as well. Ms Mayelane sought leave to appeal against this latter part of the SCA's order.

Although Ms Mayelane alleged in her founding papers in the High Court that Xitsonga customary law required her consent for the validity of her husband's subsequent customary marriage and that she had never consented to his marriage to Ms Ngwenyama, this issue was not considered by either the High Court or the SCA. Both courts determined the matter by

interpreting and applying section 7(6) of the Recognition Act and, therefore, did not consider it necessary to have regard to Xitsonga customary law on the issue of consent.

The High Court held that the second marriage that was entered into without the consent of the first wife/the court is void. The High Court stated that section 7(6) aimed to protect both the existing spouse and the new intended spouse by ensuring that the husband obtained the court's consent to a further customary marriage. The court also observed that both the existing spouse and the intended spouse had a vital interest in having their respective proprietary positions safeguarded by the procedure laid down in section 7(6). The effect of the High Court's decision was that all marriages of women in polygamous relationships are void.

On appeal, the SCA overturned the High Court's decision, holding that section 7(6) did not intend to invalidate the subsequent marriage.

When the SCA's decision was taken on appeal to the Constitutional Court, the judges agreed with the High Court's decision that the second marriage was void. However, it must be noted that the Constitutional Court decided the case on a different basis. The Constitutional Court confirmed the finding of the SCA, namely that where there was a failure to obtain the contract envisaged by section 7(6) of the Recognition of Customary Marriages Act 120 of 1998, the resultant second or further customary marriage is valid, but has to be regarded as being out of community of property and profit and loss.

If it is accepted that a second or further customary marriage is out of community of property and of profit and loss, polygynous customary marriages may be regarded as having created distinct entities, which have their own property to be used for their exclusive benefit. This is almost the same as the customary law arrangement of creating a "house" for each customary marriage contracted by a husband. To each wife, the husband was expected – in terms of customary law – to allot property, and certain kinds of property acquired in terms of customary law automatically accrued to a particular "house".

2. Describe five of the main principles of the African customary court procedure and, in each instance, indicate the characteristics of African customary law reflected in it. (15)

From page 117 to 119 in your study guide is mentioned principles which guide court procedure in the African courts. These may be summarized as follows;

- Onus of proof on the accused
- Public court sessions
- Public participation to court sessions
- Required presence of all affected parties to the case
- No legal representation
- Oral conduct of court proceedings
- Chief is the judge in council
- Informal nature of court proceedings
- Nobody can be judge in their own cause
- No counterclaim in civil proceedings
- Permission to asylum
- Mendacity not punishable
- No prescription of a debt
- Inquisitorial nature of court proceedings

You are expected to pick only five of the above and discuss them in detail. As you are discussing them, show as far as possible where you can the characteristics of customary law

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which are reflected in them. You will recall that the following characteristics are often ascribed to customary law as provided on page 11 to 13 of your study guide.

- The unwritten nature of African Customary law
- The Customary nature of African customary law
- Customary law as an expression of community values
- The role of magico- religious conceptions in African customary law
- Observance of rules for living in African customary law

4. COMMENTARY ON THE SELF-ASSESSMENT QUESTIONS

PLEASE NOTE:

The commentary on the Assignment Question below should not be regarded as a model Answer!!!

Question 1

1. Customary public law governs the relations between traditional authorities and subjects, and the relations between these authorities and subjects within the tribe. Discuss the subdivision of customary public law. (10)
 2. Name and describe the factors that promote observance of customary law. (10)
- [20]**

FEEDBACK

1. Refer to study unit 1, lecture 1, and part 1.3 on page 5.
2. Refer to the study guide, unit 1, lecture 2, part 2.5.5 on page 13

Question 2

1. Section 211(3) of the Constitutional Act of 1996 gives clear and unambiguous recognition to customary law. What are the implications of this section? (5)
2. The main conflict is between customary law and its recognition and the fundamental rights included in the Constitution? Is there a clear solution to this problem? (5)

3. Distinguish between general property, house property and personal property. Give examples to substantiate your answer. (15)
 4. State the general principles of customary law of succession and how succession differs from inheritance in a customary law context. (10)
- [35]**

FEEDBACK

1. Refer to study unit 1, lecture 4, part 4.2 on page 26 in the study guide
2. Refer to study unit 1, lecture 4, part 4.4.2 on page 29 in the study guide
3. Refer to study unit 3, lecture 1, part 1.2 on page 92-93 in the study guide
4. Refer to study unit 3, lecture 2, part 2.2.1 on pages 96 and 97 in the study guide

Question 3

1. The head of the family group, which consists of related agnatic groups, is not responsible for the conduct of its members, and has no obligation to negotiate for settlement of disputes between agnatic groups. Critically evaluate. (10)
 2. Discuss forms of punishment and the determination of punishment in African customary criminal law. (10)
- [20]**

FEEDBACK

1. Please ignore this question
2. Refer to study unit 4, lecture 4, part 4.2 on page 136 in the study guide

Question 4

1. Discuss mediation and judicial control according to common law of the Traditional leader's administrative actions. (10)

2. Discuss the reform which has taken place in terms of the Recognition of Customary Marriages Act 120 of 1998, with regard to the proprietary consequences of a customary marriage. (10)
3. In modern customary/indigenous law the courts, excluding indigenous courts, recognise certain grounds for the purpose of dissolution of marriage. Discuss the grounds for dissolution of marriage in terms of the Recognition of Customary Marriages Act 120 of 1998. (5)

[25]**FEEDBACK**

1. Refer to study unit 6, lecture 4, part 4.4.4 on page 189 in the study guide
2. Refer to study unit 2, lecture 4, part 4.5.3 on page 75 in the study guide
3. Refer to study unit 2, lecture 5, part 5.2.1 on page 82 in the study guide

5. CONCLUSION

We hope that the above additional material and information will help you to prepare for the examination and we wish you every success with your studies.

Your lecturers.