DEPARTMENT OF PUBLIC, CONSTITUTIONAL AND INTERNATIONAL LAW

AFRICAN CUSTOMARY LAW

ONLY STUDY GUIDE FOR

IND2601

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Preface

1 THE PURPOSE OF THE MODULE ON AFRICAN CUSTOMARY LAW

This is probably your first acquaintance with African customary law. African customary law is now a fully recognised and applicable branch of law in the national legal system and this module aims to:

- provide you with a basic knowledge and understanding of African customary law as recognised under the South African Constitution
- enable you to explain some of the concepts and principles of African customary law
- empower you to identify the issues involved in the practical customary law issues and to apply your knowledge to such problems
- enable you to argue customary law issues in an informed and critical manner.

The module begins with a general introduction to issues pertaining to customary law, after which you will be introduced in particular to the following:

- The place of customary law in the national legal system
- The recognition of customary law under the new Constitution and its compatibility with human rights
- Customary laws pertaining to the person and family
- Customary laws regulating property and succession
- The application of customary law in the courts
- Laws regulating criminal activity in the African context
- Laws regulating traditional leadership in African customary law

2 THE STUDY GUIDE

(a) Study units

Your syllabus has been divided into six study units, each covering a specific section of African customary law. Each study unit, in turn, has been subdivided into a number of lectures, each covering a specific facet of customary public and customary private law. Please note that the study material in this tutorial letter is

merely an introduction to the subject. In other words, not all themes have been covered in full.

(b) Structure of the study units

This study guide contains an overview of the study unit. This overview explains what the study unit entails and what you are supposed to be able to do after working your way through a particular study unit. The skills you are expected to have acquired form the learning outcomes. The overview includes an outline of the structure of each study unit.

In turn, each study unit contains several lectures addressing several themes and incorporating the following:

Compulsory reading

This includes the relevant section of the textbook for the particular theme of the lecture as well as references to relevant legislation (if any) applicable to the discussion. To gain a full understanding of a lecture, you must consult any relevant legislation and make notes.

Recommended reading

In this section certain reading material on a particular theme will be prescribed. You will not be examined on this reading material. However, any of you who might be interested in reading more about the theme may consult these references. Some of you may also find that these references enable you to understand the subject matter better.

Outcomes

These are the learning outcomes relevant to the lecture in question. The learning outcomes may look as if they can be mastered within a few weeks before the examination, but that is definitely not the case and it is advisable to start working on the module lectures in good time.

Main principles

The main legal issues covered in a particular lecture will be outlined. Here we include a comprehensive discussion of the principles and legal issues surrounding them and point out the law applicable to them.

Activities/self-assessment exercises

Once you have studied the concepts and principles of the law applicable to a lecture, you can test your understanding of the issues discussed in that lecture by doing the activities/self-assessment exercises. This will not only enhance your understanding of the work, but also give you an indication of the type of questions you can expect in the examination.

Feedback

The activities are followed by comments and guidelines on answering the questions. It should be emphasised that these are guidelines, and not model answers. You should always attempt the questions first before looking at the guidelines. This will make the exercise much more meaningful, as you will be challenged to understand the tutorial matter and find the correct answer.

(c) Approaching the study guide

We suggest that you approach the study material as follows:

(i) Most of the required material for the course is contained in the study guide. There are some sections, however, where you will be asked to supplement your reading from the prescribed book and the relevant legislation.

(ii) List any words you do not understand. Look them up and memorise their meaning. Legal concepts are usually explained in the text itself but nonlegal concepts have to be looked up in an ordinary dictionary.

(iii) Study the prescribed chapters of the textbook and prescribed legislation and make your own notes and summaries.

(iv) Incorporate any further tutorial matter you may receive (such as tutorial letters) into your own notes so that you have a fully integrated set of tutorial matter to study for the examination.

(v) Complete the activities in each study unit after you have studied each lecture. Note the meanings of the following terms that you can expect to find in the self-evaluation exercises:

- "Explain/describe" usually have the same meaning; you are required to give facts.
- "Discuss" means that you have to arrange and clarify the facts. In some cases, you will have to give several points of view and compare them.
- "Compare" means that you have to discuss similarities and differences.
- The expressions "evaluate" and "discuss critically" have more or less the same meaning. Here you must be able to give your own point of view and justify it.
- "Apply" means that you must link general principles to specific facts – often with a view to solving a problem.

3 PRESCRIBED TEXTBOOK

The compulsory readings can be found in your prescribed textbook:

Bekker JC, Rautenbach C & Goolam NMI (eds) *Introduction to legal pluralism in South Africa* (2010) LexisNexis Butterworths.

You are advised to start by working through the information given in a lecture and then supplement this with information from your reading.

We trust that you will find your study of this subject a stimulating, enriching and enjoyable experience. Please feel free to contact us if you encounter difficulties with either the tutorial matter or your study programme. We are here to help you.

STUDY UNIT 1

AN INTRODUCTION TO AFRICAN CUSTOMARY LAW

OVERVIEW

In this study unit you will be introduced to customary law as a field of study. In **lecture 1,** we discuss the relation between laws in general and law in human relationships. We also distinguish between public law and private law. Before we discuss the name of the subject, we will explain how customary law is divided into certain subdivisions. We end this lecture by referring to the cultural division of people who live according to customary law.

