

Tutorial Letter 201/1/2012

African Customary Law

IND2601

Semester 1

**Department of Public, Constitutional and
International law**

This tutorial letter contains important
information about your module.

Bar code

CONTENTS

1. Commentary on the multi-choice assignment 01/2012.....	3
2. Commentary on the written assignment 02/2012.....	5
3. Commentary on the self-evaluation questions.....	8
4. Additional self-evaluation questions.....	20
5. Suggestions on how to approach the examination.....	21

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 and a few guidelines on the forthcoming examination. We trust that you will find this tutorial letter useful for your studies and in your preparation for the examination.

1 COMMENTARY ON THE MULTIPLE-CHOICE ASSIGNMENT 01/2012

1. **True:** Property from one house, can be used for the benefit of another house, no action for repayment can be instituted in an indigenous court. (1)
2. **True:** A successor may on good grounds be removed from the line of succession. (1)
3. **False:** The court procedure for both civil matters in an African Customary courts are the same as the procedure in criminal matters. (1)
4. **False:** In original indigenous law, the disposition of property by means of a will was unknown means for disposition of the deceased property. (1)
5. **True:** Perjury is unknown in African Customary court procedures. (1)
6. **True:** In customary law, alcohol and drug abuse do not affect a person's criminal liability. (1)
7. **True:** Hearsay evidence is admissible, and is considered together with other evidence. Hearsay can also serve as a guideline in the questioning of the parties and their witnesses and is therefore admissible. (1)
8. **False:** *A traditional leader is only empowered to punish people within his jurisdiction.* (1)
9. **False:** *Emphasis in customary law is placed on the whole agnatic group and to the benefit of the agnatic group. .* (1)

10. **False:** Section 1 of the Law of Evidence Amendment Act 45 of 1988, provides that, any court **may** apply the law of a foreign state and of indigenous law in so far as such law can be ascertained readily and with sufficient certainty. (1)
11. **True:** *Observance of law often indicates that a particular rule is a rule of law, even though its nature has never been determined by a court.* (1)
12. **True:** In terms of the Constitution of the Republic of South Africa, 1996, all existing legislation will remain in force until amended or repealed (section 241, read with Schedule 6, section 2). This means, among other things, that the Black Administration Act 38 of 1927 and the Black Authorities Act 68 of 1951 are still in force.
(1)
13. **False:** *It is not the responsibility of the Labour court and the Small claims court to resolve any conflict between customary law and fundamental rights*
(1)
14. **False:** The Recognition of Customary Marriages Act 120 of 1988 regulates customary marriages in South Africa. (1)
15. **True:** Customary marriages can now only be dissolved on grounds of irretrievable breakdown in terms of section 8(1) of Act 120 1998. (1)
16. **False:** The transfer of the bride by her family group to the man's family group, is not one of the requirements for a valid customary marriage in terms of the Recognition of Customary Marriages Act of Act 120 1998. (1)
17. **False:** The difference between a crime and a delict is that in a delict the property of a particular agnatic group is affected, whereas in a crime public property is affected.
(1)
18. **True:** A community may be recognised as a traditional community if it is subject to a system of traditional leadership in terms of that community's customs.
(1)
19. **True:** A person who keeps guard whilst his or her mate commits a crime is referred to as an accomplice. (1)
20. **False:** Succession to traditional leadership in African customary law does not only follow the principle of primogeniture, there exceptions where female succeeded to leadership.
(1)
21. **True:** The process of instituting proceedings in a court or tribunal for the review of an administrative action in terms of section 6(1) of the Promotion of Administrative Justice Act 30 of 2000 can be invoked as one of the methods of control over the administrative actions of a Traditional leader. (1)
22. **True:** One of the causes of succession disputes is the ranking of the traditional leader's wives. (1)
23. **True:** According to African customary law a ruler may not execute a particular administrative action out of hand.

24. **False:** The Northern-Sotho legal maxim: *kgosi ke kgosi ka batho* (a *kgosi* is *kgosi* through and thanks to his people) means that he must not only consider the advice of his council when making decisions. (1)
25. **True:** An aggrieved person can invoke several judicial remedies to control the actions of a traditional leader, one of which is to apply for an interdict in which the chief is ordered to stop the act that infringes the rights of the applicant. (1)

2 WRITTEN ASSIGNMENT 02/2012

PLEASE NOTE: THE COMMENTARY ON THE ASSIGNMENT QUESTION BELOW SHOULD NOT BE REGARDED AS A MODEL ANSWER.

