RPL 224
LEGAL PLURALISM
UNIT 1:
LEGAL PLURALISM- INTRODUCTION

This Unit covers Chapter 1 of the prescribed textbook Rautenbach, Bekker and Goolam Introduction to Legal Pluralism 3rd ed., 2010, Lexis Nexis.

INTRODUCTION

The Constitution of the Republic of South Africa Act 108, 1996, acknowledges both the South African common law and customary law as primary legal systems. Indigenous/customary law is important since a large proportion of the South African population adheres to its principles - it governs the domestic affairs of three quarters of the South African population. Customary law forms the largest component of this course.

Secondary systems include the religious legal systems, for example the Islamic, Hindu and Jewish law. South Africa is a heterogeneous society; therefore, a basic theoretical and practical knowledge of the secondary systems of law is of great value to the jurist. Presently these religious legal systems are not officially recognised. (The last five chapters in the textbook deal with these systems, only two of them will be for test and examination purposes.)

The first unit deals with a few concepts of legal pluralism.

1. LEARNING OUTCOMES

After completing Unit 1, you should be able to do the following:

- Explain the concept legal pluralism according to its different interpretations.
- Describe the historical emergence of legal pluralism in South Africa.
- Discuss state-law pluralism in South Africa today.
2. **THE CONCEPT “LEGAL PLURALISM”**

**Study** Chapter 1, paragraph 1.2. of the prescribed textbook Rautenbach, Bekker and Goolam *Introduction to Legal Pluralism* 3rd ed, 2010, Lexis Nexis.

The concept *legal pluralism* can be interpreted in different ways. The following diagram summarises the position and should be memorised:

![Legal Pluralism Diagram]

**2.1 Narrow interpretation** (textbook paragraph 1.2.1)

- The narrow interpretation of legal pluralism is based on a “dual systems” approach.
- It can be described as the joining of European/Western and traditional forms of law.
- All the legal systems recognised in the society operate within the framework of “official law”.
- This view is in accordance with the Western positivistic perception that law consists of those norms created and sanctioned by official state organs.
- Legal positivism negates the coexistence of a variety of unofficial legal systems within a single society.
- “Laws” derived from sources other than the State become “law properly so called” only when authorised/recognised by the State.
Recognition inevitably leads to the formulation of practical rules to determine:
- when these laws may be applied;
- when they should be regarded as acceptable;
- how they should be ascertained; and
- what should happen where there is a conflict with the national law.

The narrow interpretation of legal pluralism prevails in South Africa. Even though indigenous law is recognised by the Constitution, the common law is still regarded as the dominant system.

The national law may abolish the indigenous law at any given time. The imposed State law and Western values are regarded as a tool to modernise and reshape the indigenous law and other laws which are unofficially observed.

2.2 Broad interpretation (textbook paragraph 1.2.2)

According to this interpretation, legal pluralism should be regarded as the factual situation that various legal systems are observed in a single society.

Legal pluralism is, therefore, not dependent on State recognition of the various legal systems.

Official recognition of a legal system and non-recognition of others have no effect on the factual existence of legal pluralism.

Recognition simply determines the status of the legal systems that are officially and unofficially observed in society.

The dominance of the State law is, in fact, irrelevant to the continued existence of the unofficial laws.

“Deep legal pluralism” (the broad interpretation) also exists in South Africa. The Western State law has never been able to penetrate fully the indigenous, Islamic, and other religious legal systems. They continue to be observed unofficially.

Activity 1

1. By way of a diagram, distinguish between the narrow interpretation and the broad interpretation of legal pluralism.
2. Write a paragraph on each of the following:
   2.1 The meaning and content of a narrow interpretation of legal pluralism;
   2.2 The meaning and content of a broad interpretation of legal pluralism.

3. HISTORICAL EMERGENCE OF LEGAL PLURALISM IN SOUTH AFRICA

Customary law is dealt with in Unit 2

3.1 Islamic law

Read paragraph 1.4.2.

3.2 Hindu law

Read paragraph 1.4.3.
3.3 Jewish law

Read paragraph 1.4.4.

3.4 People’s law

Read paragraph 1.4.5.

4. LEGAL PLURALISM AND THE CONSTITUTION

The religious legal systems and any possible conflict with the Constitution are dealt with in the last five units. In this unit, the focus will be on customary/indigenous law.

Study:
- Bhe v Magistrate, Khayelitsha and Others; Shibi v Sithole and Others; South African Human Rights Commission and Another v President of South Africa and Others 2005 1 BCLR 1 CC; 2005 1 SA 580 CC.
- Mabuza v Mbatha 2003 4 SA 218 CPD.
- Alexkor Ltd v The Richtersveld Community 2004 5 SA 460 par 50 – 54.

In the Constitutional Court Judgement Bhe v Magistrate Khayelitsha referred to above, there were three cases before the court, but they were heard together, since they were all concerned with the constitutionality of the customary law of succession.

For customary law, this case is extremely important. The different aspects (according to the outline) must be studied in detail.

Outline of Bhe v Magistrate Khayelitsha:

1. Introduction and issues: paragraphs 1 – 8.

South Africa has a dual legal system of succession in so far as it recognizes and enforces at least two systems of law, the one is based on the Roman-Dutch law (as amended by statute), the so-called common law, and the other system comprises a number of closely related customary laws. There are substantial differences between these two systems.

Between the time when the judgement was rendered and 20 September 2010, intestate succession was governed by two statutes: the Intestate Succession Act 81 of 1987 (common law) and the Black Administration Act 38 of 1927 (customary law), especially section 23 read with the regulations framed in terms of section 23(10). See paragraph 1.

Historically, the application of common or customary law depended on a person’s race and, more specifically, the form of marriage and the patrimonial consequences of the marriage.

There were two main issues (see paragraph 3):

- The constitutional validity of section 23.
The constitutional validity of the principle of primogeniture. According to this principle, the estate seeks a male heir, normally the oldest son of the family head, to the exclusion of women and younger children (see paragraph 77 for a short description of this principle).

2. Facts

You must be able to state very briefly in two or three sentences the most essential facts of each case.

- Bhe case, paragraphs 9 – 20.
- SA Human Rights Commission case, paragraphs 29 -34.

3. Legislative framework

- Paragraph 35: section 23 (1), (2), (3) and (10)(a).
- Paragraphs 36 – 38: regulations (read).

A summary of the relevant part of section 23 and the regulations appear in your study guide (Unit 7, under heading 4).

- Paragraph 39: the Intestate Succession Act, section 1(4)(b) excludes the estates of black people in respect of which section 23 applies. You are already familiar with the rest of this Act.

4. The approach to customary law

- Paragraphs 40 – 46 outline the status and place of customary law in our legal system. These paragraphs are extremely important and must be studied very well.

5. The constitutional rights implicated

- Paragraphs 48 – 59: you must simply be able to name the constitutional rights that were implicated (a detailed study of these rights falls outside the scope of this course).

6. Does section 2 violate the rights contended for?

- Paragraphs 60 – 73 (read only). The court answered in the affirmative. Paragraphs 68 and 73 provide a sufficient summary and should be studied.

7. The customary law of succession

- Paragraphs 74 – 79: basic principles and primogeniture rule. Know the basics (as per the activity questions).
- Paragraphs 80 – 87: changing circumstances. Know the basics (as per the activity questions).
Paragraphs 88 – 97: the problem of primogeniture. Know the basics (as per the activity questions). The court also declared the primogeniture rule unconstitutional. See paragraph 97.

8. Mthembu v Letsela

Paragraphs 98 – 100: the court rejected the finding by the SCA in the Mthembu case. The SCA found (in 2000) that the customary law of succession was not unconstitutional.

9. Remedy

Paragraphs 101 – 116: different options were available to the court, (a) – (d). Study paragraphs 105 – 106.

Paragraphs 107 – 108: reasons why options (a) and (b) were not followed.
  o By the court: paragraphs 109 – 113.
  o By the legislator: paragraphs 114 – 116.

Study paragraphs 109 – 116 very well. The court did not follow this option (c) either.

Paragraphs 117 – 125: read only. The court decided to follow option (d) and to modify the Intestate Succession Act. Study paragraph 125. It should be noted that the Reform of Customary Law of Succession Act and Regulation of Related Matters Act, 11 of 2009 came into operation on 20 September 2010. (This Act provides for the application of the Intestate Succession Act as stipulated in Bhe, but also regulates further aspects. The matter is further dealt with on the Study Unit on Succession.)

10. Retrospectivity

Study only paragraph 129.

11. Facilitation of agreements

Study paragraph 130.

12. The effect of this judgement (on the administration of the estate)

Paragraphs 131 – 134: read only. NB: All estates that fail to be wound up after the date of this judgement (15 October 2004) shall fall under the Master and shall be wound up in terms of the Administration of Estates Act. (Previously, estates in which customary law was applied were wound up under the supervision of the magistrate in terms of section 23 of the Black Administration Act.)

13. The Order (effect on succession)

NB: Paragraph 136. Study this paragraph in coherence with paragraph 125.
Activity 2

1. Briefly discuss the status and place of customary law in our legal system according to the view expressed in *Bhe v Magistrate Khayelitsha*, etc. (paragraphs 40 – 46).
2. Name the different options available to the court in *Bhe v Magistrate Khayelitsha*, etc. where a conflict between customary law and certain fundamental rights was in issue.
3. Discuss the role of the courts (judicial review) in solving conflict between customary law and the Constitution. Refer to the views of writers, examples from case law and section 39(2) of the Constitution.
4. Discuss the role of the legislator in solving a conflict between customary law and the Constitution. Refer to examples.
5. Briefly explain why the primogeniture rule of the customary law of succession and section 23 of the Black Administration Act (and the regulations thereunder) were declared unconstitutional by the court in *Bhe v Magistrate, Khayelitsha*.
6. Briefly explain the importance of *Alexkor Ltd v Richtersveld Community* 2004 5 SA 460 CC for indigenous (customary) law. (See paragraphs 50 – 54 of the case).

5. THE PRESENT POSITION

5.1 STATE LAW PLURALISM IN SOUTH AFRICA TODAY

Study paragraph 1.5 in the textbook.

5.2 DEEP LEGAL PLURALISM IN SOUTH AFRICA TODAY

Read paragraph 1.6 (including 1.6.1 and 1.6.2)

Activity 3

1. Discuss state-law pluralism in South Africa today. (10)
UNIT 2:
CUSTOMARY LAW – BASIC CONCEPTS,
HISTORICAL DEVELOPMENT,
CONFLICTS OF LAW AND
CONSTITUTIONAL RECOGNITION

This Unit covers Chapter 2 of the of the prescribed textbook.

Before we start with the substantive customary law, it is necessary to deal with a few basic concepts.

The layout of Unit 2 is as follows:

Part 1: Customary Law - Basic Concepts
Part 2: Historical development
Part 3: Conflicts of law
Part 4: Constitutional recognition

PART 1: CUSTOMARY LAW – BASIC CONCEPTS

1. LEARNING OUTCOMES

After completing Part 1, you should be able to do the following:

- Name and discuss the various names of this subject.
- Explain why it is important to note the difference between non-official and official customary law.
- Explain the division of the African language-speaking groups of South Africa.
- Explain the concepts **official indigenous law** and **unofficial indigenous law**.
- Explain why there is a need for choice of law rules.
- Distinguish between the different kinds of choice of law rules.
- Indicate the importance of *ex parte* Minister of Native Affairs: In re *Yako v. Beyi* 1948 1 A 388 (A).
- Outline the principles governing choice of law as was laid down by the courts.
- Explain how conflicts between different systems of customary law are to be resolved.
- Describe the process of law reform with regard to conflicts of law.

2. NAME OF THE SUBJECT

Study the following notes:

There is no unanimity with regard to the name of this subject. Some of the names used are customary law, indigenous law, African law, African customary law, and African law and custom.
African law is too wide.

Similarly, customary law is not sufficiently distinctive: custom, as a source of law, is also recognised in Western systems and, moreover, while the law of the various indigenous peoples of South Africa is mainly customary, custom is not the only source of law. Some tribes and traditional leaders issued edicts that had the force of law. This was, however, not an important source of law. This name is generally accepted and is one of the names used by the legislator, for example, section 211 of the Constitution of the Republic of South Africa 1996.

Indigenous law means that it originated in a country or region (and is similar in meaning to “autochthonous”). This name is also used by the legislator, for example, section 1 of the Law of Evidence Amendment Act 45, 1988. The Constitutional Court also used the name indigenous law in Alexkor Ltd v The Richtersveld Community 2004 5 SA 460 CC. The South African common law, although mainly Roman-Dutch in origin, is also in a sense indigenous in so far as it has been developed and adjusted here. It is, however, unusual to refer to the law of the land in this way, and there should not be confusion.

Despite criticism, both names customary law (or African customary law) and indigenous law are generally used in this field and will both be used in this course to distinguish this system of law from common law / law of the land.

African customary law may refer to the whole of Africa, which casts the net too wide. We will deal mainly with the indigenous legal systems of the African language-speaking groups of South Africa. Reference may nevertheless be made to surrounding territories, especially where cultural and ethnic groups overlap, such as the Tswana in the Northern Cape and North West Provinces and the Tswana in Botswana. The same applies to the Sotho in the Free State and the Sotho of Lesotho. When these groups are included, reference will be made to Southern Africa in general.

A complete study of the customary law of neighboring or other African states is not feasible within this course.

3. DEFINITION AND THE DIVISION OF CUSTOMARY LAW

Study:
The following notes;
Par 2.2 of the textbook.

Definition
The first statutory definition of customary law/indigenous law in South Africa is found in the Law of Evidence Amendment Act, Act 45 of 1988: “indigenous law’ means the law or custom as applied by the Black tribes in the Republic”. See the rest of the paragraph and definitions in the textbook par 2.2.

Division
Customary law is divided into the same categories in which the South African common law is usually divided. The law is generally divided between national and international law. National law governs relations between people within a state, and relations between the government and its subjects. International law governs relations between different states.
Most African language-speaking groups in South Africa also had independent, sovereign states under the rule of a tribal chief. Sometimes tribes were joined together and were ruled by a king or the so-called paramount chief. Examples of kingdoms are the Zulu, the Swazi, and the South Sotho in Lesotho.

The customary law of a tribe or a unit of tribes can generally be equated to the concept of national law, and one may thus speak of Pedi law or Tswana customary law. Intertribal law could be equated to international law. Few details are known about intertribal law.

With regard to tribal law, a distinction can be made between public law and private law. The chapters dealing with traditional leadership, the courts, and procedure and evidence belong to the field of public law.

The larger part of the course will consist of customary private law, but public law aspects such as the institution of traditional leaders, courts, procedure and evidence are also included.

4. THE DIVISION OF THE AFRICAN LANGUAGE-SPEAKING GROUPS OF SOUTHERN AFRICA

The term “African language-speaking” refers to a family of languages that have a remarkable degree of similarity and a common origin. Linguists and anthropologists refer to these languages as “Africa” languages. They have a similar structure and are quite different from English, which is an Indo-European language.