In **lecture 2,** customary law is located within the African context. We refer to certain aspects of customary law that are typical of indigenous systems of African law.

In **lecture 3,** we discuss the nature of customary law. Customary law is said to be unspecialised law. In this lecture, we will answer questions such as: What is meant by the term "unspecialised law"? How does an unspecialised legal system compare with a specialised one? What are the characteristics of unspecialised law?

In **lecture 4** we consider the extent to which customary law was officially recognised in South Africa before 1994 and we examine the impact of the Constitution of the Republic of South Africa, 1996, on customary law. We explain what is meant by saying that customary law is subject to the chapter on fundamental rights in the Constitution. Finally, we discuss the application of customary law and the question of choice of legal system.

Outcomes

After having studied all four lectures, you should be able to

- demarcate the field of study known as customary law
- state the main questions concerning customary law in a democratic system
- discuss the nature and characteristics of customary law
- indicate the considerations relevant to the application of customary law

Structure of the study unit

LECTURE 1: General introduction

LECTURE 2: Some characteristics of African customary law

LECTURE 3: The nature of customary law

LECTURE 4: Customary law and the Constitution

LECTURE ONE

General introduction

Recommended reading

Van Niekerk GJ "Legal Pluralism" in *Introduction to legal pluralism in South Africa* (2010) ch 1

Outcomes

After you have studied this lecture, you should be able to

- explain the relation between the law and human relationships
- classify customary law
- indicate the different indigenous legal systems that are in force in Southern Africa, and the legal implications of this diversity

1. MAIN PRINCIPLES

1.1 The law and human relationships

The purpose of any legal system is to regulate the relations of its people. These people may be individuals or groups of people. These relations also include the relations between the government and its subjects.

Any **legal relation** among people, whether among individuals or groups, or between a government and its subjects, creates responsibilities and obligations. The subject, for instance, is obliged to abide by the laws enacted by the government, while the government is obliged to protect the subject. When two individuals enter into a deed of sale, the one is obliged to deliver the object, while the other is obliged to pay the price.

Note that the emphasis in customary law is on **duties** whereas most people place the emphasis on **rights**. People often speak about the protection of their rights, or say that their rights should be protected by the government. Rights and duties are two sides of the same coin: one person's rights create duties for another. In customary law, the emphasis tends to be on duties rather than on rights.

What is public law? By "public law" we mean the legal relations between a government and its subjects, and the relations between the different parts of government. By "different parts of government" we mean government institutions, that is, the legislative, executive and judicial organs. "Legislative organs" are gov-

ernment organs (e.g. parliament in modern states) responsible for the passing of statutes. "Executive organs" are government organs (e.g. the police and revenue services) responsible for the application of statutes and other public services. "Judicial organs", generally speaking, are the courts.

What, then, is private law? By "private law" we mean the legal relations between individuals and groups in their capacity as private persons. This distinction is discussed in more detail in section 1.3 below. This general division of law also applies to customary law.

The aim of any legal system is to maintain order within the society concerned, and this maintenance of order is supported by means of approving and disapproving legal sanctions. The word "sanction" has two meanings: On the one hand, it may mean approval or confirmation of an action. On the other hand, it may mean punishment for noncompliance with, for instance, statutes or behavioural prescriptions. An example of a legal sanction is the punishment that may be imposed for theft. Legal sanctions are further supported by public opinion regarding religion (one should not steal), informal and formal education, respect for the property of others (an attitude which is learned), participation in the judiciary (as a witness), political control (statutes) and economic factors (fines). In customary law, the abovementioned factors play an even more important part than purely legal sanctions in ensuring that people obey the law.

1.2 The name of this subject

The phrase "customary law" means "the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples" (section 1 of the Recognition of Customary Marriages Act 120 of 1998). This term now enjoys wide acceptance and is regarded as synonymous with "indigenous law".

1.3 The division of customary law

There are various opinions about how the law should be divided. In this introduction, however, we shall not go into this. Since the law is basically concerned with relations between individuals and groups and between a government and its subjects, the law may, generally speaking, be divided into national and international law. National law governs the relations between subjects and foreigners, as well as the relations between subjects and government within a certain state. International law, on the other hand, governs the relations between states.

The division mentioned above also applies to customary law. Initially, most of the indigenous African people in Africa had their own independent "states", with their own authority under the supervision of the tribal chief. Some kingdoms consisted of several tribes and remnants of tribes, ruled by a king or a paramount chief. Examples of kingdoms in Southern Africa today are the kingdoms of the Zulu, Swazi and Southern Sotho. We refer, from now on, to "tribal law" only and include

the law of these larger units. We would also like to point out that in customary law a distinction can be drawn between tribal law (national law) and the law of different tribes (international law).

Little is known about intertribal law, which we could also refer to as "indigenous international law". What is known, however, is that tribes entered into agreements to help one another against communal enemies. We also know of marriages between tribal chiefs and women from the ruling families of other tribes, and the sporadic practice of barter between tribes.