1. In original indigenous law, ownership of land was not subject to any limitations. Evaluate this statement. (5)

Rights in things are known as “real rights”. There are various categories of real rights. We shall mention only a few of the best-known of these, namely ownership, servitudes, pledge, mortgage, quitrent tenure and mineral rights. The most comprehensive real right which can be acquired over material things is ownership. All other categories of real rights are limited. In original indigenous law, the agnatic group, or the house as a subdivision of the agnatic group, was the bearer of rights and thus of real rights. Rights in property were thus vested in the agnatic group. The head of the group exercises this right on behalf of, and in the interests of, the agnatic group. In modern indigenous law, real rights can also be vested in individuals, particularly majors.

2. List and discuss the provisions of the constitution that indicate which of the conflicting principles have priority over the other. (5)
- section 2, which provides that the Constitution is the supreme law

- section 8 (1), which provides that the Bill of Rights is applicable to all legislation, thus including customary law
- section 36 (2), which provides that no fundamental rights will be limited by any law, except as provided for under section 36 (1) or any other provision of the Constitution
- section 39 (1), which requires the courts to promote the values that underlie an open and democratic society based on human dignity, equality and freedom in interpreting the Bill of Rights
- section 39 (2), which provides that, in interpreting any law and applying and developing common and customary law, the courts must have due regard for the spirit, purport (purpose) and objects of the Bill of Right
- section 36 (1), which allows the rights in the Bill of Rights to be limited by “law of general application” (including customary law), provided that such limitation is reasonable and justifiable in an open and democratic society.

3. Briefly discuss the proprietary relationships between houses under customary law

Although the agnatic group is understood to form one family unit, in customary law each house in this family unit comprise a property unit. The relationship between the houses is legally regulated in customary law and each house has certain rights and powers that it can exact from the other houses in the same household and protect against the claims of the other houses. The houses can thus become involved in contractual relationships with each other.

When property from one house is used to the benefit of another house, a debt relationship is created between the houses concerned. Such a debt has to be repaid at some time, although no action for repayment can be instituted in an indigenous court. In other words ,the houses cannot, oppose each other in a lawsuit.

4. List the different categories of traditional leaders that are recognised under the Traditional Leadership and Governance Framework Act 41 of 2003.

(5)

The Traditional Leadership and Governance Framework Act 41 of 2003 recognizes

(a)Kingship and or Queenship,

(b) Senior traditional leadership; and

(c) Headmanship as leadership positions within the institution of traditional leadership including headmen and headwomen.

5. List and discuss briefly two of the principles to succession to Traditional leadership African customary law. (5)

Any of two of these principles is applicable.

- It is a hereditary system and the position of the traditional leader follows the patrilineage(male line). Succession in the female line is the exception.
- The successor is the eldest son of the ruler by the main wife. The tribal or main wife is often married specifically for this purpose and the tribe contributes towards her marriage goods.
- The other wives of the traditional leader occupy a particular rank, and this ranking order has significance especially in situations where an acting traditional leader or regent has to be appointed.
- The sons of the ruler by his various wives retain the rank of their mothers. Among some groups, this ranking order is confirmed during the rites of circumcision.
- The rule according to which younger and half brothers of a successor may succeed vary greatly among different groups.
- There is general recognition of substitution of the ruler by the institution of the levirate and substitution of the tribal wife by the sororate institution, or complementation of the wife.
 - Substitution of the husband occurs where the husband dies before he can marry or before he can marry the tribal wife. In that case, children are raised on his behalf with a wife married after his death, usually to a relative, such as his younger brother. This is often referred to as the 'ukuvusa custom'. Substitution also occurs where the traditional leader dies without a son by the tribal wife. Provided the wife is still fertile, a son is raised on behalf of the deceased with his wife in terms of the 'ukungena' custom and this son becomes the lawful successor.
 - Substitution of the tribal wife occurs in those cases where she dies without a son. In that case, she is substituted by a relative. Substitution may also occur where the wife is childless or where she has borne no son during her fertile years. In such a case her inability to bear a son is supplemented for by a relative 'supporting wife'

3. PLEASE NOTE: THE COMMENTARY ON THE ASSIGNMENT QUESTION BELOW SHOULD NOT BE REGARDED AS A MODEL ANSWER.

Question 1

- (a) Write notes on the implications of section 31 of the Constitution of the Republic of South Africa, 1996 for the recognition of customary law. (10)

According to section 31, the state has two duties, namely:

- not to interfere with the rights of the individual
- to allow the existence of institutions that would be necessary to maintain the culture concerned.

