

1. The exam is divided into 2 parts. The first part will be a multiple choice question with ten statements.
2. The second part of the exam will consist of short questions with marks which can range from 5 to 15 marks. These questions are from the whole content of the module. We try not to concentrate on one particular topic when we set the examination.
3. It is not the aim to point out themes or topics from which students can expect questions. But note the following hints as you study based on noted past mistakes that most students make.
 - The module is not taught from any particular ethnic group's stand point. Thus the **general characteristics** of customary law are pointed out as well as the general nature of customary law is discussed.
 - Any legal system will have its own general characteristics including customary law.
 - This nature of customary law is measured against common law in the degree of **specialization. We start with an inquiry of what is meant by specialization. What are the main similarities between specialized and unspecialized legal systems?**
 - **Secondly, what are the characteristics of customary law which shows the differences between the two types of legal systems.** The factors showing this can be illustrated with examples. e.g group orientation is illustrated in the law of marriage by the conception of a customary marriage being between two family groups as opposed to individuals. Do not forget to also note the similarities between specialized and unspecialized legal systems.
 - The module is also approached from a comparative perspective in the sense that for most legal principles discussed, the starting position would be a view of the old or ideal position of customary law. If the position has been changed (through legislative developments), this will be explained. E.G Divorce requirements which now in terms of legislation have been changed.
 - It would be unfortunate that a person studying African customary law cannot relate the basis of recognition of customary law in the Constitution. That is, the provisions in the constitution that lay the basis of legal recognition of the Constitution. These range from section 211(3) to the sections on the right to one's culture that are related in sections 31 and 31 of the Constitution. You would need to know the implications of these sections even if you cannot reproduce them word for word during the examination.
 - The interaction of customary law with fundamental rights often lead to conflict between principles of customary law and provisions of fundamental rights. The main question is always, how the aw approaches this question

of conflict. Students should be able to give examples of conflicting principles of customary law with fundamental rights. You should also note the different approaches that are likely to be invoked as provided in the Constitution in resolving the conflict as the Constitution does not give a clear cut answer to how the conflict can be resolved.

- Students are also always confused by the three types of marriages that are recognized by the Recognition of Customary marriages Act 120 of 1998. There is

- **Traditional marriage** (before state regulation of marriages)
- **The customary union** (part regulation of marriages, but not yet fully recognized; such as regulated through the Black Administration Act, the Code of Zulu Law etc)
- **The customary marriage** (regulated fully by legislation, namely the Recognition of Customary Marriages Act 120 of 1998 (RCMA))

Note that all these marriages are now fully recognized as legal marriages. That is why they are still referred to in our study of the module.

To apply the law to a given set of facts involving customary marriages

It is important to know when the RCMA provisions became effective, (That is on 15 November 2000)

- The requirements of all these types of marriages.
- Any other requirements such as section 4, (registration of marriages); section 7(consequences of marriage); section 8(termination of marriage); section 10 on converting a customary marriage into a civil marriage etc
- Consequences of a customary marriage are in terms of section 7 divided into 2. Subsection 1 deals with consequences affecting marriages that occurred before the promulgation of the RCMA and subsection 2 deals with those customary marriages contracted after the legislation became effective. Note that although in terms of case law, the consequences are now the same, we would still want you to show how these legal developments came to be. (NB Gumede case)
- Also keep in mind the circumstances where a customary marriage can and cannot be mixed with a common law marriage. See section 2 and section 10 of the RCMA
- Section 8 deals with a new approach to divorce in terms of customary law. Note that the reasons for divorce in terms of traditional or under customary union marriages can be the reasons for the one ground provided under the Act now for divorce.
- **Customary law of property and succession.** Note the legal developments which led to legislative developments to the administration of customary estates. The case of Bhe is critical to these developments.
- The provisions relating some of the new changes are noted under Act 11 of 2009; such as which categories of persons can inherit from the deceased's estate.

- Court procedure: Note that the jurisdiction of the traditional courts is still governed by the repealed legislation, namely, the Black Administration Act of 1927 where certain sections have been retained for this purposes. This study unit covers as well principles of court procedure as well as evidence acceptable and nature of punishments acceptable in these courts. Note the significance of certain practices of punishments which signify the reconciliatory nature of dispute resolution in African way of life (Mangangahlaa).
- Criminal law: The two requirements of criminal liability; i.e an unlawful Act as well as the fault or guilt principle is discussed in African law. The specific crimes (rape, contempt of the ruler etc) can be the source of straightforward questions here perhaps for 15 marks.
- Traditional Leadership: Note that when we refer to T/L we are talking about an institution comprising elements of the traditional community, traditional councils as well as the traditional leader as a person. All these elements are now regulated by law, Namely the Act 41 of 2003

- There are areas in the study guide where students are requested to make their own notes from the text book and legislation applicable. In this study unit these are mostly on

the categories of traditional leaders and how they are appointed

The recognition of traditional communities and withdrawal of recognitions such of traditional communities.

Students confuse the above two areas. There is a difference between a traditional leader and a traditional community.

- **The traditional leader also has a role in making certain orders to be carried out by members of his community.** Distinguish clearly discussions on the administrative actions of a traditional leader/ruler or Authority. The actions of the ruler should be in terms of certain rules and there are consequences that follow should these pronouncements of a ruler be made not in accordance with the prescribed requirements.

- What are these requirements? E.g on the form of the act/order; the consequences of the orders of the ruler etc
 - What remedies are available to a subject(s) should the pronouncements of the ruler be not made in terms of the requirements.
4. **On a general note:** There are topics in the study of African customary law that can be said to be socially topical. In the media, courts, etc there is always coverage of issues involving them. You can always expect a question relating to these incidents as they in most cases represent what you will be confronted with as you practice law once you are employed as attorneys.
 5. There are so far, four main cases that are critical in the study of this module, namely, **Bhe v Magistrate Khayelitsha; Gumede v Gumede, Mayelane v Ngwenyama, and Shilubane v Nwamitwa.** Where a question is asked based

on a discussion of any of these cases, we simply require that students show that they follow

- **what happened as a dispute(facts) in the case;**
- **secondly, to show briefly what the legal issues were that the courts had to determine (which provisions of the law were affected and giving rise to the dispute before the courts)**
- **the court's ruling.**

The legislation regulating customary law is vitally important. These are the laws which bring changes to the old approach towards customary law and currently used to deal with issues of customary law that they regulate.

- The Recognition of Customary Marriages Act 120 of 1998
- The Reform of customary law of Succession and regulation of related matters Act 11 of 2009.
- The Traditional Leadership and Governance Framework Act 43 of 2003 as Amended by Act 23 Of 2009.

6. Note also that where a question requires an evaluation of a statement, you are required to state whether or not the statement is true or false. You are then expected to support your answer in a short paragraph of about 4 to 5 lines.