As we have already said, in tribal law a distinction may be drawn between public law and private law. Customary public law governs the relations between traditional authorities and subjects, and the relations between these authorities within the tribe. Customary public law may be subdivided as follows:

- **Indigenous constitutional and administrative law** (discussed in more detail in study unit 6). This is that part of customary law which relates to the composition, powers and functions of the public organs of authority. In the case of a tribe the highest authority is the tribal chief, and in the case of a kingdom it is the king. The tribal chief has various councils that help him to perform his duties. A tribe is usually subdivided into several (territorial) wards. Each ward is headed by a headman, assisted by a system of councils. In former times, the tribal chief, together with his councils, had the power to legislate. The chief-in-council had to see to it that these laws (and other community rules) were applied. The chief and each headman had a court in which cases were tried.
- **The indigenous adjudicatory organs and the law of procedure** (discussed in detail in study unit 4). This is that part of customary law that deals with the composition and jurisdiction of the various indigenous or customary courts and the various procedures that must be followed when cases are brought before the court and tried, and when judgment is executed. It also relates to the evidence that may be led in court in order to reach a decision.
- **Indigenous criminal law** (discussed in study unit 5). This is that part of the law that deals with public action against a subject with the purpose of punishing the subject when he transgresses a rule that is punishable by law.

In private law in Western legal systems, seven subdivisions are commonly identified. In the discussion that follows, an indication will be given of the extent to which this classification is useful for South African customary law. The law of things and the law of immaterial property are often collectively known as the law of property.

- The **law of persons** determines the status of a person, that is to say, his or her rights, duties, powers and capacities according to sex, age, mental state, married or unmarried state, legitimacy, etc. The rules concerning

status play an important part in South African customary law and may safely be dealt with as the law of persons (see study unit 2).

- **Family law** (concerning marriage, parents and children, guardianship and curatorship) should be distinguished from the law of persons (see study unit 2).
- The **law of things** consists of the rules concerning real rights over material objects such as land, cattle, motor vehicles and furniture. Such material objects, which people can control, are referred to as "things" in law. Some jurists object to the use of the term "law of things" in South African customary law. However, provided that the distinctive features of rights over a particular type of object among the indigenous African people of South Africa are borne in mind, the term is perfectly acceptable (see study unit 3, lecture 1).
- The **law of immaterial property** consists of the rules concerning rights over immaterial property, such as patents and copyright. As far as we know, this legal concept is unknown in South African customary law.
- The **law of obligations** consists of the rules relating to obligations. An obligation is a legal tie between the debtor and the creditor, and requires the debtor to perform, that is to say, to give, do or refrain from doing something. The creditor has an obligatory right and the debtor a duty, namely, to perform. The phenomenon of being bound also occurs in South African customary law. The term "law of obligations", therefore, need not be rejected here, provided that its peculiarities are taken into account. In South African customary law, the parties were previously agnatic (family) groups. An obligation may arise from contract, quasi-contract, or delict. As far as South African customary law is concerned, the tie between a patient and a medicine specialist or traditional healer may be called contractual; the tie between a guardian and a person supplying his ward with the necessities of life without his consent may be called quasi-contractual and the tie between an owner and another who has wilfully damaged his property may be called delictual.
- The **law of succession** is the aggregate of rules determining what is to become of a deceased person's estate, to wit, his patrimonial rights and duties. The South African indigenous people have a well-developed law of succession. Group rights formerly excluded the individualistic notion of inheritance, and succession was confined to the position of the deceased family head as the person having most control over the group's estate (see study unit 3, lecture 2).
- The nature of the **law of personality** (right to honour, good name and privacy) is indicated by the term itself. This division of indigenous private law is dealt with in an advanced module.

Law may also be subdivided into **substantive law** and **adjective law**. Substantive law prescribes norms or requirements and attaches sanctions to these. The

sanction may be that of approval, as in the case of validity of lawfulness, or that of disapproval, as in the case of invalidity or unlawfulness or punishability. Adjective law or the law of procedure and evidence prescribes the manner in which norms are to be enforced and sanctions applied. This distinction is acceptable for South African customary law, since this system comprises not only norms, but also fixed rules of procedure.

In private law, unlawfulness consists of the infringement of a right. An infringement resulting in liability is termed a delict. We may distinguish between the following rights in customary law, according to the object.

Right	**Object**	**Example**
Real right	Corporeal thing apart from the person	Ownership
Obligatory right	Performance	Right to a fee for professional services
Right of authority	Productivity and freedom of group member	Guardianship
Right of personality	Corporeal or incorporeal part of vestee's personality	Right to one's body Right to one's honour

The first three fall within the vestee's estate. Consequently, any violation of these entails patrimonial loss (i.e. losses that can be determined in economic terms), and this loss is the basis for an action for **damages**. Rights of personality do not fall within the vestee's estate. Violation of a right of personality results in an action for **satisfaction** (**solatium**). Violation of these may occasionally also result in patrimonial loss, for instance, when it is alleged that someone is a thief (violation of one's right to a good name) and such person loses his/her job as a result of such allegation (loss of income and thus patrimonial loss). Unfortunately, the legislation and court decisions do not always distinguish clearly between damages and satisfaction.

Group ownership is typical among indigenous African people and covers movables such as cattle and agricultural produce as well as immovable property such as land. One is fully justified in speaking of "real rights" in customary law. The example of obligatory rights in the table is as valid for South African customary law as it is for Western systems, and there is every reason to accept such rights for South African customary law. However, it is not only the right that is vested in an agnatic group. The duty to perform is also that of an agnatic group, as in the case of the right of a bride's family to have marriage goods delivered to them by the bridegroom's family.