On the basis of language and other cultural characteristics, we can distinguish the main groupings of the African language-speaking people of South Africa (including Botswana, Lesotho, and Swaziland). There are four main groups, some consisting of several subgroups. In terms of section 6(1) of the Constitution of the Republic of South Africa Act 108, 1996, there are nine official African languages, which are indicated below:

<table>
<thead>
<tr>
<th>Group</th>
<th>Language</th>
<th>Area</th>
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<tbody>
<tr>
<td>Nguni: 60%</td>
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<tr>
<td>Xhosa</td>
<td>isiXhosa</td>
<td>Eastern Cape, Ciskei, and Transkei</td>
</tr>
<tr>
<td>Zulu</td>
<td>isiZulu</td>
<td>KwaZulu-Natal</td>
</tr>
<tr>
<td>Swazi</td>
<td>siSwati</td>
<td>Swaziland and Mpumalanga</td>
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<tr>
<td>Ndebele</td>
<td>isiNdebele</td>
<td>Mpumalanga, Northeast of Pretoria</td>
</tr>
<tr>
<td>Sotho: 34%</td>
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<tr>
<td>Pedi (North Sotho)</td>
<td>Sepedi</td>
<td>Limpopo Province</td>
</tr>
<tr>
<td>South Sotho</td>
<td>Sesotho</td>
<td>Free State and Lesotho</td>
</tr>
<tr>
<td>Tswana</td>
<td>Setswana</td>
<td>Northwest and North Cape Provinces</td>
</tr>
<tr>
<td>Shangana-Tsonga</td>
<td>Xitsonga</td>
<td>Limpopo Province, Mpumalanga</td>
</tr>
<tr>
<td>Venda</td>
<td>Tshivenda</td>
<td>Northern Province (north-eastern part)</td>
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</table>
The languages, legal systems, and customs of the four groups differ considerably. However, they have so many common features that they may be discussed together. For example, they all have a similar system of traditional leadership as well as that a marriage is a union between two families and all of them recognize a male family head that is responsible for the care of the whole family.

5. FEATURES OF CUSTOMARY LAW IN COMPARISON TO COMMON LAW.

Study:
Par 2.3 (and subparagraphs 2.3.1 to 2.3.12) of the textbook.

6. LIVING LAW AND OFFICIAL VERSIONS OF CUSTOMARY LAW.

Study:
The following notes;
Par 2.4 of the textbook.

In Unit 1, a distinction was made between:

- **Non-official customary law**: the customary law as it is practised and also known as “living law”, developed by the people and adapted to changing circumstances; and
- **Official customary law**: the officially recognised and written customary law, influenced by the legislator and the courts. In the past this version of customary law was mostly applied by the High Courts.

It is submitted that for the application of customary law, only the official version is available. This was aptly confirmed by the SA Law Commission:

> Much of the official version will persist for the simple reason that we have no other, more reliable account of customary law. It is true that litigants are not bound by rules from this source. They are free to allege a better version by calling proof of a new or more authentic custom.

But, if a party doing so does not meet the standards required for proving custom then the official version will prevail for want of better evidence. [See, for example Ruzane v. Paradzai 1991 1 ZLR 273 (SC) at 278; Project 90 The harmonisation of the common law and the indigenous law Discussion paper 74 Customary marriages (1997) 15].

The distinction between non-official and official customary law inevitably led to a distortion of traditional customary law. Similarly, the fact that many facets of the traditional way of life are disappearing, particularly in urban areas, has led to a greater adaptation of customary law.

See for example Bhe v Magistrate, Khayelitsha paragraphs 81-87 and, more specifically, paragraph 87.

It is of the utmost importance that official and non-official customary law should be as near as possible to each other. Otherwise, official customary law will only be paper
law, practised and accepted by nobody. Legislation has the most chance of success when it has the consensus of the people behind it, and when it confirms attitudes and patterns that the people, by their behaviour, have demonstrated to hold and value. (Bekker and Maithufi. 1992. “The dichotomy between official customary law and non-official customary law”. *Journal for Juridical Science*: 47-60).

It is important to be aware of the distinction between official and non-official customary law for several reasons:

(i) All the different African language-speaking groups do not adhere to only one universal system of customary law.

Each community (formerly known as “tribe”) or conglomeration of communities has its own legal system that may, to a greater or lesser extent, differ from other tribal systems. For example, it is customary for most of the 280 Zulu tribes in KwaZulu-Natal to pay all the *lobolo* (bridewealth) before or at the marriage ceremonies, unless specifically agreed otherwise. Amongst most of the Xhosa speaking tribes in the Eastern Cape, the *lobolo* is paid only after the marriage according to the *theleka* custom (whereby the wife is “impounded” by her father/guardian until a further *lobolo*-beast has been paid.)

It is impossible to study all the different systems (in South Africa, there are approximately 200 different systems if tribal differences are taken into account). There is, however, a high degree of similarity of legal principles and cultural values. Group ownership of property, for instance, is universal, as is the principle that the family head is in charge of family affairs. Thus, it is possible to present the course as a single legal system and discuss important variations where necessary.

(ii) The high courts apply a more universal system. Judges and lawyers are mostly obliged to apply the law as they find it in the usual legal sources such as textbooks, statutes, and case law.

(iii) Customary law is not static – in common with other legal systems, it is subject to change as a result of political, economic, and social development. It is impossible to present a version that embodies all changes that might have occurred. In rural areas, the people are more likely to live according to the traditional law, but it is impossible for people to perform all traditional ceremonies in an urban area. It is the general view that the core of legal principles and cultural values remained intact.

(iv) Knowledge of the traditional principles is important in understanding the underlying values, especially in the case of amendments and the development of the law.

**Activity 1**

1. Name and discuss the most important names of this subject.
2. Give a concise critical discussion of the statutory definitions of customary/indigenous law in South Africa.
4. Explain the features of customary law in comparison to the common law. (par 2.3.1 to 2.3.11 or each one separately).
5. Write explanatory notes on the concept ubuntu.(10-12).
6. Distinguish between the concepts “official” and “non-official” (“living”) customary law.
7. Why is it important to be aware of the distinction between “official” and “non-official” customary law?
8. Why must the official and non-official customary law be as near as possible to each other?
9. What should rather be applied: official or non-official (“living”) customary law?
10. Is there one universal system of customary law in South Africa?

OR:
Explain why the different African legal systems can be offered as one course.

PART 2: HISTORICAL DEVELOPMENT

Recognition and application of customary law.

1. LEARNING OUTCOMES

After completing Part 2, you should be able to do the following:

- Explain the historical development of the recognition and application of customary law;
- Evaluate relevant legislation.


Read par 2.6.1 of the textbook and study the following notes:

(Source: Bekker 1989: Seymour's Customary Law in Southern Africa 5th Ed.)

The Cape Colony before annexation of Transkei

- In the former Cape Colony (Transkei excluded), customary law received no recognition whatsoever.
- All subjects living in the Colony were subject to the law of the Colony, namely Roman-Dutch law as modified by legislation.
- The courts of the Colony never recognised or applied customary law as a system of law, but were always prepared to enforce an agreement if the terms thereof were not prohibited by law or contrary to morality, public policy, or equity.
- Accordingly, the courts gave effect to a contract to pay lobolo with regard to a civil marriage as it was not morally out of keeping with the marriage. A lobolo contract made in consideration of a customary marriage was not given any effect as this marriage was not recognised by the law of the Colony.
- In practice, the majority of black people in the Colony continued to live in accordance with their traditional laws and customs.
In 1864, the customary law of succession was recognised when the legislator passed the Black Succession Act 18, 1864, which dealt only with intestate succession.

**The Cape Colony after annexation of Transkei**

- The independent principalities of Transkei, each under the rule of its own chief, were annexed one by one to the Cape Colony by the British authority.
- In these former Transkei territories, a different approach was followed. The local customary law was recognised by the special annexation legislation.
- A magistrate’s court could apply customary law as a system of law if all the parties to a suit were black.
- An appeal in civil cases was allowed to the Native Territories Appeal Court, and from 1898, a further appeal to the Cape Supreme Court was available.
- The Cape Colony was, therefore, divided into two distinct sections: the Colony proper where the law of the Colony and only Act 18, 1864 was applied and the Transkei where magistrate’s courts could apply both systems of law.
- The Governor could also, by proclamation, provide legislation for the indigenous people, and in this way, customary law could quickly be changed and adapted.

**The Transvaal from 1885 to 1927**

- In the former Transvaal, the local customary law was recognised in terms of Law 4 of 1885 as long as it was not inconsistent with the general principles recognised in the civilised world.
- Chiefs’ and Commissioners’ Courts were established. These courts could apply only customary law and applied it to all black litigants in all matters and disputes of a civil nature.
- Customary law could not be applied in the magistrate’s court or in the high court. Until 1907, only the president could review these judgements.

**Natal from 1898 to 1927**

- In Natal, the laws regarding the administration of civil law to blacks were consolidated in the Courts (Blacks) Act 49, 1898.
- In terms of this act, the courts of chiefs, magistrates, and the specially created Black High Court had original jurisdiction in all cases in which all the parties were blacks and were obliged to apply customary law.
- A code on customary law, the Natal Code, was passed in 1878. This code was a manual for magistrates, but in terms of Act 19, 1891, a new code was passed which was binding on all courts. The former Zululand was annexed in 1887 and, in 1897, formally became part of Natal. It was subject to all Natal legislation.

**Orange Free State**

- Customary law as such was not recognised in the Orange Free State.
- In the Thaba ‘Nchu reserve, customary unions were recognised. In the Witsieshoek reserve, the commandant was empowered to hear appeals from the chiefs’ courts.
From union in 1910 until 1927 and the enactment of the Black Administration Act, no specific provision for the recognition and application of customary law was made.

3. POSITION AFTER THE BLACK ADMINISTRATION ACT, 38 OF 1927

Study:
The following notes;
Par 2.6.2 of the textbook.

The Black Administration Act, 38 of 1927

- This act was introduced with a view to:
  - establishing a national system for the recognition and application of customary law, and
  - creating a separate court structure consisting of the following:
    - Courts of Chiefs and Headmen;
    - Commissioners’ Courts;
    - Appeal Courts for Commissioners’ Courts;
    - Black Divorce Court.
- The application of customary law in special courts for black people led to the isolation of customary law and the recognition given were only limited.
- Section 11 of Act 38, 1927 was the most important section for the recognition of customary law. Very important: study par 2.6.2 in the textbook.

4. RECOGNITION IN TERMS OF THE LAW OF EVIDENCE AMENDMENT ACT, 45 OF 1988

Study:
The following notes;
Par 2.6.3 of the textbook.

- The section 1 is still applicable and provides as follows:

  Judicial notice of law of foreign states and of indigenous law –

  (1) Any court may take judicial notice of the law of a foreign state and of indigenous law in so far as such law can be ascertained readily and with sufficient certainty: Provided that indigenous law shall not be opposed to the principles of public policy or natural justice: Provided further that it shall not be lawful for any court to declare that the custom of lobola or bogadi or other similar custom is repugnant to such principles.

  (2) The provisions of subsection (1) shall not preclude any party from adducing evidence of the substance of a legal rule contemplated in the subsection which is in issue at the proceedings concerned.

  (3) In any suit or proceedings between Blacks who do not belong to the same tribe, the court shall not in the absence of any agreement between them with regard to the particular system of indigenous law to be applied in such suit or proceedings, apply any system of indigenous law other than that which is in operation at the place where the defendant or respondent
resides or carries on business or is employed, or if two or more different systems are in operation at that place (not being within a tribal area), the court shall not apply any such system unless it is the law of the tribe (if any) to which the defendant or respondent belongs.

(4) For the purposes of this section 'indigenous law' means the law or customs as applied by the Black tribes in the Republic.

Important: Study par 2.6.3 of the textbook.

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<th>Activity 2</th>
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<tr>
<td>1. Write an essay on the recognition of customary law prior to the <strong>Black Administration Act, 38 of 1927</strong> in the Cape Colony, Transvaal, Natal and the Free State.</td>
</tr>
<tr>
<td>2. What were the main aims of the Black Administration Act?</td>
</tr>
<tr>
<td>3. Although the aim of the <strong>Black Administration Act, 38 of 1927</strong> was to recognize customary law, it had shortcomings and placed many restrictions on the application of customary law. Explain. (10)</td>
</tr>
<tr>
<td>4. Write short declaratory notes on the repugnancy clause contained in section 1(1) of the <strong>Law of Evidence Amendment Act, 45 of 1988</strong>. (10-12)</td>
</tr>
<tr>
<td>5. Write short declaratory notes on section 1(2) of the <strong>Law of Evidence Amendment Act, 45 of 1988</strong>. (8-10)</td>
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**PART 3: CONFLICTS OF LAW**

1. **LEARNING OUTCOMES**

After completion of Part 3, you should be able to do the following:

- Explain why there is a need for choice of law rules.
- Distinguish between the different kinds of choice of law rules.
- Indicate the importance of *ex parte Minister of Native Affairs: In re Yako v Beyi 1948 1 A 388 (A).*
- Outline the principles governing choice of law as was laid down by the courts.
- Explain how conflicts between different systems of customary law are to be resolved.

2. **INTRODUCTION**

Bennett declares that although section 211(3) of the Constitution elevates customary law to the same position as the common law, the three provisions in that section maintain its subordinate position:

- The courts may apply customary law only if it is compatible with the Constitution;
- only to the extent that it is not amended by legislation.

The court must apply customary law **when that law is applicable**. The court must, therefore, choose between common law and customary law in a given case. If the court has to make a choice, the court will be guided by choice of law rules.
For example, A and B entered into a contract. A has already performed under the contract, but B refuses to perform. A sues B and alleges that customary law is applicable. B raises the defence of prescription and claims common law to be applicable. (In customary law, prescription is unknown.)

Which system of law should govern this dispute? The court has to make a choice and will be guided by choice of law rules.

Activity 3

1. Is Bennett correct in stating that section 211(3) of the Constitution maintains the subordinate position of customary law? Explain briefly.
2. In some instances the courts have to choose whether common law or customary law should be applied in a given case. How is this decision taken? Explain by referring to an example why there is a need for choice of law rules.

3. CHOICE OF LAW RULES

Study

The following notes;
Paragraph 2.2.4 in the textbook;
Maisela v Kgolane 2000 2 SA 370 (TPD).

In South Africa, we had statutory choice of law rules to determine whether common law or customary law were applicable in succession-cases. Section 23 of the Black Administration Act and the regulations promulgated there-under were however declared unconstitutional and scrapped.

Choice of law rules can also originate from case law: section 11(1) of the Black Administration Act provided that the former commissioners’ courts and the Appeal Courts for Commissioners’ Courts had a discretion to apply customary law “in all suits or proceedings between Blacks involving questions of customs followed by Blacks”.