Section 31 contains yet another aspect of the right to culture: the right of a group of people to have and maintain a specific group identity. Group and individual rights are thus symbiotic in nature (ie they depend on each other). The individual right to adhere to a culture of choice assumes the existence of a cultural group or community, and this community must first exist before the individual may have any rights in it.

It may therefore be argued that a person's right to the application of customary law in a certain instance is vested in membership of a group. This group must be recognised by the state before the individual may enforce his or her right.

Another implication of sections 30 and 31 is the conversion of a freedom into a constitutional right. These sections refer expressly to “a right”. This raises the following question: **What is the difference between a constitutional freedom and a constitutional right?** “Freedom” means that there is no regulation by the law. The individual may act according to his or her own choice and as he or she thinks fit. This means that freedom is subject to a right, because the bearer of a right may enforce that right. Rights demand a specific conduct, while freedoms allow choices.

Question 2

Evaluate the following statements.

- (a) A family head can make certain allotments during his lifetime. (5)

This statement is true.

A family head could, during his lifetime, make certain allotments which would remain valid after his death. These methods of making allotments are still recognised in modern indigenous law, and include the following:

- Allotment of property to a specific house or son; this allotment is accompanied by certain formalities and may occur more than once.
- Adoption, which influences the normal order of succession; an *adoptivus* is, however, excluded by a legitimate child; note that the Zulu and Swazi do not recognise adoption.
- Transfer of a younger son from one house to another house without a son; such a son succeeds to the latter house.
- Seed-raising is an alternative means of trying to ensure a successor in a house without a son.
- Allocation of daughters to sons in a house as a means of providing for the marriage goods of these sons; the marriage goods received for a daughter are then used as

marriage goods for the wife of one of the sons. This method of providing for the marriage goods of sons is found chiefly among the Sotho groups.

- *Ukungena*, or the procreation of a successor for a deceased man by his widows.
- Disherison (disinheritance) as a means of eliminating a potential successor from the order of succession; disherison requires special reasons and formalities that will not be discussed here.

b) The family head's control over house property does not give him the authority to allocate marriage goods for daughters in one house to another house. (5)

This statement is false.

The family head's control over house property includes the authority, for example, to allocate marriage goods received for daughters in one house to another house. Such action gave rise to a debt between these houses. These allocations, however, are generally limited to specific circumstances and are controlled by specific rules. In this connection, consultation with the wife and the future successor of the house is important.

[20]

Question 3

Study the following hypothetical case and answer the questions that follow. Consider all possibilities and justify your answers in full.

In 2002, Vuyo (a male aged 22) and Karabo (a female aged 17) and their respective fathers concluded an agreement in terms of which Vuyo had to deliver five head of cattle and R 10 000 as *lobolo* to Karabo's family. Vuyo delivered part of the *lobolo* agreed upon and shortly thereafter, Karabo was allowed to reside with Vuyo and his family. Their marriage was never registered.

a. Did a legally valid marriage come into being between Vuyo and Karabo? (7)

No legal consequences flow from a void juristic act, that is to say, an act in which the absolute legal requirements were not fulfilled. Where the relative legal requirements have not been met, the juristic act is valid, and all the legal consequences of a valid juristic act flow from this fact. A legal

requirement is a requirement that is prescribed by law in order for it to be a valid juristic act. Non-fulfilment of a legal requirement can have the consequence that the juristic act is null and void, or only voidable.

The legal requirements for a valid customary marriage entered into after 15 November 2000 are provided for in *section 3 of Act 120 of 1998* and are as follows:

- The prospective spouses:
 - must both be above the age of 18 years; and
 - must both consent to be married to each other under customary law; and
- the marriage must be negotiated and entered into or celebrated in accordance with customary law.

These requirements are absolute, which means that each requirement must be fulfilled for a valid marriage to be concluded. What follows is an analysis of each of these requirements.

b. what are the general consequences for them as husband and wife in terms of indigenous law?