The indigenous African people are apparently unacquainted with any right comparable to the immaterial property rights of Western systems. The patrimonial group

right of "guardianship" is well known in customary law. Apart from its objective regarding the freedom of members, guardianship is also considered a patrimonial right because it entitles the group concerned to the productivity of its members. This particular element of guardianship is lacking in modern Western legal systems.

The indigenous African people, for example in cases where rituals are performed to remove pain, sorrow, or defilement. An example of defilement is defloration among some Southern Nguni, where a beast is taken from the wrongdoer's place of residence by the women who belong to the seduced girl's group. This beast, called the *isihewula* beast, is then ritually slaughtered by the group as an act of cleansing and to obtain satisfaction. The fact that the vestee of the right may be a group does not alter the nature of the right. Note that, where pregnancy follows, the girl's guardian, as the representative of her group, is also considered to have suffered patrimonial loss and may recover damages (Whitfield 448). The same action may therefore lead to the infringement of various rights.

1.4 Various indigenous legal systems

When studying customary law, it must be kept in mind that there has never been only one general legal system that applied to all indigenous African groups. In former times, each tribe or kingdom had its own legal system that, in varying degrees, differed from the legal systems of other groups. Among most of the 280 Zulu tribes in KwaZulu-Natal under the authority of traditional leaders (chiefs), for instance, it is customary to deliver all the marriage goods (*ilobolo* (noun); *ukulobola* (verb)) before or during the marriage ceremony. In most Xhosa-speaking communities of the Eastern Cape, however, the marriage goods are delivered over a period of time after the woman has been handed over to the man's family group. In some Xhosa groups, the woman's family "impounds" her from time to time and keeps her until the husband has delivered a further portion of the marriage goods. This custom is known as *theleka*.

In this module it is not possible to discuss all the different local indigenous legal systems. Fortunately, there is a great deal of similarity between them, especially as far as underlying legal principles and legal values are concerned. In this study guide, we will be focusing on these common underlying principles. In the following section, you will find an overview of the most important differences between the legal systems of the different indigenous African people of Southern Africa.

1.5 The division and features of the indigenous African people of Southern Africa

1.5.1 Introduction

The term "African language" refers to a family of languages with a marked degree of correspondence and a common origin. People speaking one of the languages belonging to this family of languages are referred to as "African-speaking". Apart

from the African languages, other languages, such as Nama, Khoe (Khwe) and !XeÂ (!Kung), are also spoken in Southern Africa.

Based on language and other cultural features, the following main groups can be identified in South Africa, Botswana, Lesotho and Swaziland:

- the Nguni groups
- the Sotho groups
- the Venda
- the Shangana-Tsonga

These groups differ from one another in important respects, that is, they each speak a different language, and have a different legal system and different customs. Despite these differences, sufficient similarities do exist for these groups to be discussed together. This is because these groups all have a system of traditional succession to leadership although, individually, their rules of succession differ greatly.

These differences do play an important part as far as the practical application of the law is concerned. It is often necessary to determine the personal laws of a specific community. If you focus on the underlying legal principles, you will not find it difficult to see the significance of the variations that occur in these systems. For instance, if you have a good knowledge of the legal principles underlying the custom of *lobolo*, you should find it easy to determine the legal implications of the marriage goods being delivered at different stages in different groups.

1.5.2 Characteristics of the main groups

1.5.2.1 The Nguni groups

The most important languages in this main group are Zulu, Xhosa, Swazi and Ndebele.

The original areas where the Nguni groups settled are as follows:

- The Zulu-speaking groups: KwaZulu-Natal
- The Xhosa-speaking groups: the Eastern Cape (especially Ciskei and Transkei)
- The Swazi-speaking groups: Swaziland and Mpumalanga
- The Ndebele-speaking groups: Mpumalanga, north-east of Pretoria

Characteristic of the Nguni groups was a composite household, which was divided into two, and sometimes three, sections. Each section had a senior wife, as well as affiliated wives who were subordinate to the senior wife. Each wife in a section formed a "house" with its own identity and rank, property and successor. The following explanation makes this clear:

The household is subdivided into three sections, namely A, B and C. Each section has a senior wife, namely 1, 2 and 3, respectively. Wives 4 and 5 are affiliated to the senior wife in section A. Wife 6 is affiliated to senior wife 2 in section B, and wife 7 is affiliated to senior wife 3 in section C.

This division of the household is still found in rural areas. In urban areas, where a man has more than one wife according to customary law, the wives usually live in separate houses, and sometimes in different local government areas.

1.5.2.2 The Sotho groups

The most important languages in this main group are Tswana, Northern Sotho and Southern Sotho. The original areas where the Sotho-speaking people settled are as follows:

- The Tswana-speaking groups in Botswana, North West and parts of the Northern Cape.
- The Northern Sotho-speaking groups in Limpopo.
- The Southern Sotho-speaking groups in Lesotho and the Free State.

An important characteristic of the Sotho-speaking people is that the household is not divided into sections. Each married woman has a certain rank, and her house has its own identity, its own property and successor.

1.5.2.3 The Shangana-Tsonga groups

This main group is sometimes also referred to as the "Tsonga" or "Shangana". The Shangana-Tsonga originally settled in Limpopo and Mpumalanga, in areas adjacent to Mozambique.