In ex parte Minister of Native Affairs: In re Yako v Beyi 1948 1 SA 388 (A), the court laid down the following principles regarding the discretion of the courts:

1. Neither system of law is primarily applicable (neither common nor customary law). (This would now be even more so as customary law has been placed on par with common law by the Constitution.)
2. The courts have judicial and not absolute or arbitrary discretion. There are no hard and fast rules on how the courts should exercise such judicial discretion.
3. The primary desideratum is to achieve an equitable decision between the parties.

Bennett comments that although this judgement clarified the process for selecting the appropriate law, it did not lay down any choice of law rules. The appeal courts, however, succeeded in fashioning an enduring set of principles, which is still helpful in solving the modern conflict of laws problems.
These principles are discussed in paragraph 2.6.4 of the textbook and must be studied!

Also remember to study Maisela v Kgolane 2000 2 SA 370 (TPD).

Facts:
The case concerns a tractor that was sold and delivered. There were a number of disputes that the magistrate adjudicated upon, against which an appeal was lodged.

Issue:
For customary law, only the third issue in the appeal is of importance, namely, the Magistrate’s decision that customary law is applicable, resulting in the plea of prescription being dismissed. Indigenous law was applied without any mention of it in the pleadings.

Rules and conclusion:
Study pp. 375C-377E. The magistrate erred by applying customary law to a contract of sale simply because both parties were black. Prescription should not have been rejected on this ground.

Activity 4
1. Distinguish between the two kinds of choice of law rules.
2. Indicate the importance of ex parte Minister of Native Affairs: In re Yako v Beyi 1958 1 SA 388 (A).
3. In some instances the courts have to choose whether common law or customary law should be applied in a given case. Outline the principles governing choice of law as was laid down by the courts.
4. Discuss the importance of Maisela v Kgolane 2000 2 SA 370 (TPD) for the customary law.

4. CONFLICTS BETWEEN DIFFERENT SYSTEMS OF CUSTOMARY LAW

Study Chapter 2, paragraph 2.6.5 in the textbook.

Activity 5
2. Mr Fihlo is a South Sotho working in Bloemfontein. His wife, Puleng, is on holiday in East London. While she is there, Mr Xaba, a Xhosa from the Pondo tribe who resides and works in Umtata, commits adultery with Puleng. Mr Fihlo wants to sue Mr Xaba for damages for adultery under customary law. Which system of law would apply?
PART 4: CUSTOMARY LAW AND THE CONSTITUTION

1. LEARNING OUTCOMES

After completing Part 4, you should be able to do the following:

- Briefly describe the constitutional recognition of customary law.
- Identify possible areas of conflict between customary law and the Constitution.
- Name and briefly describe the ways in which a conflict between customary law and fundamental rights were dealt with by the courts.
- Critically discuss the legislator’s commitment and efforts to harmonise customary law and common law.
- Discuss relevant case law.

Study:

- The notes in the study guide.
- Paragraph 2.6.6 (and all subparagraphs) in the textbook.
- *Bhe v Magistrate, Khayelitsha and Others; Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Others* 2005 1 BCLR 1 CC; 2005 1 SA 580 CC.
- *Mabuza v Mabatha* 2003 4 SA 218 CPD.
- *Alexkor Ltd v The Richtersveld Community* 2004 5 SA 460 par 50 – 54.

Some aspects of customary law may, on the face of it, be in conflict with the Bill of Rights. It seems as if the Constitution, by recognising customary law, on the one hand, and prohibiting discrimination, on the other, created a conflict between two opposing principles. Conflict between traditional customary law and the Constitution was inevitable, especially between the right to equal treatment and the many rules of customary law that subordinate the interests of woman and children to senior males. In traditional customary law, women do not have the same status as men. See also *Bhe v Magistrate Khayelitsha and Nicholson* p373-388.

Section 9: Equality is of importance

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

Section 9(2) and (3) provides that neither the state nor any other person may discriminate against somebody on any of the grounds specified in section 9(2), *inter alia*, gender and age.

**Activity 6**

1. The Constitution recognises customary law as a system of law. Explain this statement by referring to authority (par 2.6.6.1 and 2.6.6.2). (6)
2. The recognition of customary law is subject to three requirements. Name them. (3)
3. Does the Constitution also apply horizontally? Explain briefly (sec 8(1) and (2). (4)
4. Do the courts have a duty to develop customary law? Explain briefly. (7-8)
5. Briefly explain the meaning and effect of the right to culture as recognized in the Constitution.
6. In the area of customary law section 9 of the Constitution has been the object of most legislation so far. Explain this statement by referring to five recent cases. (15) OR
   Explain this statement by referring to cases with regard to
   6.1 Burial rights
   6.2 Customary marriages (requirements)
   6.3 Intestate succession
   6.4 Succession to traditional leadership
   6.5 Customary marriages (patrimonial consequences) (±5 each)
7. The recognition and application of customary law is subject to legislation specifically dealing with customary law. Explain this statement by referring to examples (6) OR
   Discuss the role of the legislator in solving a conflict between customary law and the Constitution. Refer to examples. (6)
8. Briefly explain the importance of Alexkor Ltd v Richtersveld Community 2004 5 SA 460 CC for indigenous (customary) law. (See par 50-54 of the case). (8-10)
9. Briefly explain the importance of Mabuza v Mbatha 2003 4 SA 218 CPD for customary law. (±10)
10. Briefly discuss the status and place of customary law in our legal system according to the view expressed in Bhe v Magistrate, Khayelitsha, etc. (paragraphs 40-46 of the case). (±15)
11. Name the different options available to the court in Bhe v Magistrate, Khayelitsha, etc. where a conflict between customary law and certain fundamental rights was in issue.(10-12)
UNIT 3:
FAMILY LAW

This Unit covers Chapter 3 of the prescribed textbook.

INTRODUCTION

This unit covers Chapter 3 of the textbook and some additional notes in the study guide. Indigenous family law is probably the most important part of indigenous law. Family law was radically changed by the Recognition of Customary Marriages Act 120, 1998, which came into operation on 15 November 2000. Needless to say, a thorough knowledge of the content of this act is necessary. The act requires that the marriage must be negotiated and concluded or celebrated according to customary law. Therefore, the most important aspects of traditional customary law must also be studied.

The layout of Unit 3 is as follows:

Unit 3.1: Customary Engagement
Unit 3.2: Customary Marriage
Unit 3.3: Civil Marriages

LEARNING OUTCOMES

Please refer to the lecture notes for the outcomes.

READINGS


UNIT 3.1: CUSTOMARY ENGAGEMENT

1. LEARNING OUTCOMES

After completion of Unit 3.1, you should be able to do the following:

- Name and briefly describe the different ways to initiate marriage negotiations.
- Distinguish between the different categories of property (material goods) under discussion at the engagement, and also give the legal position of each category.
- Describe the methods of termination of the engagement.
- Briefly discuss the legal consequences of the termination of an engagement with reference to the different categories of material goods at the termination of the engagement.
2. **WAYS TO INITIATE MARRIAGE NEGOTIATIONS**

Study Chapter 3, paragraph 3.2.1 of the textbook.

<table>
<thead>
<tr>
<th>Activity 1</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Name and briefly explain the different ways to initiate marriage negotiations.</td>
</tr>
<tr>
<td>2. Discuss the <em>ukuthwala</em> custom.</td>
</tr>
</tbody>
</table>

3. **THE CONSEQUENCES OF BETROTHAL**

Study paragraph 3.2.2 of the textbook.

4. **WAYS OF TERMINATING THE ENGAGEMENT**

Study paragraph 3.2.3 in the textbook.

<table>
<thead>
<tr>
<th>Activity 2</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Distinguish between the different categories of property (material goods) under discussion at the engagement and give the rules applicable to each category. (Also when terminating the engagement).</td>
</tr>
<tr>
<td>2. Describe the ways of terminating the engagement.</td>
</tr>
</tbody>
</table>

Source: Olivier et al. (1994).

**UNIT 3.2: CUSTOMARY MARRIAGE**

As indicated above, the *Recognition of Customary Marriage* Act 120, 1998 regulates customary marriages occurring after 15 November 2000, and must be studied thoroughly. The most important aspects of traditional customary law must, however, also receive attention because the act requires that the marriage must be “negotiated and concluded or celebrated according to customary law”.

1. **LEARNING OUTCOMES**

After completion of Unit 3.2, you should be able to do the following:

- With regard to the *Recognition of Customary Marriages Act*
  - i. Explain which customary marriages will be recognised as valid in terms of section 2.
  - ii. Define customary marriage and customary law in terms of section 1.
  - iii. Explain the requirements for a valid customary marriage.
  - iv. Write notes on the registration of a customary marriage (section 4).
  - v. Describe the status of a wife in a customary marriage (section 6).
  - vi. Explain the proprietary consequences of customary marriage and the contractual capacity of spouses.
  - vii. Explain how and on which grounds a customary marriage can be dissolved.
  - viii. Describe the powers of the court in divorce proceedings.

- Briefly describe the traditional requirements of a customary marriage.
2. RECOGNITION OF CUSTOMARY MARRIAGES

On 15 November 2000, the Recognition of Customary Marriages Act came into operation (referred to as The Act).

Study paragraph 3.3.1 in the textbook.

Activity 1

1. In terms of the Recognition of Customary Marriages Act:
   - explain which customary marriages will be recognised as valid (in terms of section 2);
   - define:
     - customary marriage;
     - customary law.
2. Can a member of any population group enter into a customary marriage? Briefly explain.

3. REQUIREMENTS FOR A VALID CUSTOMARY MARRIAGE

3.1 Requirements for customary marriage before 15 November 2000

Study:

- Chapter 3, paragraph 3.3.2 of the textbook.
- Mabena v Letsoalo 1998 2 SA 1068 (T).
- Mabuza v Mbatha 2003 4 SA 218 (CPD).

Optional


The Transkei Marriage Act stipulated:

Subject to the provisions of this Act, the time, place and manner of consummation of any customary marriage and the procedure to be followed, the customs to be observed and the ceremony (if any) to be performed at or in connection with the consummation of such customary marriage shall be in accordance with the customary law applicable to the male party to such customary marriage: Provided that –

(a) no customary marriage shall be consummated except with the consent of-
   (i) every party to such customary marriage who has attained the age of twenty-one years; or
   (ii) the father or guardian of every party to such customary marriage who has not attained the age of twenty-one years; and
(b) if the female party to such customary marriage is under the age of twenty-one years, she shall be handed over to the male party by her father or guardian.
Activity 2

1. Name and briefly explain the requirements of a customary marriage (outside KZN and the Transkei) before 15 November 2000.
2. Name the requirements of a customary marriage in:
   i) KwaZulu-Natal.
   ii) Transkei.
   before 15 November 2000.
4. Discuss Mabuza v Mbatha 2003 4 SA 218 (CPD).
5. Give a brief critical discussion of Nontobeko Virginia Gaza v RAF unreported SCA case no 419/2006.

3.2 Statutory requirements from 15 November 2000

3.2.1 General

Study section 3 of The Act and from Chapter 3 of the textbook, paragraph 3.3.3 (3.3.3.1 – 3.3.3.4).

*Fanti v Boto and Others* 2008 5 SA 405 CPD

Section 3 reads as follows:

**Requirements for validity of customary marriages**

(1) For a customary marriage entered into after the commencement of this act to be valid –
   (a) the prospective spouses –
       (i) must both be above the age of 18 years, and
       (ii) must both consent to be married to each other under customary law;
   (b) the marriage must be negotiated and entered into or celebrated in accordance with customary law.

(2) Save as provided in section 10(1), no spouse in a customary marriage shall be competent to enter into a marriage under the Marriage Act 25, 1961 during the subsistence of such customary marriage.

(3) (a) If either of the prospective spouses is a minor, both his or her parents or legal guardian, where he or she has no parents, must consent to the marriage.
    (b) If the consent of the parent or legal guardian cannot be obtained, section 25 of the Marriage Act 1961 applies.

(4) (a) Despite section 10(1)(a)(i), the Minister or any officer in the public service, authorised in writing thereto by him or her, may grant written permission to a person under the age of 18 years to enter into a customary marriage if the Minister or the said officer considers such marriage desirable and in the interests of the parties in question.
(b) Such permission shall not relieve the parties to the proposed marriage from the obligation to comply with all the other requirements prescribed by law.

(c) If a person under the age of 18 years has entered into a customary marriage without the written permission of the Minister or the relevant officer, the Minister or the officer may, if he or she considers the marriage to be desirable and in the interests of the parties in question and if the marriage was in every other respect in accordance with this act, declare in writing the marriage to be a valid customary marriage.

(5) Section 24A of the Marriage Act 1961, subject to subsection (4), applies to the customary marriage of a minor entered into without the consent of a parent, guardian, commissioner of child welfare or a judge, as the case may be.

(6) The prohibition of a customary marriage between persons on account of their relationship by blood or affinity is determined by customary law.

Note that both prospective spouses must be above the age of 18. If a prospective spouse is still a minor, the consent of both parents or legal guardian must be obtained. Note that the Births and Deaths Registration Amendment Act 1, 2002 reduced the age of majority from 21 to 18 years. Traditionally (as you will see a little further on), only the father’s permission was needed because before the act, women were regarded as perpetual minors, always under the guardianship of a male (her father when she was unmarried, her husband when married and again her father or his successor or her husband’s successor should she become widowed or divorced). The act therefore substantially changed this position.

Section 3(3)-(5) brings the customary marriage virtually on par with a civil marriage (common law marriage), except that the customary marriage is potentially polygamous, must be negotiated and concluded or celebrated according to customary law and, according to section 3(6), the prohibition to marry on account of relationship by blood or affinity is determined by customary law.

3.2.2 Prohibited and preferential marriages (Study paragraph 3.3.3.2)

With regard to the relationship question (section 3(6)), there are major differences between the Nguni-group and other groups.

- The Nguni-group has stringent, far-reaching rules and prohibitions on marriage and incest.
- The Sotho-group does not have the same stringent prohibitions – some relatives are preferred (but not compulsory) marriage partners, for example it is preferred for a man to marry the daughter of his mother’s brother, a so-called cross-cousin marriage.

3.2.3 Negotiation, conclusion and celebration according to customary law

Study paragraph 3.3.3.3.
3.2.4 Lobolo

Study

a) Paragraph 3.3.3.4

Activity 3

1. Name the requirements for a customary marriage in terms of section 3 of the Act.
3. Write short notes on prohibited marriages amongst the different groups (section 3(6)).
4. Name and briefly describe the distinct stages of a customary marriage.
5. Is lobolo presently a requirement for a valid customary marriage? Discuss.
6. How is the size of lobolo determined? Explain.
7. Briefly discuss contemporary problems with regard to lobolo.