- A new and separate unit, namely a family or house, comes into being. This unit is also a legal unit.
- The husband and wife have a mutual obligation to live together. Some groups allow a woman to live with her eldest son once he occupies his own independent residence.
- The husband and wife have a mutual duty to allow sexual intercourse. Each group has its own particular customs. These customs take reasonableness of demand into account. Greater fidelity is expected from the wife than from the husband, since customary marriages are potentially polygynous.
- The status of the man and woman changes. As far as the traditional indigenous marriage and the customary union are concerned, the powers of the woman's

group in respect of marital guardianship over her are transferred to the husband and his group. Children born of these unions fall under the guardianship of their mother's husband and his family. In her own house, the wife enjoys a considerable degree of independence. She does, however, have to consult her husband on important matters. The husband, as family head, has specific powers. He represents his unit in matters that are external to the family. He is responsible for order and discipline within the family and for its needs and interests.

- i. **If we assume that a valid marriage did come into being between Vuyo and Karabo: what are the general consequences for them as husband and wife in terms of customary law? (5)**

Section 6 of Act 120 of 1998, provides that "a wife in a customary marriage has, on the basis of equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity to acquire and dispose of assets and to enter into contracts and to litigate".

To enter into contracts and to litigate, in addition to any rights and powers she might have at customary law.

A new and separate unit, namely a family or house, comes into being. This unit is also a legal unit.

- ii. **Can Vuyo enter into a further customary marriage with another woman, if he does, does Vuyo have to follow any particular procedures to regulate the matrimonial property system of his marriages? (9)**

No Vuyo cannot enter into any **polygynous** marriage. In the case of a polygynous customary marriage, where the husband intends to enter into a further customary marriage with another woman, the provisions of the Recognition of Customary Marriages Act 120 of 1998 state that the husband must apply to the court to approve a written contract which will regulate the future matrimonial property system of his marriages (section 7(6)). In terms of section 7(7), when considering such an application, the court must:

- (i) in the case of a marriage which is in community of property or which is subject to the accrual system-
 - (a) terminate the matrimonial property system which is applicable to the marriage; and

- (b) effect a division of the matrimonial property;
- (ii) ensure an equitable distribution of the matrimonial property; and
- (iii) take into account all the relevant circumstances of the family groups which would be affected if the application is granted.

The court may-

- (i) allow further amendments to the terms of the contract;
- (ii) grant the order subject to any condition it may deem just; or
- (iii) refuse the application if, in its opinion, the interests of any of the parties involved would not be sufficiently safeguarded by means of the proposed contract.

c. What effect does the dissolution of a customary marriage have on marriage goods?
(8)

If you remember, the husband must deliver marriage goods to the wife's group. This transfer is done in various ways. The question, however, is: What happens to these marriage goods should the marital union be dissolved?

Generally, it can be stated that, on the dissolution of the marital union, the marriage goods are either returned to the husband or forfeited by the husband in favour of the wife's group. In some cases, however, the marriage goods are returned in part only. Are there any guidelines on how this should be done?

The various groups differ considerably when it comes to the return of the marriage goods. The following factors, however, are usually taken into account:

- the amount of blame on either side;
- the number of children born of the marital union; and

- the portion of marriage goods already delivered.

[30]

Question 4

(a) Discuss the factors that promote the observance of customary law. (10)

It is significant that the vast majority of the members of any community generally observe most rules for living, including legal rules, faithfully on a daily basis without feeling that they are being "forced" to comply. The motives for such voluntary observance of the law often indicate that a particular rule is a rule of law, even though its nature has never been determined by a court.

Why do people voluntarily observe legal rules and rules for living? The availability of law enforcing organs such as the police, courts, and judges certainly encourages the observance of the law in any community, but in many communities there are other factors that are more important than the availability of such organs. As far as customary law is concerned, the following factors may be of importance in this respect:

- The **religious or sacral (holy) element of the law**. (Think of examples of your own religious beliefs and also keep in mind what we said earlier on about the belief in ancestral spirits.)
- **Public opinion**, and particularly sensitivity about what other people may think and say about one's behaviour. (In customary law, the interests of the community are very important.)
- The **knowledge that, if a person is harmed, that person will endeavour to get compensation** or will take measures to protect him- or herself. (African customary law, for instance, allows for the use of all kinds of medicines to protect a person from harm. Don't forget what we said about sorcery earlier on.)
- The **fact that everybody in the community has a broad general knowledge of the law**. This is because there is general participation in the legal process, and the law is handed down, orally, from one generation to the next. In short, everybody has an opportunity to find out how the law operates in that particular society.
- **Fear of punishment**. Especially punishment of supernatural origin, when the conduct in question conflicts with accepted legal principles.