1.5.2.4 The Venda

The Venda originally settled in the north-eastern part of Limpopo. Their language is also called "Venda". They have historical links with the Shona-speaking people of Zimbabwe.

Self-evaluation

(1) Briefly explain the relation between law and human relationships. (5)

(2) Illustrate, by means of a diagram, how customary law can be subdivided into different categories. (8)

(3) Illustrate, by means of a diagram, how the indigenous African groups of Southern Africa can be subdivided into different groups. (5)

Feedback

Your answer could include some of the following points:

1. Law regulates relations between people. Two types of relations may be distinguished: One type comprises the relations between the government and its subjects. This type of legal relation is generally described as "public law". The other type comprises relations between people in their private capacity. This type of legal relation is generally described as "private law".
2. Your diagram must include the following:
    - national law and international law
    - the subdivisions of national law, namely public and private law
    - the subdivisions of public law
    - the subdivisions of private law
3. The diagram must include the four main groups, as well as the most important groups under each main group.

LECTURE TWO

Some characteristics of African customary law

Recommended reading

David R & Brierly JEC *Major legal systems in the world today* (1985) 547–554.

Outcomes

After you have studied this lecture, you should be able to

- discuss the general characteristics of customary law
- explain the role of magico-religious conceptions in customary law
- explain the factors that encourage the observance of customary law

2. MAIN PRINCIPLES

2.1 Introduction

The indigenous legal systems of the indigenous groups of Southern Africa are related to the indigenous legal systems of Africa, especially to the systems found south of the Sahara. In this lecture, we will briefly discuss some characteristics of this "family" of legal systems, and in lecture 3 we will discuss the nature of indigenous legal systems.

According to Allott (131), the indigenous legal systems of Africa do not form a single system. He says that, instead, the legal system of Africa is a "family of systems which share no traceable common parent ... But, more fundamentally, African laws reveal sufficient similarity of procedure, principles, institutions, and techniques for a common account to be given of them."

2.2 The unwritten nature of African customary law

Originally, African customary law was not recorded in written legal sources such as statutes, law reports or textbooks. Court procedures were conducted orally, and the law was also transmitted orally from one generation to the next. This process of legal transmission was furthered by the public participation of adult men in particular in the administration of justice. The result, therefore, was that the community had a broad general knowledge of the law. To a large extent, important legal principles were expressed by means of legal maxims.

The following are examples of such maxims:

- *motho ke motho ka batho* (Sotho); *umuntu ngumuntu ngabantu* (Zulu): a person is a person in relation to other people. This expresses group orientation and humaneness.
- *o mo tshware ka diatla tsÂe pedi* (Northern Sotho): you should hold him/her with both hands. This expresses the marital relationship between husband and wife.
- *kgoši ke kgoši ka batho le batho ke batho ka kgoši (Northern Sotho) – a kgoši* (ruler) is a kgoši through his people (subjects), and the subjects are subjects through their kgoši (indicating that a kgoši should reign through his councils, and by so doing act in accordance with the will of his people).
- *go sa boelwego ka teng, maropeng goa boelwa* (Northern Sotho) – there is no return to the womb; to the ruins is the return (indicating that it can be expected that subjects who left the area will be welcomed back by the tribe).

2.3 The customary nature of African customary law

Most indigenous legal systems in Africa are the result of age-old traditions and customs that, in the course of time, came to be classified as "law". There are also examples of laws promulgated by chiefs. These laws were mainly limited to direct orders and instructions from the ruler.

Formal administration of justice was also known, but the indigenous court's function was limited to the application, and not the creation, of law. Furthermore, a system according to which indigenous courts were bound to their previous decisions or to the decisions of a higher court was unknown in indigenous African law. In other words, the indigenous courts had no system of precedent. ("Precedent" means that a court's decision sets a precedent or example that must be followed in similar cases by courts of the same order or by courts of a lower order.)

2.4 Customary law as an expression of community values

Public participation in the process of adjudication resulted in the law also giving expression to the prevalent values or the general moral behavioural code of the community. As values changed in the course of time, so did the law. Conflict between legal and moral values was therefore unknown.

In a dispute between parties, usually family groups, the emphasis was not on which party was right and which party was wrong. The dispute affected the wider community, which meant that any decision had to take into account future relations between the parties within the community. These relations were extremely important if the wider community was to enjoy harmony. Thus, the administration of justice did not concern legal justice as such, but the reconciliation of people ("human" justice). As a result, the interests of the community were considered so

important that, in the eyes of the law, the individual had no special part to play. The individual did, however, have a role to play within the group, that is within the family on the one hand and within the community on the other.

2.5 The role of magico-religious conceptions in African customary law

Given the danger of distorting the data relating to this aspect of African law (ie by making wild generalisations), we will highlight only two supernatural beliefs, both of which are fairly common throughout the continent of Africa. One is the belief in ancestral spirits, and the other the belief in sorcery. Note that each cultural group has its own particular conceptions of these phenomena, and these conceptions may differ in detail from the general description we give below.