4. REGISTRATION OF A CUSTOMARY MARRIAGE

Study Chapter 3, paragraph 3.3.4. Kambule v The Master and Others 2007 3 SA 403 E confirmed that registration is not a prerequisite for a valid customary marriage. Read section 11 of the act. Note that the regulations referred to in section 11 of the act have been promulgated in the Government Gazette, 1 November 2000, No. 21700. Detailed knowledge of these regulations falls outside the scope of this course.

Read
The existence and proof of customary marriages for purposes of Road Accident Fund claims. Obiter 164-174.

Activity 4

1. Explain the arrangements regarding registration of customary marriages in terms of section 4 of the act.
2. Briefly explain the problems that exist in practice, regarding the registration of customary marriages.
5. **EQUAL STATUS AND CAPACITY OF SPOUSES**

Traditionally women were regarded as perpetual minors, always under the guardianship of a male (her father when she was unmarried, her husband when married. The act therefore substantially changed this position.

**Study** Chapter 3, paragraph 3.3.5 and section 6 of the Act. *Gumede v President of the Republic of South Africa and Others* 2009 (3) SA 152 (CC).

<table>
<thead>
<tr>
<th>Activity 5</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Explain how section 6 changed the traditional position in customary law.</td>
</tr>
<tr>
<td>2. Briefly explain the importance of <em>Gumede v President of the Republic of South Africa and Others</em> 2009 (3) SA 152 (CC) for the customary law.</td>
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</tbody>
</table>

6. **PROPRIETARY CONSEQUENCES OF A CUSTOMARY MARRIAGE**

6.1 **CUSTOMARY MARRIAGES ENTERED INTO BEFORE 15 NOVEMBER 2000**

Section 7(1) stipulates that the proprietary consequences of a customary marriage entered into before the commencement of the act continue to be governed by customary law. Note: This marriage is neither in, nor out of community of property; it is governed by customary law (the marital power was not abolished retrospectively).

**Study** paragraph 3.3.6.1 of the textbook. *Gumede v President of the Republic of South Africa and Others* 2009 (3) SA 152 (CC).


<table>
<thead>
<tr>
<th>Activity 6</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Discuss the proprietary consequences of a customary marriage entered into before 15 November 2000. Distinguish between monogamous and polygamous marriages.</td>
</tr>
<tr>
<td>2. Can parties who married prior to 15 November 2000 change their matrimonial property system? Explain briefly.</td>
</tr>
</tbody>
</table>

6.2 **Customary Marriages since 15 November 2000**

Section 7 of the act is extremely important in legal practice and this section as well as par 3.3.6.2 should be studied very well.

<table>
<thead>
<tr>
<th>Activity 7</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Explain the proprietary consequences of a customary marriage (section 7(1)-(3)). Distinguish between monogamous and polygamous marriages.</td>
</tr>
<tr>
<td>2. Briefly explain how parties in a customary marriage who married after 15 November 2000 can change their matrimonial property system (section 7(4)-(5)).</td>
</tr>
</tbody>
</table>
3. Thandi and Vuyo entered into a customary marriage in 1998. Vuyo wants to enter into a further customary marriage with Puleng. Explain the present position in law and the required procedure (section 7(6)-(9)).

4. Briefly explain the importance of Gumede v President of the Republic of South Africa and Others 2009 (3) SA 152 (CC) for the customary law.

7. **DISSOLUION OF A CUSTOMARY MARRIAGE**

**Study:**

1. Sec 8 of the Act and Chapter 3, par 3.3.7 (3.3.7.1 – 3.3.7.5) and 3.3.8 of the textbook.
3. Thembisile and Another v. Thembisile and Another 2002 2 SA 209 (TPD).
6. Fosi v Road Accident Fund and Another 2008 3 SA 560 CPD.
7. Gumede v President of the Republic of South Africa and Others 2009 (3) SA 152 (CC).

The act provides for the dissolution of a customary marriage by a court of law on the grounds of irretrievable marriage breakdown.

The procedure used in obtaining the dissolution of a customary marriage is the same as in the case of civil marriages.

In traditional customary law, some circumstances were regarded as good (justified) grounds for the dissolution of the marriage and should still play a role in determining whether an irretrievable marriage breakdown has taken place. Remember presently the only ground for dissolution is an irretrievable marriage breakdown. Some factors can be taken into account to decide whether an irretrievable breakdown of the marriage has taken place.

Traditional customary law has always been very committed to reconciliation. In regard to family law, the phuthuma-custom is still of importance.

**Activity 8**

1. How and on which ground(s) can a customary marriage be dissolved in terms of the Act?
2. Which courts have jurisdiction to dissolve a customary marriage. Explain it differs from the traditional position.
3. Which circumstances can the court take into account to determine whether there is an irretrievable breakdown of the marriage?
4. Discuss the aspect of maintenance and custody/guardianship (of minor children) as stipulated in the Act in view of traditional customary practices and the present legal position.
5. Discuss Hlope v. Mahlalela and Another 1998 1 SA 449 (T).
6. Briefly discuss the court’s powers regarding patrimonial consequences when
granting a decree for the dissolution of a customary marriage.

7. What effect did the dissolution of the customary marriage have on the *lobolo* traditionally? Is this still the position?

8. Briefly distinguish between the traditional and the present position regarding the payment of maintenance by one spouse to another at the dissolution of a customary marriage.

9. Briefly explain the importance of *Fosi v Road Accident Fund and Another* 2008 3 SA 560 CPD.

10. Is a customary marriage dissolved by the death of one of the spouses? Briefly explain.

---

8. WOMAN-TO-WOMAN MARRIAGES

Study
Paragraph 3.3.9 in the textbook.

Activity 9

1. Write short explanatory notes on the so-called woman-to-woman marriages in customary law.

9. EVALUATION

Study paragraph 3.3.10 in the textbook.

Optional reading


Activity 10

1. Certain marriage practices may be perceived to undermine the equal status of women. Briefly discuss these practices.

---

UNIT 3.3: CIVIL MARRIAGES

Generally the black people in South Africa have a *choice* with regard to marriage. They can marry by civil rites (in terms of the general law of the land) or in terms of African customary law. According to the Civil Union Act (effective date 30 November 2006) everybody also has a choice to enter into a civil union.

Before 2 December 1988, a distinction was made between civil marriages of black people and the rest of the people in South Africa. A peculiar marriage regime applied to blacks before **2 December 1988**. From that date, in terms of the *Marriage and Matrimonial Property Amendment* Act 3, 1988, all marriages have been on an equal footing and governed by common law, but this act was not retrospective.

As a result, the former provisions (**Black Administration Act** 38, 1927, s 22(6)) still apply to marriages of blacks contracted **before 2 December 1988**.
This date is, therefore, very important when determining the proprietary consequences of a marriage.

1. LEARNING OUTCOMES

After completion of Unit 3.3, you should be able to do the following:

- Describe the formalities and proprietary consequences of civil marriages entered into:
  i. before 2 December 1988, and
  ii. after 2 December 1988.
- Explain the effect of the Recognition of Customary Marriages Act on the contracting of a civil marriage and the consequences of a contravention of the prohibitions.
- Write short notes on the payment of lobolo in regard to a civil marriage.

2. THE EFFECT OF THE RECOGNITION OF CUSTOMARY MARRIAGES ACT ON CIVIL MARRIAGES

1) Study paragraph 3.4 in the textbook.

   Activity 1

   1. Can a spouse in a civil marriage enter into a customary marriage with another person? Explain.
   2. Can a spouse in a customary marriage enter into a civil marriage with another person? Explain.
   3. Explain:
      3.1 The circumstances under which spouses in a customary marriage can convert their marriage into a civil marriage.
      3.2 The consequences of such a conversion.

3. CIVIL MARRIAGES ENTERED INTO BEFORE 2 DECEMBER 1988

3.1 Formalities

Study par 3.4.

3.2 Proprietary consequences

3.2.1 Section 22(6) was applicable.

- The marriage was automatically OUT of community of property.
- If the husband did not have a customary marriage with any “other” woman, the parties could jointly make a declaration one month prior to the marriage before a magistrate/marriage officer that they desired to be married in community of property.
3.2.2 Section 22(7)

Provided that where a marriage was contracted during the subsistence of a customary marriage between the husband and any woman other than his wife, such a marriage should in no way affect the material rights of any partner to the customary marriage or any issue thereof, and the widow of any such a marriage and any issue thereof should have no greater rights to the estate of the deceased spouse than she or they would have had if the marriage had been a customary marriage.

3.2.3 Case law

*Exparte Minister of Native Affairs: Re Molefe v. Molefe* 1946 AD 315 ruled that the proprietary rights of the spouses were governed by common law except where a specific statute altered the common law.

According to *section 7(3)-(6)* the Divorce Act, the court may order an equitable redistribution of assets in marriages OUT of community of property. In *Mathabathe v. Mathabathe* 1987 3 SA 45 (W), the court said that in marriages where the repealed section 22(6) applied, which made these marriages automatically OUT of community of property, the court can also make an equitable redistribution.


*Mathabathe* was confirmed in legislation (Act 3, 1988). Therefore, *section 7(3)* is applicable in section 22(6) marriages (automatically out of community of property).

<table>
<thead>
<tr>
<th>Activity 2</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Describe the formalities for a civil marriage between two black people entered into before 2 December 1988.</td>
</tr>
<tr>
<td>2. Puleng, a black woman, approaches you for legal advice. She wants to divorce her husband Vuyo to whom she was married by civil rites on the 10th of September 1988. She is unaware of the proprietary consequences of her marriage and needs your advice. Explain the possibilities to her.</td>
</tr>
</tbody>
</table>

4. CIVIL MARRIAGES ENTERED INTO AFTER 2 DECEMBER 1988 AND BEFORE 15 NOVEMBER 2000

Study

*Thembisile and Another v. Thembisile and Another* 2002 2 SA 209 (T).


4.1 Formalities

Section 22(1)-(5) was amended by Act 3, 1988.
1) A man and a woman, between whom a customary union subsists, are competent to contract a marriage with each other if the man is not also a partner in a subsisting customary union with another woman.

2) Subject to section 22(1), no person who is a partner in a customary union shall be competent to contract a marriage during the subsistence of that union.

3) No marriage officer shall solemnise the marriage of a black man unless he has first taken from him a declaration to the effect that he is not a partner in a customary union with any woman other than the one he intends marrying.

4) Any person contravening section 22(3) shall be guilty of an offence and shall, upon conviction, be liable to a fine not exceeding twenty-five pounds or in default of payment, to imprisonment for a period not exceeding three months.

5) A black man who wilfully makes a false declaration to a marriage officer with regard to the existence of a customary union between him and any woman shall be guilty of an offence and liable, on conviction, to the penalties which may, by law, be imposed for perjury.

- A man or woman could not enter into civil marriage with “other” person during the subsistence of a customary marriage.
- Olivier (1994) submits that a contravention of the rules will make the marriage voidable, not void. (This is contrary to what was decided in Thembisile and Another v. Thembisile and Another 2002 2 SA 209 (T).)
- The Recognition of Customary Marriage Act 120/98 repeals section 22(1)-(5), but section 22(1) and (2) is replaced by similar provisions in section 3 and section 10.

4.2 Proprietary consequences

Section 22(6) was repealed, therefore:

1) marriages were IN community of property; and
2) parties needed an antenuptial contract to be married OUT of community of property.

Activity 3

1. Describe the formalities for and the proprietary consequences of a civil marriage between two black people entered into after 2 December 1988 but before 15 November 2000.
2. Discuss Thembisile & Another v Thembisile & Another 2002 2 SA 209 TPD briefly.
3. Briefly discuss the options available to the court in case of multiple marriages where a civil marriage is also involved.

5. LOBOLO AND CIVIL MARRIAGE

Lobolo negotiations are obviously not an essential requirement in the case of a civil marriage, but most people are unaware of this. Lobolo is given in more or less 95% of civil marriages.

- The husband and the father/guardian of the bride may enter into a lobolo contract.
According to Olivier (1994), the payment of *lobolo* does not also create a customary marriage – only the civil marriage exists.

Only a competent court may divorce the parties. Any action for the return of the *lobolo* cannot be combined with the divorce action because the parties are not the same.

A claim for the return of the *lobolo* must be instituted after the divorce action has been concluded. Customary principles should then be applied.

### Activity 4

1. Write short notes on the payment of *lobolo* with regard to a civil marriage.
This Unit covers Chapter 4 of the prescribed textbook.

INTRODUCTION

Common law is generally applicable to the law relating to property. Certain circumstances, such as the nature of and the place where the property is situated, may, however, dictate the application of customary law. If property is situated in a tribal area, then generally customary law will be used to determine disputes relating to such property. Customary law may, however, also find application in urban areas, for example in succession disputes like 

LEARNING OUTCOMES

After completing Unit 4, you should be able to do the following:

- Describe the characteristics of customary law property rights.
- Describe the position of the traditional leader over land.
- Explain the effect of legislation governing customary law land rights.
- Briefly describe “allotment” as a way of acquiring property in customary law.
- Describe certain limited rights over the property of another.
- Explain how property rights are protected in customary law.
- Discuss the influence of the Constitution on customary rights to property.

READINGS


1. CHARACTERISTICS OF CUSTOMARY LAW PROPERTY RIGHTS

Study Chapter 4, paragraph 4.1 and 4.2 (including 4.2.1, 4.2.2 and 4.2.3).

Activity 1

1. Describe the characteristics of customary law property rights.
2. Distinguish between family property, house property, and personal property.

2. THE POSITION OF LAND

Read par 4.3.5 and 4.3.6.

Study paragraph 4.3.7.
Activity 2

1. Define communal land.
2. Name the different categories (portions) of communal property.
3. Describe the traditional position rights and duties of the traditional leader over communal land.

3. THE COMMUNAL LAND RIGHTS ACT, 11 OF 2004

Study paragraph 4.3.8 (4.3.8.1 – 4.3.8.8) and the following note:

The Communal Land Rights Act (CLRA), 11 of 2004, was promulgated on 20 July 2004 and will come into operation on a date to be determined by the President by proclamation in the Gazette. This Act attempts to provide millions of rural dwellers, whose tenure rights are insecure as a result of previous discriminatory laws or practices, with secure title or comparable redress. It is estimated that approximately 13 million people or 2.4 million households still reside in the former homelands to which the CLRA applies. Initiated in 1996, the Act has gone through an incubation period of almost eight years, and despite major criticism (inter alia, regarding its constitutionality) and possible lawsuits, it has been signed.

In Tongoane and Others v National Minister for Agriculture and Land Affairs Case no 11678/2006 the North Gauteng High Court declared 14 sections of this Act unconstitutional on 30 October 2009. This must still be confirmed by the Constitutional Court.