- **The influence of indigenous leaders** in the community. These people are regarded as the living representatives of the ancestors and are responsible for the community's observance of the law, without there necessarily being, or even before there is, any question of a formal legal ruling.

Of particular importance is the fact that the recognised indigenous leaders played an important part in the communities' daily life without having to refer to their judicial authority. For instance, because of their hereditary (inherited) position, indigenous leaders played an important part in allocating land for residential and agricultural purposes, in admitting strangers to the communal territory, and in communicating with the ancestral spirits. The authority emanating (flowing) from these positions alone was enough to ensure observance of the law, without any formal administration of justice being necessary.

Also, local heads of families and kinship groups were consulted before anything important, such as the institution of legal action, was undertaken. This ensured that the proposed action would not be opposed and that the interests of others would not be harmed in an unfair and unlawful manner. It also meant that the local headmen and leaders would be informed about the matter should any legal dispute arise from that particular action.

Finally, it must be remembered that these leaders, with their advisors, are the bearers of the local community's traditions and that it is they who must ensure that these traditions are observed. They are therefore regarded as the people who have the authority to pronounce on what is allowed and what is not allowed.

(b) Describe the execution of a sentence or judgement in indigenous law. (10)

- The judgment of an African customary court must be executed, unless it is taken on appeal. The compensation or the fine, whatever the case may be, must be paid as soon as possible after judgment has been given. The cattle, goats, or other goods or amounts of money are taken to the court where judgment was given. In the case of compensation the successful party is notified that the goods or livestock may be fetched. Sometimes this party then gives part of the goods or livestock to the court, to be used for serving food to its members. In this respect it should be remembered that in former times members of the court were not rewarded for their services.

- Should a person refuse or neglect to pay the fine or compensation owing within a reasonable period of time, the African customary court ordered that the person's property be confiscated. In such a case force could be used to confiscate the property. Some groups had a special messenger, known as an *umsila* among the Xhosa, who performed this function. In such a case the fine and the compensation were usually increased summarily.
- The increase may be regarded as a fine for contempt of court. This additional levy was called *thupa* ("stick" or "admonition"(warning)) by the Northern Sotho. It was used for maintenance of the messengers, and can therefore also be regarded as execution costs.
- The judgment debtor, that is, the person against whom judgment was given for payment of a fine or damages, may also arrange with the court to pay the judgment goods in installments.
- In former times, sentences in the form of corporal punishment and banishment was enforced directly after the court session. Today a sentence by an African customary court may be enforced only if no notice of appeal was received within 30 days after registration of the judgment with the local magistrate's court.
- If the property to be confiscated is situated outside the area of jurisdiction of an African customary court application must be made to the clerk of the magistrate's court for execution of the sentence or judgment. Also, today the messengers of the African customary court are not allowed to use force in order to execute a sentence or judgment. Any interference with the messenger in the execution of his duty is considered a crime (Rule 8(4), GN R2082 of 1967). However, no more goods may be seized than is laid down in the judgment.
- Section 20(5) of the Black Administration Act 38 of 1927 makes provision for another way in which to exact unpaid fines. If an African customary court cannot exact a fine, the court may arrest the guilty person, or have the person arrested, and make him or her appear in the local magistrate's court within 48 hours. If the magistrate is satisfied that the fine was imposed in a proper manner and finds that all, or part, of it is still outstanding, the magistrate may order that the fine be paid immediately. Failure to do so may lead to the guilty person being sentenced to imprisonment of a period not exceeding three months.

(c) Distinguish between a general and a particular administrative determination. Why is the distinction important? (10)

The traditional ruler can institute or revoke valid general determinations only as long as this administrative power is exercised in accordance with valid legal rules. The ruler has no power to

create new acts or laws. The competent organ that could make new laws was, in the past, the general assembly, and now it is the traditional authority.

When the ruler exercises his discretion which affects the rights or powers of subjects, such as the removal of subjects, he must do this in collaboration with the traditional authority. Discretion includes the power to present a choice between proceedings, but nevertheless this choice must still be exercised according to the requirements of the law. If the ruler, in the example of postponement, does not consult the proper council, then his action is invalid.