Briefly, the **belief in ancestral spirits** means that after death a person continues to live in a spiritual world more or less in the same way as he or she did on earth. Relations that existed on earth, so it is believed, are continued in the spiritual world. From the spiritual world, the ancestral spirits maintain contact with their living relatives on earth. Ancestral spirits have an interest in the community living on earth and may make their wishes known to the living in various ways. It is believed that the rules for living, and thus also the law, are derived from the ancestors and are protected by the ancestral spirits. The ancestral spirits ensure that these rules are observed. Any disregard of, or deviation from, these rules for living may lead to punishment by the ancestral spirits. Misfortunes such as illness, drought, hail, floods and heat waves that are experienced are often interpreted as forms of supernatural punishment, even today.

The effect of this belief in ancestral spirits on the law is twofold in nature. First, this belief explains the law, and therefore also forms a basis for the law. In other words, the law has a supernatural origin and is therefore seldom questioned. Secondly, it results in the law appearing static and unchangeable: any change may be against the wishes of the ancestral spirits.

The **belief in sorcery** is related to the belief that there are supernatural powers at work in the universe that may be used by a person for his or her own ends. People may use these supernatural powers in two ways: either to the advantage or to the disadvantage of other people or their interests. Cases of sorcery always involve a person, that is, a "sorcerer", who uses these supernatural powers in order to harm others. It is therefore in the interests of the community that the sorcerer be identified and removed from the community. Some form of supernatural process is often implemented to identify the sorcerer. To this end use is often made of extraordinary evidence to point out a sorcerer. Usually, the sorcerer is then killed or removed from the community.

2.6 The observance of rules for living in African customary law

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

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

- The **religious or sacral (holy) element of the law**. (Think of examples of your own religious beliefs and also keep in mind what we said earlier on about the belief in ancestral spirits.)
- **Public opinion**, and particularly sensitivity about what other people may think and say about one's behaviour. (In customary law, the interests of the community are very important.)
- **The knowledge that, if a person is harmed, that person will endeavour to get compensation** or will take measures to protect him- or herself. (African customary law, for instance, allows for the use of all kinds of medicines to protect a person from harm. Don't forget what we said about sorcery earlier on.)
- **The fact that everybody in the community has a broad general knowledge of the law**. This is because there is general participation in the legal process, and the law is handed down, orally, from one generation to the next. In short, everybody has an opportunity to find out how the law operates in that particular society.
- **Fear of punishment**. This refers especially to punishment of supernatural origin, when the conduct in question conflicts with accepted legal principles.
- **The influence of indigenous leaders** in the community. These people are regarded as the living representatives of the ancestors and are responsible for the community's observance of the law, without there necessarily being, or even before there is, any question of a formal legal ruling.

Of particular importance is the fact that the recognised indigenous leaders played an important part in the community's daily life without having to refer to their judicial authority. For instance, because of their hereditary (inherited) position, indigenous leaders played an important part in allocating land for residential and agricultural purposes, in admitting strangers to the communal territory, and

in communicating with the ancestral spirits. The authority emanating (flowing) from these positions alone was enough to ensure observance of the law, without any formal administration of justice being necessary.

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

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

Self-evaluation

(1) Discuss the relationship between African customary law and magico-religious conceptions. (8)

(2) Describe the factors that promote the observance of customary law. (10)

Feedback

Your answer should include some of the following points:

1. African customary law gives expression to the values of the community. In many instances, these values are based on conceptions of the supernatural world. In Africa, the belief in ancestral spirits and the belief in sorcery are very important. Briefly describe these beliefs and indicate how the law was influenced by these beliefs.
2. Name the various factors, briefly indicate what they entail, and specifically indicate how each factor promotes observance of customary law.

LECTURE THREE

The nature of customary law

Recommended reading

Bennett TW *Human rights and African customary law* (1995) 60–65.

Myburgh AC *Papers on indigenous law in Southern Africa* (1985) 2–9.

Outcomes

After having studied this lecture, you should be able to

- differentiate between "specialised law" and "unspecialised law"
- indicate the similarities between these types of legal system
- discuss the differences between these types of legal system

3. MAIN PRINCIPLES

3.1 Introduction

The world's legal systems differ in terms of their degree of specialisation. **What is meant by "specialisation"?** Specialisation, among other things, refers to the distinction of certain functions or a definition of certain activities. According to Myburgh (2), specialisation implies "the separation, differentiation, division, distinction, classification, delimitation, definition or individualisation in respect of time, activity, functions, interests, duties, knowledge and conceptions, including the isolation or abstraction of ideas and concepts".

Let us explain some of these factors by giving you a few examples:

- In specialised legal systems there is a clear **division** between criminal and civil cases. Each of these divisions has its own court procedure (i.e. criminal procedure in a criminal court, and civil procedure in a civil court). In unspecialised legal systems, however, criminal and civil cases are tried in a single hearing, and there is no clear division between case and procedure and between case and court.

  From this example we can see a **distinction** between criminal and civil cases, as well as between courts and procedures. We can also see a form of **classification**: criminal cases, criminal courts and criminal procedures as against civil cases, civil courts and civil procedures. Furthermore, a distinction is drawn between criminal and civil cases.