Some of the points of criticism that have been levelled against the constitutionality of the CLRA are:

(a) The Act fails to give effect to the underlying constitutional right entrenched in section 25(6) and (9) of the Constitution. This section obliges parliament to adopt legislation to determine the extent to which a person or community will be entitled to legally secure tenure or to comparable redress. However section 18(3) of the CLRA places this task entirely within the Minister’s discretion. In effect the CLRA reduces a constitutionally entrenched right to something dependant on the goodwill and/or convictions of the Minister.

(b) The Act fails to provide guidance in meeting the constitutional objectives of the CLRA. The Act makes the realization of constitutional rights subject to the exercise of official discretion. The law is supposed to instruct officials to exercise their administrative discretion, which may affect the constitutional rights of individuals, in a manner that achieves the realization of the rights concerned. For example: The provisions dealing with comparable redress in the Act give no indication of the factors or criteria to be considered in determining who will be entitled to comparable redress and to what extent. This might lead to inconsistencies in decision-making. (Johnson, Mostert and Pienaar Property Law Conference 2004 Bloemfontein).
### Activity 3

2. How does the Communal Land Rights Act enhance security of tenure?
3. Explain how the **registration of new order rights** in terms of the Communal Land Rights Act will take place.
4. Explain how conflict about land and land tenure rights will be resolved in terms of the Act.
5. Who will manage and administer communal land in terms of the Act?
6. Briefly explain some points of criticism that can be levelled against the Communal Land Rights Act, 11 of 2004.
UNIT 5:
LAW OF CONTRACT

This Unit covers Chapter 5 of the prescribed textbook.

INTRODUCTION

The most important contract in customary law is the lobolo agreement and other contracts associated with it. In unit 3, you have already dealt with the lobolo agreement. In this unit, we will only deal with some general information, the sisa-contract and some quasi-contracts.

LEARNING OUTCOMES

After completing Unit 5, you should be able to do the following:

- Explain how a contract is concluded in customary law.
- Explain when a contractual liability arises in customary law.
- Describe the sisa-contract.
- Briefly describe the quasi-contracts ukwethula, isondlo and ukufakwa.

READINGS


1. THE CONCLUSION OF A CONTRACT AND CONTRACTUAL LIABILITY

Study paragraphs 5.1, 5.2.1 of the textbook (Bekker 2006) and par 5.2.1 and 5.2.2 of Bekker (2002) (in the reading list).

Activity 1

1. Explain the way in which a contract is concluded in customary law.
2. Explain when a contractual liability arises in customary law.
3. Explain the legal position with regard to the family as party to a contract.

2. SPECIFIC CONTRACTS AND QUASI-CONTRACTS

Study paragraphs 5.3.4 and 5.4 (5.4.1, 5.4.2 and 5.4.3).
<table>
<thead>
<tr>
<th>Activity 2</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Define the <em>sisa</em>-contract.</td>
</tr>
<tr>
<td>2. What are the objectives of the <em>sisa</em>-contract?</td>
</tr>
<tr>
<td>3. Describe the rights and duties of the:</td>
</tr>
<tr>
<td>3.1 owner, and</td>
</tr>
<tr>
<td>3.2 keeper;</td>
</tr>
<tr>
<td>in a <em>sisa</em>-contract.</td>
</tr>
<tr>
<td>4. Write short notes on the:</td>
</tr>
<tr>
<td>4.1 <em>ethula</em> custom,</td>
</tr>
<tr>
<td>4.2 <em>isondlo</em>, and</td>
</tr>
<tr>
<td>4.3 <em>ukufakwa</em>.</td>
</tr>
</tbody>
</table>

The *lobolo* contract and the contracts discussed above are known only in customary law. In any dispute arising from these contracts, customary law will be applied.
UNIT 6:
LAW OF DELICT

This Unit covers Chapter 6 of the prescribed textbook.

INTRODUCTION

It is important to keep in mind that where a delict is alleged to have been committed, both customary law and common law may be applied. However, it is necessary first to determine which legal system will probably be applicable in order to determine:

- the parties to the dispute;
- the forum; and
- whether an alternative dispute resolution may best serve the purpose.

The Bill of Rights is, in several respects, incompatible with the customary law of delict (see paragraphs 6.1 and 6.3 in Bekker et al. 2006). We will deal only with some of the most important delicts in customary law.

LEARNING OUTCOMES

After completing Unit 6, you should be able to do the following:

- Explain why it is necessary to determine which legal system will probably be applicable - common or customary law.
- Discuss the defloration of an unmarried girl as a delict in customary law.
- Distinguish between the action for defloration and the common law action for seduction.
- Discuss adultery as a delict in customary law.
- Explain when ukuthwala will be a delict in customary law.
- Explain the relevance of section 31 of the Black Laws Amendment Act 76, 1963.
- Describe the requirements of the certificate mentioned in section 31.
- Explain when the certificate mentioned in section 31 should be “produced”.
- Indicate whether the section 31 certificate is still necessary in the widow’s action for loss of maintenance.
- Explain in which aspects the customary law of delict is probably in conflict with the Constitution.
- Write brief notes on the accessory liability of the family head.
- Discuss prescription in customary law.

READINGS

1. **ACCESSORY LIABILITY OF THE FAMILY HEAD**

**Study** paragraph 6.7 (including 6.7.1 to 6.7.7) and paragraph 6.8 in the textbook.

**Activity 1**

1. Discuss the following aspects of the accessory liability of the family head:
   1.1 Historical background and whether it should still find application.
   1.2 Customary law principles which determine liability.

2. **SEXUAL DELICTS**

**Study** paragraphs 6.3, 6.3.1 – 6.3.6.

Note that the plaintiff in these delicts is always a male person. Why? (See paragraph 6.3.)

**Activity 2**

1. Why is the plaintiff in an alleged sexual delict in customary law always a male?
2. Discuss the defloration of an unmarried girl as a delict in customary law.
3. Distinguish between the action for defloration and the common law action for seduction and indicate whether both can be instituted.
4. Discuss impregnation of an unmarried girl in customary law.
5. Discuss adultery as a delict in customary law.

3. **UKUTHWALA AND DEFAMATION AS A DELICTS**

**Study** paragraph 6.4 and 6.5.

**Activity 3**

1. Is *ukuthwala* a delict in customary law? Explain briefly.
2. Is defamation a delict in customary law?

4. **ASSAULT AND CAUSATION OF DEATH**

*Gasa v Road Accident Fund* Case no. 579/06 (SCA) court order 19 November 2007. Note par. 2 and 4.

**Study** paragraphs 6.7(6.7.1 and 6.7.2).

Due to the unfair situation, **section 31** of the Black Laws Amendment Act 76, 1963 was promulgated.

Section 31 provides as follows:

1. A partner to a customary union as defined in section *thirty-five* of the Black Administration Act, 1927 (Act 38 of 1927), shall, subject to the provisions of this section, be entitled to claim damages for loss of support from any person who
unlawfully causes the death of the other partner to such union or is legally liable in respect thereof, provided such partner or such other partner is not at the time of such death a party to a subsisting marriage.

(2) No such claim for damages shall be enforceable by any person who claims to be a partner to a customary union with such deceased partner unless –
(a) such person produces a certificate issued by a Commissioner (now magistrate) stating the name of the partner, or in the case of a union with more than one woman, the names of the partners, with whom the deceased partner had entered into a customary union which was still in existence at the time of death of the deceased partner; and
(b) such person’s name appears on such certificate.

(3) A certificate referred to in subsection (2) shall be accepted as conclusive proof of the existence of a customary union of the deceased partner and the partner or, in the case of a union with more than one woman, the partners whose name or names appear on such certificate.

(4) Where it appears from the certificate referred to in subsection (2) that the deceased partner was survived by more than one partner to a customary union, all such surviving partners who desire to claim damages for loss of support shall be joined as plaintiffs in one action.

(5) (a) Where any action is instituted under this section against any person by a partner to a customary union and it appears from the certificate referred to in subsection (2) that the deceased partner was survived by a partner to a customary union who has not been joined as a plaintiff, such person may serve a notice on such partner who has not been joined as a plaintiff to intervene in the action as a co-plaintiff within a period of not less than fourteen days nor more than one month specified in such notice, and thereupon the action shall be stayed for the period so specified.
(b) If any partner to a customary union upon whom a notice has been served in terms of paragraph (a) fails to intervene in the action within the period specified in such notice or within such extended period as the court on good cause shown may allow, such partner shall be deemed to have abandoned her claim.

(6) If a deceased partner to a customary union is survived by more than one partner to such a union, the aggregate of the amounts of damages to be awarded to such partners in terms of this section shall under no circumstances exceed the amount which would have been awarded had the deceased partner been survived by only one partner to a customary union.

(7) A partner to a customary union whose name has been omitted from a certificate issued by a Commissioner in terms of subsection (2) shall not by reason of such omission have any claim against the Government of the Republic or the Commissioner (magistrate) if such omission was made *bona fide*. 

---

Legal Pluralism: RPL 224  41
(8) Nothing in this section contained shall be construed as affecting in any manner the procedure prescribed in any other law to be followed in the institution of a claim for damages for loss of support.

Since 15 November 2000, customary marriages have been recognised as valid marriages. The widow or widower of a customary marriage, therefore, has the same rights as a widow or widower of a civil marriage – he or she is a legal dependant of his or her spouse and the right to maintenance can be enforced against third parties.

Section 31 has, however, not been repealed and still applies in so far as it is not inconsistent with the Recognition of Customary Marriages Act 120, 1998. Therefore, it can still be used to prove the existence of a customary marriage should a dispute arise. In a polygamous marriage, section 31 can still be used to avoid payment of more compensation than would be payable if the deceased had only one wife, and to limit time and costs (see paragraph 6.6.2.1 (c) in the textbook). It is however not a prerequisite for the widow’s claim anymore. The registration certificate issued in terms of section 4 of the Recognition of Customary Marriages Act, is prima facie evidence of the existence of a customary marriage. Registration is not a prerequisite for the validity of the marriage and therefore other evidence can also be accepted to prove the existence of the customary marriage.

Section 31(2) mentions that the spouse must “produce” a certificate. There is conflicting case law on when this certificate must be “produced”.

Finlay and Another v Kutoane 1993 4 SA 675 (W), gives (in my opinion) the best account of what the legal position should be:

(a) “Produce” must be understood in its ordinary meaning, that is, to show to the other party (Afrikaans: toon).
(b) There is flexibility with regard to the time when the certificate must be produced, either:
   (i) directly to the defendant prior to the issuing of summons; or
   (ii) attached to the summons; or
   (iii) on application; or
   (iv) at the final stage during the trial, but then it must be covered by an allegation in the summons that he/she could produce the certificate.
(c) The defendant need not wait until the trial before he/she demands the production of the certificate.

Gasa v Road Accident Fund, Case no 579/06 (SCA) court order 19 November 2007 (par 2 and 4). The Supreme Court of Appeal ordered the Minister of Justice and Constitutional Development to review the continued existence of section 31 within a specific time. The section has not been repealed yet. See par 3.3.2.7 in the chapter on Family Law for a short discussion of this case.

Activity 4

1. For which purposes is section 31 of the Black Laws Amendment Act 76, 1963 still relevant?
2. Indicate whether the section 31 certificate is still necessary in the widow’s...
action for loss of maintenance and what your advice to your client in this regard will be.
3. Describe the requirements of the certificate mentioned in section 31 (see sectopm 31 (2)).
4. Explain when the certificate mentioned in section 31 should be “produced”.

5. PRESCRIPTION OF DELICTUAL CLAIMS

Study par 6.8.

Activity 5

1. Briefly discuss prescription in customary law.
2. Which aspects of the customary law of delict are probably in conflict with the Constitution?
UNIT 7:
LAW OF SUCCESSION AND INHERITANCE

This Unit covers Chapter 7 of the prescribed textbook.

INTRODUCTION

This is a very important part of customary law, which is often encountered in legal practice.

The customary law of succession and inheritance has long been a contentious issue in South Africa. In Unit 1, you have already come across the case of Bhe v Magistrate, Khayelitsha in which the Constitutional Court declared the customary law of succession and the relevant legislation unconstitutional. The court provided an interim solution. This aspect is therefore subject to statutory reform. The Reform of Customary Law of Succession and Regulation of Related Matters Act, 11 of 2009 was assented to and published in the Gazette on 21 April 2009, but will come into operation on a future date proclaimed in the Gazette. This Act provides for the application of the Intestate Succession Act as stipulated in Bhe, but also regulates further aspects. Provision is made for the seantlo and seedraiser, as well as for woman-towoman marriages. The concept “descendant” is also extended accordingly.

LEARNING OUTCOMES

After completing Unit 7, you should be able to do the following:

- Distinguish briefly between inheritance and succession.
- Give a detailed account of the general principles of the customary law of succession.
- Explain the general order of succession in a monogamous and a polygamous household.
- Explain the impact of Bhe v Magistrate, Khayelitsha etc 2005 1 SA 580 CC.
- Explain the current legal position regarding customary succession.

READINGS

- Bhe v Magistrate, Khayelitsha.
1. **THE LAW OF SUCCESSION**

Study paragraphs 7.1 and 7.2 (including paragraphs 7.2.1, 7.2.2, 7.2.2.1, and 7.2.2.2). Read paragraphs 7.2.2.3, 7.2.3, and 7.2.4 of the textbook.

*Bhe v Magistrate, Khayelitsha*: read paragraphs 74-79, and study paragraphs 80-97.