A ruler's administrative determination is valid only in the area of the traditional authority and on the residents who are in that territory. An instruction which addresses a person who lives outside of that territory cannot be enforced.

The formal requirements of an administrative determination are related to

- the announcement thereof
- its content
- the correct procedures

No determination is valid if it does not come to the attention of the person to whom it relates. General determinations must be made known in public, for example at a public assembly. Some determinations are made known via rituals, such as the commencement of the ploughing season. In many communities it is coupled with the rain ritual and the ritual ploughing of a part of the public fields. Accordingly all residents can then plough their fields for the season.

According to tradition particular determinations are conveyed orally to the person concerned by the ruler's messenger. Presently the decision can be conveyed to the particular people concerned in writing by the secretary of the traditional authority.

The content of the determination must be clear and understandable. The action that is required from the subjects must be clearly stated and it must be connected to the exercise of an administrative function. For example an order for removal must clearly

indicate who must be removed, when they must be removed, where they are to be removed and why they must be removed.

The procedure of determinations relates to the fact that a ruler must consult the relevant councils in circumstances where a subject's rights have been infringed. Previously, the particular council was determined on the basis of the nature of the determination. Presently the traditional authority must be consulted, as it is the only council that has been statutorily recognised.

Question 5

Advise Buza on the steps that he can take if Mr. Mbuyazwe decides to fine him for to obeying his orders in terms of;

According to African customary law a ruler may not execute a particular administrative action out of hand. Such an action must be executed in view of a particular objective. The purpose of all administrative actions is to further the public interest. Besides this general objective there is also a particular specific objective for every action, for example the expropriation of a piece of land for general use by the tribe, or attachment of property with the purpose of using it as evidence in a criminal case or in order to execute a court order.

A valid administrative power entails the authorised actions as well as the execution of the act in order to attain the authorised purpose. If authorised action is directed towards an unauthorised purpose, the action is invalid. For example a removal order cannot be issued if the ruler wishes to give that particular residential land to a friend.

(i) African customary law

(8)

African customary law does not allow a court action to a subject to oppose an administrative action of the ruler in the tribal court. The reason for this is that the ruler

will then act as judge and accused in the same case. An aggrieved subject can however use indirect means to oppose an administrative determination of the ruler by raising the invalidity of the act as a defence in a criminal suit. For example, where people were accused of not carrying out the ruler's instruction to deliver cattle, after it was proved that they had not received notification of such an order, the case against them was dropped.

(ii) common law

(12)

An aggrieved subject does not have to first apply for internal review of a ruler's administrative action before he can approach a court of law. He can directly apply to the magistrate's court or the Supreme Court to check the administrative action of the ruler and in this regard he can make use of several remedies.

The subject can

- apply for review of the validity of the administrative act
- apply for an interdict (a court order which restrains a person from acting in a particular way) in which the chief is ordered to stop the act that infringes the rights of the applicant
- apply for an mandamus (a court order which compels someone to do something) whereby the chief is compelled to execute his power

The act complained of can be opposed indirectly by raising the invalidity of the act as a defence in a criminal case.

By instituting an action the force of the ruler's administrative act is not deferred. If the subject wishess a deferment, he must specially apply for a temporary interdict.

With review the court merely looks at the validity requirements of the administrative act and not at its effectiveness.

The traditional leader on account of his invalid administrative actions is today privately and criminally liable. For example, if he, without authorisation, deprives a subject of his property or damages it, or allows a subject to undergo the initiation rites without his consent and to be circumcised, the subject can institute a claim against him. A traditional leader who metes out corporal punishment, can also be charged with assault.

4 ADDITIONAL SELF-EVALUATION QUESTIONS

Apart from the questions for self-evaluation at the end of each study unit, you would also do well to study the questions below. These are the types of question that are likely to appear in the examination, and we suggest that you study them carefully. You are welcome to contact us about these questions and to discuss your answers with us. **However, please do not submit your answers to us.**

Question 1

- (a) Give an exposition of the factors that promote observance of customary law.