- If we take **time** as an example, broadly speaking, there is a natural division between day and night. More specifically, however, time may also be divided up into very small units, such as seconds and milliseconds, and even smaller units. The fine differentiation in time is highly specialised when compared with the more unspecialised division of time into night and day. In specialised legal systems, specific moments in time are often important. For instance, in a specialised legal system, it is important that a legal action be instituted before a certain period has elapsed, or else the action expires. In unspecialised legal systems, however, prescription of a legal action is unknown. (In law, the term **"prescription"** means that the action lapses after a certain period of time. Therefore if a person waits too long before instituting an action, it is said that the action is "prescribed".) In specialised legal systems, the precise moment (even in seconds!) is important in order to determine when rights and duties come into existence. The moment of birth, death and marriage are therefore important, as well as the moment when a contract comes into being. However, in customary law, which is an unspecialised legal system, marriage, for instance, is described as a process in which the precise moment of the ceremony is not important. In fact, in unspecialised systems, the precise moment when an event occurred is often not nearly as important as the fact that the event did actually occur.

  Specialisation, or the relative lack of it, also has to do with the size of the population and the extent of cultural homogeneity (uniformity). The larger the population and the larger the cultural diversity (variety) within the population, the greater the possibility of specialisation.

  On the grounds of these abovementioned criteria for specialisation, we can distinguish between **specialised** and **unspecialised** legal systems. We can discern two poles, specialised and unspecialised systems, and it is between these two extremes that we determine whether a legal system is more specialised or less specialised. It should, however, be mentioned that no legal system is totally unspecialised.

  The indigenous legal systems of Africa are, as we have already indicated, "unspecialised" in comparison with Western legal systems. The indigenous legal systems of the Indonesians, Polynesians, Eskimo, early Greeks, Germanic tribes and Anglo-Saxons are further examples of unspecialised legal systems. In this module we will only concentrate on the indigenous legal systems of the indigenous African people of Southern Africa.

  Legal systems are not static – they are in a state of constant change, and some are changing more rapidly than others. Customary law, because of its contact with Western legal systems, is also in a constant process of change and development. These changes and developments lead to greater specialisation. In our opinion, this will not cause the legal systems of Africa to totally lose their indigenous nature, since those who observe customary law still regard their law as meaningful. (Note that, recently,

there has been debate, in the public media, about the "Africanisation" of the general law of the land.)

As we said above, the indigenous legal systems of Southern Africa today are in a process of extensive change and development. In South Africa, Namibia and Botswana recognition of the local legal systems is now subject to a bill of fundamental rights that will, in many respects, change customary law. We will be discussing these changes in this study guide.

A comparison between specialised and unspecialised legal systems leads to certain problems with terminology. A comprehensive legal terminology and divisions of law are the products of specialised legal systems that are largely lacking in unspecialised legal systems.

If, however, we remember that the terminology and classification of phenomena, that is, the division of law, were developed for studying the law and legal phenomena, the specialised system may be applied to the study of any legal system. A degree of adaptation may be needed in order to understand the uniqueness of each system.

3.2 Similarities between specialised and unspecialised legal systems

The following are a few examples of existing similarities:

- The relations governed by law are, broadly speaking, the same for more or less all legal systems. They comprise relations between organs of state and subjects on the one hand, and relations among groups and between individuals on the other.
- The means by which the law is transferred from one generation to the next is basically the same for all legal systems. It starts with education in the context of the family, develops in the wider context of the community and, in specialised legal systems, is supported by formal instruction in schools, colleges and universities.
- In all legal systems, a transgression of the law and legal rules will have certain, specific consequences for the transgressors.

3.3 Differences between specialised and unspecialised legal systems

The differences between specialised and unspecialised legal systems will give you more insight into the nature of customary law than the few examples of similarities we have mentioned above. The following examples of differences in the spheres of public and private law will be discussed below:

- group versus individual orientation
- concrete versus abstract approach
- the religious element

- categorisation
- kinship
- polygyny
- lack of formalities
- time
- governmental functions

3.3.1 Group versus individual orientation

In unspecialised legal systems, emphasis falls strongly on the group rather than on the individual. The individual functions entirely within the context of the group. In specialised legal systems, however, the emphasis falls very strongly on the individual. Indeed, in many instances, an individual may uphold his or her rights even when this is against the interests of the state or the community.

This emphasis (i.e. on the group or the individual) is also reflected in the different systems of education. Among peoples with unspecialised legal systems, the informal and the formal systems of education are directed towards encouraging the individual to adapt to, and become subordinate to, the interests of the group. The individual's acceptance of his or her particular place and rank within the community is impressed upon him or her from early childhood. Everyone knows exactly what his or her role is in the community, and there is not much room for individual freedom. In contrast, communities with specialised legal systems stress the person's individuality and achievements. These characteristics will eventually determine his or her particular adult place and role in the community. It is therefore not surprising that, in this type of legal system, there is a great deal of emphasis on the rights of the individual, and that these rights find expression in a bill of human rights.

The difference between group orientation and individual orientation is also clearly reflected in the law. At this point we will mention a few examples from customary private law and customary public law.

3.3.1.1 Rights

The strong individualisation of rights in modern societies that implies, for example, that the individual, and not the group, is the owner or creditor, is almost absent in original indigenous law.

In indigenous public law, the ruler, for instance, did not rule as an individual, but only as the representative of members of the ruling family, who were the true rulers. Close relatives, such as own brothers and brothers of the father, formed a council of relatives that ruled the tribe. The ruler was also the living link with the family of ancestors that had an interest in the welfare of the community. In specialised legal systems, however, the emphasis is on the powers of the individual official.