1.1 **Monogamous household**

The order of succession (paragraphs 7.2.2 and 7.2.2.1) can be illustrated by way of a diagram:

```
<table>
<thead>
<tr>
<th>5</th>
<th>paramount chief (Or premier of province)</th>
</tr>
</thead>
<tbody>
<tr>
<td>4</td>
<td>Great grandfather a</td>
</tr>
<tr>
<td>3</td>
<td>Great father a</td>
</tr>
<tr>
<td></td>
<td>Eldest brother b</td>
</tr>
<tr>
<td></td>
<td>2nd brother c</td>
</tr>
<tr>
<td></td>
<td>2nd brother etc.</td>
</tr>
<tr>
<td>2</td>
<td>Father a</td>
</tr>
<tr>
<td></td>
<td>2nd brother d</td>
</tr>
<tr>
<td></td>
<td>Half brother d</td>
</tr>
<tr>
<td>1</td>
<td>Eldest son a</td>
</tr>
<tr>
<td></td>
<td>2nd son a</td>
</tr>
<tr>
<td></td>
<td>3rd son a</td>
</tr>
<tr>
<td></td>
<td>Etc.</td>
</tr>
</tbody>
</table>
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1.2 **Polygamous household**

To understand the order of succession in a polygamous household, paragraph 7.2.2.2 and paragraph 7.2.3 should be studied together.

The difference between general succession and special succession (see paragraph 7.2.3) should be kept in mind.
According to the KwaZulu-Natal codes, the order of succession will be as follows:

- **General succession**
  
  `⇒` Status (position of family head).
  `⇒` General/family property (that does not belong to a specific house).

1) **Indlunkulu**
   
   a) ELDEST SON, or if deceased, his senior male descendant;
   b) Failing such son, the SECOND SON, or if deceased, his senior male descendant and so on through sons and senior male descendents.

2) If there is no son or male descendant of any son of *indlunkulu*, the ELDEST SON of the HOUSE FIRST AFFILIATED to the *indlunkulu* or his senior male descendant and so on through the sons of the first affiliated house.

3) If there is no son or male descendant of the house first affiliated, the ELDEST SON of the HOUSE SECOND AFFILIATED to the *indlunkulu* or his senior male descendant and so on through the sons of the second house.

4) If there is no heir in the *indlunkulu* or any house affiliated thereto, there is recourse to the *Iqadi* (right-hand house) for a general heir and thereafter to the affiliated *iqadi* houses in order of their affiliation to the *iqadi*.

5) If there is no heir, there is recourse to the *ikhohlo* and thereafter to the affiliated *ikhohlo* houses in order of their affiliation.

6) If there is no heir in the *iqadi* or *ikhohlo*, the FATHER of the deceased, or if he is already deceased, the family head's eldest brother of the same house or his senior male descendant and so on through the brothers of the house and their male descendants in order of seniority (as in SINGLE SUCCESSION).

- **Special succession**
  
  `⇒` House property.

  a) The ELDEST SON of the house, or senior male descendants.
  b) The SECOND SON, or senior male descendants, etc.
  c) The property, rights, and claims of the various houses remain with the heirs thereto.

### Activity 1

1. Distinguish briefly between inheritance and succession.
2. Give a detailed account of the general principles of the customary law of succession.
3. **3.1** Name the principles that influence the order of succession.
   
   **3.2** Discuss the general order of succession in:
   
   - a monogamous household, and
   - a polygamous household.

3. **3.3** Place the following survivors of a deceased Zulu family head in the correct order of succession according to traditional customary law:
   
   - Eldest son of the house first affiliated to the *indlunkulu*.
   - Second son of the *indlunkulu*.
   - Deceased's brother.
   - Eldest son of the *indlunkulu*.
   - Father of the deceased.
   - Paternal grandfather.
   - Eldest son of the house affiliated to the *iqadi*. 
2. INHERITANCE OF PROPERTY

Study paragraph 7.3 (paragraphs 7.3.1 and 7.3.2).

Read paragraphs 7.3.3 and 7.3.4.

In paragraph 7.3.2, the various methods of disposition of property, namely,

- allotment of property,
- the customary will, and
- the deathbed wish are discussed and must be studied.

Activity 2

1. Explain the various methods of disposition in customary law.

3. STATUTORY AMENDMENTS TO CUSTOMARY LAW OF INHERITANCE

Read paragraphs 7.4.1 and 7.4.2.

Read Bhe v Magistrate, Khayelitsha, paragraphs 35-39 and paragraphs 60-73; study paragraphs 68 and 73.

The Reform of Customary Law of Succession and Regulation of Related Matters Act, 11 of 2009 was assented to and published in the Gazette on 21 April 2009, but will come into operation on a future date proclaimed in the Gazette. This Act provides for the application of the Intestate Succession Act as stipulated in Bhe, but also regulates further aspects. Provision is made for the seantlo and seedraiser, as well as for woman-towoman marriages. The concept “descendant” is also extended accordingly.

Take note of the following only:

The following diagram contains a summary of the different possibilities according to section 23 of the Black Administration Act 38 of 1927:
Until recently (15 October 2004), the position was governed by section 23 of the Black Administration Act and Regulations contained in Government Notice R200, 1987:

- **Any Black person CAN dispose of his property by means of a WILL.**
  - Property that CANNOT be disposed of by a will (section 23(1)(2) and (3) applies).
    - House property or property belonging to a wife in a customary marriage (devolves according to customary law, section 23(1)).
    - Quitrent land (devolves according to Tables of Succession, section 23(2)).
    - The Master has NO powers over these assets (section 23(3)).
  - Property that MAY be disposed of by a will:
    - All other property not falling under (a) above.

- **If deceased left a VALID will**
  - property devolves according to the will.
  - property not disposed of in the will (NOT including property under (a) above) devolves according to COMMON LAW intestate succession laws. Section 23(9) stipulates that an estate that has been partially or totally bequeathed by will, must be administered in terms of the Administration of Estates Act.

- **If deceased died WITHOUT a VALID will**
  - regulation 2 of Government Notice R200, 1987 is applicable. Remember, property referred to in section 23(1) and (2), as in (a) above, is excluded. (See p. 118, last paragraph, and p. 119 of the textbook.)
- **Common law rules of intestate succession apply if the deceased was**
  - EXEMPTED from customary law;
  - a party of a CIVIL marriage IN community of property, or under an antenuptial contract;
  - a widower, widow, or divorcee of a CIVIL marriage in community of property or under an antenuptial contract, and NOT survived by partner of a customary marriage entered into AFTER dissolution of a civil marriage.

- **Customary law rules apply if the deceased**
  - is survived by partner of customary marriage; or
  - a descendent of such a customary marriage; or
  - survived by a wife (or child) in a civil marriage automatically out of community of property (due to section 22(6) of Act 38, 1929 – section 22(6) was repealed on 2 December 1988 without retrospective effect); or
  - survived by a PUTATIVE spouse or a descendent of such a relationship.
  - All other instances not falling under (a) or (b).

According to regulation 2(d) of Government Notice R200, 1987, the Minister may, if he is of the opinion that the Black law and custom to the devolution of the property as a whole or in part is INEQUITABLE or INAPPROPRIATE, direct that the property/part thereof devolve as if the deceased was a EUROPEAN married out of community of property.

**NB.** Section 23 and the regulations were declared unconstitutional by the Constitutional Court in *Bhe v Magistrate Khayelitsha* on 15 October 2004.

### 3.1 Present position (Very important)

**Study:**
Paragraph 7.4.5 in the textbook and the following notes and the references to the *Bhe*-case.

In *Bhe v Magistrate Khayelitsha*, the Intestate Succession Act, 81 of 1987, was amended and made applicable also to estates that previously fell under section 23 of the Black Administration Act, 38 of 1927.

**Read:** paragraphs 117-124.

**Study:** paragraph 125.

**RETROSPECTIVITY**

**Study:** paragraph 129 of the *Bhe* case.

**FACILITATION OF AGREEMENTS**

**Study:** paragraph 130 of the *Bhe* case.
THE EFFECT OF THE *BHE* CASE:

(a) on the administration of estates

Read paragraphs 131-134. **NB! Study the following note:** All estates that fall to be wound up after the date of the judgement (15 October 2004) shall fall under the Master and shall be wound up in terms of the Administration of Estates Act. (Previously, estates in which customary law were applied were wound up under supervision of the magistrate in terms of section 23 of the Black Administration Act.)

(b) on succession

**NB Study:** paragraph 136 in coherence with paragraph 125.

### Activity 3

1. Discuss why section 23 of the Black Administration Act and the relevant regulations were declared unconstitutional by the court in *Bhe v Magistrate, Khayelitsha* (see paragraphs 68 and 73).
2. A black family head died intestate in July 2005 and is survived by his wife, whom he had married according to customary law principles, one son, and three daughters.
   (a) Explain how his estate will devolve, and
   (b) will be administered.
3. Briefly explain the position where a man died intestate in July 2005 and is survived by two wives, whom he had married according to customary law.
4. Does *Bhe v Magistrate, Khayelitsha* have retrospective effect? (See paragraph 129.)
5. The *Bhe* case provides for the “facilitation of agreements”. Briefly explain. (See paragraph 130.)

4. LEGAL REFORM

**Study** paragraph 7.5 in the textbook and the Act:

The *Reform of Customary Law of Succession and Regulation of Related Matters Act, 11 of 2009* was assented to and published in the *Gazette* on 21 April 2009, but will come into operation on a future date proclaimed in the *Gazette*. This Act provides for the application of the Intestate Succession Act as stipulated in *Bhe*, but also regulates further aspects. Provision is made for the *seantlo* and *seedraiser*, as well as for woman-to-woman marriages. The concept “descendant” is also extended accordingly.

Additional sources for the diligent student who wants to know more about this topic:

Activity 4

1. Is the division of an estate into equal shares between the beneficiaries subject to criticism?

5. BURIAL RIGHTS

Study:

- Paragraph 7.6 (7.6.1 – 7.6.4) in the textbook.
- *Mahala v Nkombombini & Another* 2006 (3AllSA) 366 SE.

Activity 5

1. Briefly discuss the right to visit the grave of a deceased. (± 6 marks)
2. Briefly state the legal position regarding the burial of a deceased on the land of somebody else. (± 5 marks)
3. In a set of facts: you must be able to reason who should have the burial rights (with reference to case law). (± 10 marks)

In the Constitutional Court Judgement *Bhe v Magistrate, Khayelitsha* referred to above, there were three cases before the court, but they were heard together, since they were all concerned with the constitutionality of the customary law of succession.

**For customary law, this case is extremely important! The different aspects (according to the relevant activity questions) must be studied very well.**

Outline of *Bhe v Magistrate Khayelitsha*:

1. **Introduction and issues: paragraphs 1-8**

South Africa has a dual legal system of succession in so far as it recognises and enforces at least two systems of law. The one is based on the Roman-Dutch law (amended by statute), the so-called common law. The other system comprises a number of closely related customary laws. There are substantial differences between these two systems.

Intestate succession is governed by two statutes: common law: The Intestate Succession Act 81 of 1987; and customary law: The Black Administration Act 38 of 1927, especially section 23 read with the regulations framed in terms of section 23(10). See paragraph 1.

Historically, the application of common or customary law depended on a person’s race and, more specifically, the form of marriage and the patrimonial consequences of the marriage.

**There were two main issues (see paragraph 3):**
- The constitutional validity of section 23.
- The constitutional validity of the principle of primogeniture. According to this principle, the estate seeks a male heir, normally the oldest son of the family head, to the exclusion of women and younger children (see paragraph 77 for a short description of this principle).
2. **Facts**

You must be able to state very briefly in two or three sentences the most essential facts of each case.

- *Bhe* case, paragraphs 9-20.
- *SA Human Rights Commission* case, paragraphs 29-34.

3. **Legislative framework**

- Paragraph 35: section 23 (1), (2), (3), and (10)a.
- Paragraphs 36-38: regulations (just read).

A summary of the relevant parts of section 23 and the regulations appears in your study guide (Unit 7, under heading 4).

- Paragraph 39: the Intestate Succession Act, section 1(4)(b) excludes the estates of black people in respect of which section 23 applies. You are already familiar with the rest of this Act.

4. **The approach to customary law**

- Paragraphs 40-46 outline the status and place of customary law in our legal system. **These paragraphs are extremely important and must be studied very well!!!**

5. **The constitutional rights implicated**

- Paragraphs 48-59: you must just be able to name the constitutional rights that were implicated (a detailed study of these rights falls outside the scope of this course).

6. **Does section 23 violate the rights contended for?**

- Paragraphs 60-73 (read only). The court answered in the affirmative. Paragraphs 68 and 73 provide a sufficient summary and should be studied.

7. **The customary law of succession**

- Paragraphs 74-79: basic principles and primogeniture rule. Know the basics (see the activity questions).
- Paragraphs 80-87: changing circumstances. Know the basics (see the activity questions).
- Paragraphs 88-97: the problem of primogeniture. Know the basics (see the activity questions). The court also declared the primogeniture rule unconstitutional. See paragraph 97.
8. *Mthembu v Letsela*

- Paragraphs 98-100: the court rejected the finding by the SCA in the *Mthembu* case. The SCA found (in 2000) that the customary law of succession was not unconstitutional.

9. **Remedy**

- Paragraphs 101-116: different options were available to the court, (a)-(d).
- **Study paragraphs 105-106.**
- Paragraphs 107-108: reasons why options (a) and (b) not followed.
- Paragraphs 109-116: the development of the customary law.
  - By the legislator: paragraphs 114-116.
- **Study paragraphs 109-116 very well!** The court did not follow this option (c) either.

- Paragraphs 117-125: read only. The court decided to follow option (d) and to modify the Intestate Succession Act. **Study paragraph 125.** It should be noted that the *Reform of Customary Law of Succession and Regulation of Related Matters Act, 11 of 2009* was assented to and published in the *Gazette* on 21 April 2009, but will come into operation on a future date proclaimed in the *Gazette*. (This Act provides for the application of the Intestate Succession Act as stipulated in *Bhe*, but also regulates further aspects. The matter is further dealt with in the Study Unit on Succession.)

10. **Retrospectivity**

  Study only paragraph 129.

11. **Facilitation of agreements**

  Study paragraph 130.

12. **The effect of this judgement** (on the administration of the estate)

  Paragraphs 131-134: read only. **NB: All estates that fail to be wound up after the date of this judgement (15 October 2004) shall fall under the Master and shall be wound up in terms of the Administration of Estates Act.** (Previously, estates in which customary law was applied were wound up under the supervision of the magistrate in terms of section 23 of the Black Administration Act.)

13. **The Order** (effect on succession)

  **NB: Paragraph 136: study in coherence with paragraph 125.**
UNIT 8:
TRADITIONAL LEADERSHIP AND GOVERNANCE

This Unit covers Chapter 8 of the prescribed textbook.

INTRODUCTION

The Traditional Leadership and Governance Framework Act, 41 of 2003 was promulgated in December 2003 and came into operation on 24 September 2004. The aim of this long-awaited Act is:

1. to bring finality to the future, status, role, and function of traditional leadership within the new system of democratic governance;
2. to transform the institution in line with constitutional imperatives; and
3. to restore the integrity and legitimacy of the institution of traditional leadership in line with customary law and practices.

(You will remember that in 2000, the local elections had to be postponed nationwide to the 5th of December of that year because the traditional leaders threatened to boycott the elections unless the Government came up with final answers regarding their position. After lengthy discussions between the traditional leaders and the Government, some sort of agreement was reached, and the elections could go ahead.) A new Bill, the Traditional Leadership and Governance Framework Amendment Bill B57D-2008 was tabled in June 2008, but has not been promulgated yet. The Bill provides for the recognition of Kingships and Kingship Councils the withdrawal of such recognition, as well as other matters regarding traditional leaders where lacunias in the Act were experienced.