(10)

Question 2

- (a) State the main principles of the customary law of succession (10)
- (b) What is the difference between inheritance and succession? (5)

Question 3

- (a) Evaluate the following statements:
- (i) In a traditional court evidence is given under oath. (5)
- (ii) A traditional leader is empowered to punish anyone. (5)
- (iii) Institutional action excludes unlawfulness. (5)
- (b) Discuss the execution of a sentence by an indigenous court. (10)

[25]

[100]

SUGGESTIONS ON HOW TO APPROACH THE EXAMINATION

You will soon start to prepare for the examination. We would like to make a few general suggestions on how to approach the examination in this module. We suggest that you carefully analyse the previous examination paper to find out our general approach to setting examination questions. Note that the questions differ from year to year, and that the format of the paper, and the way in which the questions are formulated, may well vary, since our aim in the assignment and the examination is to test various skills.

It is always a good idea first to read through the paper carefully in order to note the marks allocated to each question, and then to decide on the time that should be spent on each question. As a general guideline, you should allow six minutes for every five marks. Start practising now to see how much you can write in six minutes.

Here is a suggestion on how to approach questions involving the unspecialised nature of indigenous law. For example:

“Discuss indigenous law as unspecialised law with specific reference to the law of marriage.”

The purpose of a question like this is to test your understanding of unspecialised law by applying it to the law of marriage. When discussing indigenous law as unspecialised law you will therefore have to illustrate your discussion with examples from the indigenous law of marriage only. The question is therefore **not** based on a comparison between specialised law and unspecialised law.

Nor does it call for a general discussion on the law of marriage exclusively. A possible answer may include the following:

One of the characteristics of indigenous law which is strongly evident in the indigenous marriage is **group orientation**. The indigenous marriage is a relationship which concerns not only the husband and the wife, but also the respective families. Both family groups participate not only in the matter of the choice of the marriage partners, but also in the preceding negotiations, the agreement, the transfer of the marriage goods and the ceremonies. Without their participation, the marriage cannot take place.

Another characteristic of indigenous law which is strongly evident in the indigenous law of marriage is the emphasis which is placed on the **concrete**. The indigenous marriage is accompanied by the delivery of marriage goods (commonly known as *lobolo*) by the bridegroom's agnatic group to the bride's agnatic group. One of the requirements of indigenous marriage is the transfer of the bride by her family group to the man's family group. We hope you know by now that the marriage is effected only once the transfer of the bride has taken place. Also, in KwaZulu-Natal, there is the additional requirement of a public declaration, by the bride to the official witness, that the union takes place with her consent.

A strong **religious focus** is also evident in the indigenous law of marriage. One of the features of the traditional indigenous marriage is the procreation of children. In this regard, male children are of vital importance. This characteristic is specifically related to the belief in ancestral spirits. This belief can be summarised as follows: the ancestral spirits live in a spirit world that is similar to the conditions of the living on earth. The living must care for the ancestral spirits by continually making various sacrifices to them. The ancestral spirits, in turn, care for their living kin by ensuring their prosperity and wellbeing. Because man is mortal, he must procreate children in order to ensure that he will be taken care of once he dies and passes over to the world of the ancestral spirits. The indigenous law of marriage therefore also allows for substitution if one of the spouses cannot procreate a successor.

The marriage of people with unspecialised or less specialised legal systems is potentially **polygynous** - that is, one man can be involved in a marital union with more than one woman at

22

the same time. The implications are that there is no longer only one house but many houses, each of which constitutes a household of which the husband is the head. Also, because of the polygynous nature of marriage, a married woman is not permitted to enter into a further marriage.

The role of **kinship** is of paramount importance in indigenous law. In an indigenous marriage, the man and the woman must not be related to each other within the prohibited degrees of kinship. In addition, where one of the spouses is substituted, a kin member of the spouse concerned has to stand in for the spouse.

In unspecialised legal systems there is no strong emphasis on the aspect of **time**. The precise moment at which any given marriage took place is not as important as the fact that the marriage has indeed taken place.

This should not be seen as a model answer, although it is more or less the kind of answer we expect. Also bear in mind the other characteristics of indigenous law, namely, the lack of formalities and the lack of categorisation, two points which should also be mentioned when you answer this type of question. Bear in mind that this question may be asked in many different ways. For example: "Discuss indigenous law as unspecialised law with specific reference to *lobolo*, the *sisa* contract, or the law regarding adultery."

We wish you all the best in the examination and we trust that your hard work will be rewarded with success. Feel free to contact us if you have any problems with the study material. You are also welcome to e-mail us.

Best wishes

Ms NF Dlamini-Ndwandwe

Mr P Makama