LEARNING OUTCOMES

After completing Unit 8, you should be able to do the following:

- Compare the features of modern constitutionalism and traditional government.
- Explain the different aspects of the traditional authority system.
- Explain briefly why it can be stated that the institution of traditional leadership is also subject to the Constitution.
- Briefly describe the legislative foundation of the institution of traditional leadership.

READINGS

1. AUTHORITY SYSTEM

Study paragraphs 8.2 and 8.4.3 in Bekker 2002 (see reading list).

Study par 8.1.2 (8.1.2.1 and 8.1.2.2) with reference to the activity questions.

Activity 1

1. Briefly compare the features of modern constitutionalism and traditional government.
2. Briefly explain the following regarding the traditional leader:
   2.1 How a position of authority is attained through succession.
   2.2 The rules regarding replacement, and regency.
   2.3 The arguments against the succession of women as traditional leaders.
   2.4 Fulfilment of functions.
3. Name the different bodies advising the traditional leader and briefly describe their composition and main functions.

2. LEGISLATIVE RECOGNITION AND FUNCTIONS OF TRADITIONAL LEADERS

Read par 8.2.1 – 8.2.5 of the textbook.

Study par 8.2.6, 8.2.7 and 8.2.8 (all subparagraphs) with reference to the activity questions.

➢ Shilubana and Others v Nwamitwa 2008 (9) BCLR (CC) (delivered on 4 June 2008).

Activity 2

1. The institution of traditional leadership is also subject to the Constitution. Which sections of the Constitution are implied? Explain briefly. (6 marks)
2. Outline the aim of the Traditional Leadership and Governance Framework Act, 41 of 2003. (6 marks)
3. When and how can a traditional community be recognised (section 2(1)(a) and 2(2)(a)) as noted in par 8.2.8.1 and 8.2.8.2)? (6 marks)
4. “A traditional community would in its traditional form not comply with the requirements embodied in the Bill of Rights”. Name and briefly explain the ways in which it must transform. (Par 8.2.8.2). (5 marks)
5. Write short notes on the establishment and recognition of traditional councils (section 3 as noted in par 8.2.8.3) (8 marks)
6. What are the functions of traditional councils (par 8.2.8.4)? (6 marks)
7. How will performance of functions by a traditional council be regulated (section 4(2) as noted in par 8.2.8.4)? (4 marks)
8. The Act provides for partnerships between municipalities and traditional councils. Explain (par 8.2.8.5). (4 marks)
9. Name the different categories of traditional leadership positions, recognised in the Act (par 8.2.8.6 (a)). (3 marks)

10. Describe the role of the following:
    (a) the royal family; (4 marks)
    (b) the president; (8 marks)
    whenever the position of a king or queen is to be filled (par 8.2.8.6(b)).

11. On which grounds may a king, queen, or other traditional leader be removed from office (par 8.2.8.6 (b))? (4 marks)

12. Briefly describe how a person will be recognised as a senior traditional leader, headman, or headwomen. (Par 8.2.8.7 (b)). (6 marks)

13. When will a regent be appointed (par 8.2.8.9)? (2 marks)

14. Briefly discuss the importance of *Shilubana and Others v Nwamitwa* 2008 (9) BCLR (CC) for customary law and traditional leadership. (10-12 marks)

**Study** par 8.2.8.12 of the textbook with reference to the activity questions and read the rest.

**Activity 3**

1. Name the different houses of traditional leaders (par 8.2.8.12 (a)). (3 marks)
2. When must a local house of traditional leaders be established (par 8.2.8.12 (e))? (2 marks)
3. What are the functions of a local house of traditional leaders (section 17(3))? (6 marks)

**Study** par 8.2.9 en 8.3.

**Activity 4**

1. How and why did the Act address the problem of resolving disputes where a whole community is involved? (4 marks)
2. Briefly explain the functions of the “Commission of Traditional Leadership Disputes and Claims” (par 8.2.9.2). (3 marks)
3. What are the outstanding features of the Act? (6 marks)
UNIT 9: TRADITIONAL AUTHORITY COURTS

This Unit covers Chapter 9 of the prescribed textbook.

INTRODUCTION

In January 2003, the South African Law Commission issued a “Report on Traditional Courts and the Judicial Function of Traditional Leaders”. A Bill was also proposed. In 2008 the Traditional Court Bill B15-2008 was tabled but has not been promulgated yet.

You will only be expected to study selected paragraphs. It is, however, very important to read the other paragraphs.

LEARNING OUTCOMES

After completing Unit 9, you should be able to do the following:

- Explain whether traditional authority courts are recognised by the Constitution.
- Name the courts that may apply customary law.
- Explain the civil and criminal jurisdiction of courts of traditional leaders.
- Write brief notes on the courts of ward heads.
- Explain the jurisdiction of the Divorce Courts with regard to customary marriages.
- Explain the concept *ubuntu*.
- Explain the different aspects of the traditional court procedure.
- Describe the nature of the customary law of evidence.
- Explain the evidential value of the different forms of evidence made in court.

READINGS

1. INTRODUCTION

Study paragraph 9.2.1.

Activity 1

1. Are traditional authority courts recognised by the Constitution? Explain briefly.

2. COURTS OF TRADITIONAL LEADERS AND WARD HEADS

Study paragraphs 9.2.3, 9.2.4 and 9.2.5 and the following note:

When the last section of the Repeal of the Black Administration Act and Amendment of Certain Laws Act, 28 of 2005 becomes effective, it will repeal all the remaining subsections of section 12 (authorizing civil jurisdiction) section 20 (conferring criminal jurisdiction on traditional leaders) and the Third Schedule of the Black Administration Act. It will be repealed on 30 Des 2010 or on such date as national legislation to further regulate the matters dealt with in these sections and the third schedule of the Act is implemented, whichever occurs first.

Read paragraphs 9.2.6 and 9.2.7.

Activity 2

1. Explain the jurisdiction rights and duties of a traditional leader in civil claims. (10 – 12 marks)
2. Explain the jurisdiction of traditional leaders in criminal cases. (8 – 10 marks)
3. Write brief notes on the courts of ward heads. (10 marks)

3. MAGISTRATE’S COURTS

Read paragraph 9.2.8.

4. FAMILY COURTS (DIVORCE COURTS)

Study paragraph 9.2.9 and the note below.

In terms of the Black Administration Act 1927, Amendment Act 9, 1929, provision was made for the State President, by means of proclamation, to establish divorce courts for civil marriages contracted by black people – they were called the Black Divorce Courts.

On 6 April 1998, the Divorce Courts Amendment Act 65, 1997, commenced. Since this date, these courts have been called Divorce Courts and are open to all race groups. These courts are deemed to be family courts (see textbook, paragraph 9.2.9). As contemplated in section 10(1) of Act 9, 1929, these courts have jurisdiction to hear and determine suits relating to nullity of marriage and divorce, and any question arising therefrom.
These courts operate in the same way as circuit courts and sit in the main centres four times a year. They were established to limit costs and to provide for a simplified procedure. The local and provincial divisions of the High Court have concurrent jurisdiction. The areas of jurisdiction of the three Divorce Courts are as follows:

- **The North Eastern Divorce Court**, with jurisdiction within the area of jurisdiction of the Province of KwaZulu-Natal, the Province of Mpumalanga, the Limpopo Province, including areas within the Province of Gauteng, namely the Magisterial Districts of Pretoria, Soshanguve, Wonderboom, Cullinan and Bronkhorstspruit, and areas within the North West Province, namely the Magisterial Districts of Rustenburg, Bafokeng and Madikwe.

- **The Southern Divorce Court**, with jurisdiction within the area of jurisdiction of the Province of the Western Cape, the Province of the Eastern Cape, the Province of the Northern Cape and the Province of the Free State.

- **The Central Divorce Court**, with jurisdiction within the area of jurisdiction of the Province of Gauteng and the North West Province, excluding the following areas within the Province of Gauteng, namely the Magisterial Districts of Pretoria, Soshanguve, Wonderboom, Cullinan and Bronkhorstspruit, and the following areas within the Province of North West, namely the Magisterial Districts of Rustenburg, Bafokeng and Madikwe.

### Activity 3

1. Explain the jurisdiction of the divorce courts regarding customary marriages (so-called family courts).

### 5. INFORMAL DISPUTE-SETTLEMENT FORUMS

Read paragraphs 9.3.1 and 9.3.2.

### 6. PROCEDURE AND EVIDENCE

#### 6.1 INTRODUCTION

The traditional court procedure still applies in the courts of traditional leaders. These procedures were amended by the regulations promulgated under the enabling provision of the Black Administration Act. These rules represent the statutory modification of the traditional procedure. It is important to note that the African legal procedure is retained in most of the regulations. The textbook states the traditional procedure and where it has been amended, gives the present legal position.

The customary law of procedure is, to a large extent, based on the African variant of humanism, popularly known as *ubuntu*.

Van Niekerk (1998. CILSA: 158) describes the word as follows:

This Nguni word may be translated as humaneness or the link that binds men together. It emphasises the connection between the individual and the community. The term has also been described as ‘the art of being a human being, a description
which focuses on tolerance, compassion and forgiveness in relation to other human beings’.

With reference to the law of procedure, *ubuntu* finds expression in the dispute resolution mechanism with the main focus on reconciliation as well as the rules that afford a fair hearing.

The concept of *ubuntu* was specifically commented on in the judgement *S v. Makwanyane* 1995 3 SA 391 (CC).

6.2 THE LODGEMENT AND TRIAL PROCEDURE

Read paragraph 9.5.1 and study paragraphs 9.5.2 and 9.5.3 of the textbook.

<table>
<thead>
<tr>
<th>Activity 4</th>
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<tbody>
<tr>
<td>1. Explain the concept <em>ubuntu</em>.</td>
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<tr>
<td>2. Briefly describe the lodgement procedure.</td>
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<td>3. Briefly describe the trial procedure in a traditional court.</td>
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<td>4. Write notes on the following aspects of the traditional court:</td>
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<tr>
<td>4.1 Record of proceedings</td>
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<td>4.2 Enforcement of judgement</td>
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<td>4.3 Appeals</td>
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6.3 EVIDENCE

Study paragraph 9.5.7 (and subparagraphs).

<table>
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<th>Activity 5</th>
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<tbody>
<tr>
<td>1. Write short notes on the nature of the customary law of evidence.</td>
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<tr>
<td>2. Explain the different forms of evidence produced in court and the importance and evidential value of each.</td>
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</table>

6.4 EVALUATION

Study par 9.5.8.

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<th>Activity 6</th>
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<tr>
<td>1. Discuss the advantages and disadvantages of the traditional courts procedure and evidence.</td>
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</tbody>
</table>
UNIT 10:
RELIGIOUS LEGAL SYSTEMS –
GENERAL FOUNDATIONS

This Unit covers Chapter 11 of the prescribed textbook.

INTRODUCTION

The last five chapters of the textbook deal with three religious legal systems, namely Hindu law, Jewish law and Islamic law. The references are to Bekker et al (2006). Only chapters 11 (General Foundations) and 13 (Law of Marriage) will be included in this course.

The South African population comprises a multi-cultural, multi-ethnic and multi-religious society. A large number of people adhering to Judaism, Islam and Hinduism live according to their customs and usages.


It is, therefore, important to include a brief overview of these religious legal systems in this course.

LEARNING OUTCOMES

After completing Unit 11, you should be able to do the following:

- Explain why a brief overview of the religious legal systems is important for the South African jurist.
- Name and briefly describe the sources of Hindu, Jewish, and Islamic law.
- Explain the relationship between law and religion in the different religious legal systems.

READINGS

1. **HINDU LAW**

*Read* paragraph 11.1.1 and 11.1.2 (and the subparagraphs).

It is impossible to ask you to *study* each paragraph. However, it is important that you read the suggested paragraphs to get a broad overview of the specific religious legal system. I am, however, convinced you will find the religious foundations of these systems very interesting (and be comforted in the knowledge that you need not study and memorise all the foreign sounding words!).

*Study* paragraph 11.1.3 (including paragraphs 11.1.3.1 – 11.1.3.8) and 11.1.3.2.

(See activity 1, questions 1, 2 and 3 for an indication of the amount of detail expected from you.)

*Read* the other paragraphs.

*Study* paragraph 11.1.6.

### Activity 1

1. Name and briefly describe (in approximately one sentence each) the ancient sources of Hindu law.
2. Name the requirements for a custom to be legally valid in Hindu law.
3. Name and briefly explain the categories of customs in Hindu law.
4. Name and briefly describe the modern sources of Hindu law.
5. Explain the relationship between rules of law, morality and religion according to Hinduism.
6. “Although the sacred law is regarded as sovereign, custom plays an important role in Hindu law.” Explain this statement.

2. **JEWISH LAW**

*Read* paragraph 11.2.1.

*Study* paragraphs 11.2.2, 11.2.3 and 11.2.4.

### Activity 2

1. Briefly describe the role and function of:
   a) a Rabbi,
   b) the Beth Din.
2. Name and briefly explain the four movements in Judaism.
3. Name and briefly describe the sources of Jewish law.
4. Explain the concept *dina d’malkhuta dina* in Jewish law and refer to examples.
3. **ISLAMIC LAW**

**Read** paragraphs 11.3.1, 11.3.2 and 11.3.3.

**Study** paragraph 11.3.4 (see activity 3, question 1).

**Read** paragraphs 11.3.5, 11.3.6 and 11.3.7.

**Study** paragraph 11.3.8.

**Activity 3**

1. Name and briefly describe the primary, secondary and supplementary sources of Islamic law in order of importance.
2. Write short notes on the relationship between Islamic law and religion.

4. **CHRISTIANITY AND THE LAW**

**Read** paragraph 11.4.
SOLUTIONS

UNIT 10

Activity 1

1. See paragraph 11.1.3 (and 11.1.3.1 – 11.1.3.8) (approximately one or two sentences on each source, just to indicate the importance - or explanation - of the specific source.)
2. See paragraph 11.1.3.7.
3. See paragraph 11.1.3.7.
4. See paragraph 11.1.3.2.
5. See paragraph 11.1.6, first paragraph.
6. See paragraph 11.1.6, second paragraph.

Activity 2

1. a) A Rabbi is seen as an ordinary human with extensive, advanced training in Torah scholarship. He is learned in Jewish law, answering questions and resolving disputes. In addition to being a preacher, teacher, advisor and counsellor, he is supposed to set an example by his life of faith and piety, Torah study and moral integrity. He is not a priest who can administer sacraments or grant absolution. In fact, there is nothing a Rabbi can do that a Jew cannot do for himself if he has the knowledge and skills.
   b) The only ecclesiastical body that has authority in Jewish life is the Beth Din (Rabbinical Court), which rules on questions of Jewish law and arbitrates disputes in accordance with Halacha or mediates compromise settlements. It usually administers matters of personal status (e.g. marriage, divorce and conversion) and supervises production of Kosher food.
2. See paragraph 11.2.2 and subparagraphs 11.2.2.1 – 11.2.2.4 (just briefly the essential aspects).
3. See paragraph 11.2.3.
4. See paragraph 11.2.4.

Activity 3

1. See paragraph 11.3.4 and subparagraphs (approximately one or two sentences on each source, just to indicate the importance - or explanation - of the specific source).
2. See paragraph 11.3.8, first paragraph.
3. See paragraph 11.3.8, second paragraph.
UNIT 11:
RELIGIOUS LEGAL SYSTEMS –
LAW OF MARRIAGE

This Unit covers Chapter 13 of the prescribed textbook.

INTRODUCTION

The chapter on the law of marriage is probably the most important part of the religious legal systems. Marital disputes frequently end up in court.

LEARNING OUTCOMES

After completing Unit 13, you should be able to do the following:

- Explain briefly the requirements, forms, ceremonies, and consequences of a Hindu marriage.
- Write short notes on divorce, custody of children, and adoption in Hindu law.
- Describe the requirements and consequences of a Jewish marriage.
- Explain the divorce proceedings and problems relating to the Jewish get.
- Explain the principles pertaining to the granting of custody of children in Jewish law.
- Describe the nature of requirements for and consequences of an Islamic marriage.
- Explain the different divorce methods and consequences thereof in Islamic law.
- Write short notes on the status of children in Islamic law.

READINGS


1. HINDU LAW

Study Singh v Rampersad 2007 3 SA 445 D.

Study paragraphs 13.1.1 and 13.1.2.1.

Read paragraph 13.1.2.2.

Study paragraphs 13.1.2.3 and 13.1.2.4 (see activity question).

Study paragraphs 13.1.2.5 and 3.1.2.6 (see activity question).

Read paragraph 13.1.2.7.
Study paragraphs 13.1.2.8, 13.1.2.9, 13.1.2.10, 13.1.2.11 and 13.1.2.12 (see activity questions).

Activity 1

1. What are the consequences of a breach of betrothal in Hindu law?
2. Briefly explain the nature of a Hindu marriage.
3. Write short notes on the requirements for a valid marriage according to:
   3.1 Ancient Hindu law.
   3.2 Present legislation.
4. Name and describe two examples of the various marriage ceremonies found in Hindu law.
5. Name and describe the two forms of marriages recognised in Hindu law today.
6. Name five categories of property included in stridhan and describe the woman’s rights over stridhan.
7. “Modern day dowry … has corrupted the ancient Hindu custom of ‘stridhan’.” Briefly explain this statement.
8. What are the consequences of a Hindu marriage?
9. Write short notes on the widow’s right to maintenance in Hindu law (10 marks).
10. Hindu law permits a wife to claim maintenance and a separate residence under certain circumstances. Explain briefly.
11. Write short notes on the following according to Hindu law:
    a) Divorce;
    b) Custody of children upon divorce;
    c) The consequences of adoption.
12. Discuss the position of Hindu marriages in South Africa.

2. JEWISH LAW

Read paragraph 13.2.1.

Study paragraph 13.2.2.

Read paragraph 13.2.3 and 13.2.4.

Study paragraphs 13.2.6 and 13.2.7.

Read paragraph 13.2.8, 13.2.9 and 13.2.11.

Study paragraph 13.2.12.

Read paragraph 13.2.10.

NB: In addition to the above, you must study the following note on Jewish divorces (compiled from information in The South African Law Commission’s Working Paper 45).
2.1 Divorce

In terms of the Jewish faith, it is a requirement that a divorce document, a writ or "get" has to be delivered by a Jewish husband (or his agent) to his wife to effect a divorce.

This has to be done under the supervision of a Jewish ecclesiastical court, or Beth-Din, if such spouses want to dissolve their marriage.

The CONSENT of both spouses is required and if this requirement is met, no reasons for the divorce have to be supplied to the Beth-Din.

Two branches of Judaism exist in South Africa:

- Orthodox Judaism.
- The Reform Movement.

Orthodox Judaism does NOT recognise a divorce decree granted by a secular court in terms of the Divorce Act 70, 1979.

The traditional Jewish law requires that a Jewish divorce take place even if the marriage was dissolved by a secular court.

The Reform Movement abolished the requirement of a religious divorce, but reformed spouses frequently make use of the religious divorce procedure overseen by Orthodox Judaism.

2.2 Consequences of a secular divorce without a Jewish Divorce

- Should a Jewish couple obtain a secular divorce without a Jewish divorce and subsequently the woman remarry somebody else secularly, her second marriage is regarded as adulterous, and her children born from the second marriage as illegitimate according to Jewish law.

- These children are called manzerim, and are prohibited from marrying:
  - Orthodox, or
  - Conservative Jews.

- They may only marry other manzerim or convert to Judaism.

- Such a wife is regarded as still being married to her first husband. She is bound to her first husband and is called an aqunah. She cannot ever remarry her second husband since Jewish law regards them as being partners in adultery.

- An Orthodox rabbi will also refuse to conduct a marriage ceremony if a wife was NOT granted a religious divorce (get) by her husband after the secular divorce.
Her former husband does not have the same problems:
In the case where a husband divorces his wife secularly without obtaining a Jewish divorce, and subsequently remarryes, any children born out of his second marriage are not regarded as illegitimate manzerim in terms of Jewish law.

2.3 Developments

It seems to be a common trend for Jewish couples in South Africa not to proceed with a Jewish divorce after having obtained a secular divorce.

The reasons for not proceeding with a religious divorce might be that one of the spouses has disappeared, or spitefully refuses either to deliver or to receive a get. This creates problems as, according to Jewish law, they are still married even though they obtained the secular divorce.

Jewish husbands, however, tend to be in a better position than their wives. They regularly abuse divorce negotiations to obtain favourable property or custody settlements. The wife, then, has the choice of either giving in to his demands or refusing to give in and becoming an aqunah.

In South African law, no direct provision was made for the recognition of a get.

This situation, combined with the unfair position as elucidated above, resulted in the South African Law Commission’s intervention and the addition of section 5A to the Divorce Act 70, 1979.

Section 5A:

Refusal to Grant Divorce – In divorce proceedings, if it appears to a Court that, despite the granting of a decree of divorce by the Court, the spouses or either one of them will, by reason of the prescripts of their religion or the religion of either one of them, not be free to remarry unless the marriage is also dissolved in accordance with such prescripts or unless a barrier to the remarriage of the spouse concerned is removed, the Court may refuse to grant a decree of divorce unless the Court is satisfied that the spouse, within whose power it is to have the marriage so dissolved or the said barrier so removed, has taken all the necessary steps to have the marriage so dissolved or the barrier to the remarriage of the other spouse removed, or the Court may make any other order that it finds just.

Example of application:

Amar v. Amar 1999 3 SA 604

Facts:

- The parties, married according to Jewish law, wanted a divorce.
After approaching the Court, the parties entered into a written agreement and the defendant (husband) later withdrew his defense and counterclaim, and the matter was postponed.

The reason for the postponement was that the plaintiff wanted to obtain a divorce according to Jewish law.

In the settlement agreement, the parties agreed that the Johannesburg Beth-Din would dissolve the marriage and that the Divorce Act 1979 would become applicable thereafter.

The defendant insisted on being divorced according to Sephardi rules, which meant that he would have to go to Israel to do so, while his wife was content to have the divorce granted in Johannesburg.

The Johannesburg Beth-Din offered to accommodate the defendant in one of two ways:

- By paying half of his ticket to Israel.
- By obtaining the services of a Sephardi rabbi.

The defendant was still unhappy with the financial arrangements and wrote a letter to the plaintiff in which he demanded other arrangements and threatened not to grant the get.

The Court, by applying section 5A, found that it was entitled to make any order it deemed just.

The purpose of section 5A is to force spouses who do not wish to cooperate in such divorce proceedings to grant religious divorces where the other spouse needs this to remarry.

The court found that an effective way to do this would be to order the defendant to pay monthly maintenance to his wife until the marriage was dissolved according to Jewish law.

This is the first reported case on the application of section 5A.

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**Activity 2**

1. Describe the main parts of a valid Jewish marriage ceremony and also how it is performed presently.
2. Explain the meaning and importance of the *ketuvah* in Jewish law.
3. Briefly describe the grounds for divorce in Jewish law.
4. Describe the consequences of divorce in Jewish law.
5. How is a divorce effected according to Jewish law?
6. Why was it necessary to insert section 5A in the *Divorce Act 70, 1979*?
8. Explain the meaning of:
   8.1 *Aqunah*
   8.2 The circumstances in which a woman can become an *aqunah*.
8.3 The legal position of the *aqunah* and possible solutions.
9. Discuss the position of *mamzer/manzerim* in Jewish law.
10. Write brief notes on adoption in Jewish law.
11. Explain the parental obligations towards children in Jewish law.

3. **ISLAMIC LAW**

**Read** paragraph 13.3.1.

**Study** paragraphs 13.3.2.1, 13.3.2.2 and 13.3.2.3.

**Read** paragraphs 13.3.2.4, 13.3.3, 13.3.4 and 13.3.5.

The following notes should also be studied.

3.1 **The Islamic marriage (nature of, requirements for and consequences)**

- Marriage according to the *shari’ah* is a civil contract (*aqd*). It is, however, clear that an Islamic marriage is not an ordinary contract, but also a religious institution with religious purpose.
- It is not a sacrament and can, therefore, be dissolved.
- Both parties must consent - a wife cannot be forced into a marriage.
- Upon marriage, the wife is entitled to receive from her husband a sum of money known as *maher* (dower). It is seen as a token of respect for the bride.
- The amount of the dower and the time of its payment, if not paid at the time of the marriage, are matters for negotiation and agreement between the parties. It ranks as a debt and on the death of the husband, the wife, along with other creditors, is entitled to have it settled out of his estate.
- It is also customary that the husband donates two sets of golden jewellery to the bride - one set upon engagement and the other at the time of the marriage.
- The bride is not present at the marriage ceremony and she does not participate.
- The ceremony is performed by the *Imam* in a mosque, but any adult, male Muslim who has adequate knowledge of the ritual is competent to perform the ceremony. A formal marriage officer in terms of the *Marriage Act 25, 1961* is not required and the state need not participate in the ceremony in any way.
- According to Islamic law, marriages are automatically out of community of property. Marriage does not create a joint estate and the wife retains full ownership of all property acquired before the marriage.
- The wife also retains full legal capacity to conclude contracts, to acquire or alienate movable or immovable property and to litigate without the assistance of her husband. The concept of marital power is alien to Islamic law. A married woman even retains her maiden surname.
According to the teachings of the Qur’an, a husband is allowed to have a maximum of four wives simultaneously, provided he treats them with absolute equality and is able to maintain them all.

The husband is obliged to maintain his wife in a reasonable way and in accordance with his income. Even if the wife has her own income, the husband is still responsible for seeing to her well-being. The wife does not have to contribute to household expenses.

A stipulation in a marriage contract that the husband shall not contract a second marriage during the existence of the first is valid and enforceable.

Presently, an Islamic marriage is not regarded as a valid marriage in South African law (Ismail v. Ismail 1983 1 SA 1006 (A)).

### 3.2 Divorce and the consequences thereof

The Qur’an and the Hadith contain prescriptions regarding the adjudication by the Moulana (a high ranking ecclesiastical office-bearer) of property disputes and claims pursuant to divorce.

Parties can have their marriage dissolved where there is an irretrievable breakdown in their marriage relationship.

Divorce may take place orally or in writing, but must take place in the presence of witnesses. (There are differences amongst the different schools: according to classical Sunni law, there are no fixed formalities for the talaq (see paragraph 13.3.3.2, fourth paragraph).

Divorce at the instance of the husband takes place where the husband exercises his right of repudiation (talaq) on three successive occasions. Talaq means that the husband must repeat the words “I divorce you/set you free” three times to the wife. The marriage relationship continues to subsist before pronouncement of the third and final talaq.

The husband may terminate their marriage unilaterally by simply issuing three talaqi without having to show good cause.

The wife can go to the Moulana and obtain annulment of the marriage only if she can satisfy the Moulana that her husband has been guilty of certain kinds of misconduct and that he fails or refuses to divorce her by issuing three talaqi.

The term khula is used where divorce takes place at the instance of the wife and she can be required to surrender her dower to her husband as compensation.

The woman may stipulate her right to khula (initiate divorce) in her marriage contract.
Three important consequences follow after a divorce:

- The wife must observe a “waiting period” (iddah) of three months from the date of divorce or if she is pregnant, until delivery of the child before she may marry another man.
- The wife is entitled to maintenance from her divorced husband during her period of iddah. (See paragraph 3.3.2.3 in textbook: Ryland v. Edros).
- It becomes absolutely unlawful for the husband and wife to remarry each other. The divorce destroys the marital tie between the parties forever. There is a single exception to this. The first husband may remarry the wife whom he divorced if, after her iddah, she had married another man who had then divorced her (or died).

Guardianship and custody (hadinah): The mother is entitled to custody of male children up to the age of seven and in the case of female children, until they reach the age of puberty. Thereafter, custody and guardianship devolve upon the father. According to legislation and court decisions in Islamic countries (e.g. Egypt, Pakistan and Malaysia), the best interest of the child should dominate questions concerning custody of minor children (see paragraph 3.3.4 in textbook.).

Maintenance (Nafqah): The ex-husband must maintain the woman during the iddah. He is obliged to support his sons until their majority and his daughters until their marriage.

3.3 Children: Status

- Legitimacy: Legitimacy is dependent on a valid marriage. Illegitimacy is a permanent condition because the shari’ah does not recognise the doctrine of legitimating per subsequent matrimonium.
- Majority: Boys and girls cease to be minors as soon as they reach the age of puberty.
- Adoption: The Qur’an forbids adoption as an artificial mode of creating family ties.

Activity 3

1. What are the partrimonial consequences of an Islamic marriage?
2. Write short notes on the nature of requirements for and consequences of an Islamic marriage.
3. Discuss divorce (proceedings and consequences) in Islamic law.
4. Write short notes on the status of children in Islamic law.
SOURCES

Bulbulyia MAE
1983 "Women’s rights and marital status, are we moving closer to Islamic law?" De Rebus September 430-440.

Cachalia F

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Maithufi IP

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1981 "Islamic personal and SA Law, some problems highlighted" De Rebus October 485-503.
UNIT 11

Activity 1

1. See paragraph 13.1.1, last paragraph.
2. See paragraph 13.1.2.1.
3. See paragraph 13.1.2.3.
4. See paragraph 13.1.2.4.
5. See paragraph 13.1.2.5 (Brahma and Asura).
6. See paragraph 13.1.2.5.
7. See paragraph 13.1.2.6.2.
8. See paragraph 13.1.2.8.
9. See paragraph 13.1.2.9.1.
10. See paragraph 13.1.2.9.1.

Activity 2

1. See paragraph 13.2.2.
2. See paragraph 13.2.3, last paragraph and 13.2.4 (last two paragraphs).
3. See paragraph 13.2.6.
4. See paragraph 13.2.6.
5. See paragraph 13.2.6 in study manual.
6. See paragraph 13.2.6 and notes.
7. See notes in study manual.
8. See paragraph 13.2.7 and notes in study manual.
9. See notes in study manual and paragraph 13.2.12.
10. See paragraph 13.2.14.

Activity 3

1. See paragraph 13.3.2.1 and 13.3.2.2
2. See notes in study manual and paragraph 13.3.2.2.
3. See notes in study manual and paragraph 13.3.2.3.
4. See notes in study manual.