3.3.1.2 The law of marriage

In modern law, the interested parties in a marriage are practically restricted to the two spouses. The interests of the community are limited to age requirements, certain prescribed formalities, monogamy, etc. In contrast, in customary law, marriage concerns family groups. Both family groups participate not only in the matter of choice of marriage partners, but also in the preceding negotiations, the agreement, the transfer of marriage goods, and the ceremonies. Indeed, without the participation of both family groups, marriage simply cannot take place. It has to be borne in mind, however, that the parties who acquire rights and duties are, basically, the households of the bride and bridegroom.

3.3.1.3 The law of contract

Although the idea of groups as parties to a contract is not totally unknown in specialised legal systems, most contracts are concluded between individuals. In customary law, the parties are mostly agnatic groups rather than individuals.

3.3.1.4 Criminal law

As far as criminal law was concerned, a whole family group could be punished for the crime of one of its members. In cases of sorcery, for instance, the whole family could be banished or even killed. Fines had to be paid by the group. In cases of corporal punishment, the transgressor was punished as an individual although the entire group would be prosecuted. Also, parents were responsible for the wrongs of their children. In specialised legal systems, however, the wrongdoer is always liable as an individual for his or her actions.

3.3.1.5 Administrative law

In specialised legal systems the administration of justice is usually entrusted to appointed officials who have exclusive power to administer justice. Although trials are generally conducted in public, the role of the public is limited to that of an audience. Unspecialised legal systems also have officials specially charged with administering justice, but the public takes an active part in the proceedings, which always take place in the open. The public freely takes part in the cross-examination and the discussion of the case and forms part of the court procedure. Further, negotiations for extrajudicial (i.e. outside the court) settlement take place between the family groups concerned, and not between individuals.

3.3.2 Concrete versus abstract approaches

Unspecialised legal systems follow a more concrete and visible approach than that of specialised legal systems, which tend to be more abstract in nature. This applies, among other things, to the law of marriage, the law of obligations and to the structure and organisation of constitutional units. The abstract consent and abstract expression of intent as characteristic of Western law is, to a large degree,

replaced by apparent observable, visible acts from which consent becomes obvious in a very concrete way. For example, in concluding a marriage in an unspecialised legal system, the actual visible transfer of both the bride and the marriage goods takes place. In the same visible and concrete manner, the bride is detached from her own group, is transferred to the bridegroom's family group and incorporated into the latter group. In many juristic acts the oral agreement is supplemented by the concrete handing over of some object.

A further example of the concrete nature of unspecialised legal systems is the importance attached to concrete evidence: the fact that a married woman spent a night in a hut with another man is considered evidence of adultery; the hide (of a cow) left in the care of another person is considered evidence that the animal died (Bekker 338). Also, if a man closes the door of his wife's hut in a certain way, he makes it known that he wishes to divorce her.

Furthermore, rights to land are acquired in a visible, perceptible manner by demarcating and indicating an area, and by actually using the land and bringing it under cultivation. This is in sharp contrast with the abstract way of transferring land by means of registration in a deeds office, which is how land is transferred in specialised legal systems.

Another example may be that among indigenous-speaking groups the different legal communities are very concrete in nature, both as far as the conceptions and feelings of the people and their terminology are concerned. Not only is the legal community sometimes typified as a "person", a "cow" or some other animal, but also the agencies (organs) of the legal community are sometimes defined with reference to parts of the body – headmen, for example, are referred to as the "ears and eyes" of the chief.

3.3.3 The religious element

The strong religious element of customary law is based on the belief that the law originates with the ancestors. Disregard of the law is punished by the ancestors, not so much because it is considered "sinful", but rather because it is regarded as disrespect, neglect and contempt of the ancestors. Reconciliation between the community and the ancestors is usually accomplished by slaughtering an animal and by having a communal meal. If important juristic acts are planned, the blessing of the ancestors is obtained by means of special rites. Furthermore, the role of extraordinary evidence, for example in the pointing out or identification of sorcerers, is well known in customary law.

3.3.4 Categorisation

A sharp distinction between categories, institutions and concepts is foreign to customary law. It is often difficult to determine whether authority in a family group with many members concerns private law only, or whether it also contains elements of public law. Furthermore, the distinction between categories of transgressions is

sometimes vague. It is not always possible to distinguish whether a transgression is harmful to the interests of the community, or harmful to the interests of family groups. In legal language, this is referred to as a distinction between crimes and delicts. In customary law, theft of another person's property is mostly merely a delict, while stock theft is always a crime. Furthermore, there is no distinction between civil and criminal cases, and there are also no separate court procedures for these cases.

3.3.5 Kinship

In many respects, kinship plays a dominant role in legal life. Apart from the position of the household as a legal unit, the wider family circle, that is the family group, has extensive authority over its members. Since all the members participate in the authority of the family group, this authority is firm, yet benevolent and protective. In general – but subject to certain exceptions – we could maintain that among many groups who have non-specialised legal systems, the position of women compares unfavourably with that of men.

3.3.6 Polygyny

In unspecialised or less specialised legal systems, marriage is polygynous. In other words, one man can be involved in a marital union with more than one woman at a time.

3.3.7 Lack of formalities

Unspecialised legal systems lack formalities. For example, as far as the betrothal agreement is concerned, there are generally no fixed rules regarding the type of articles or property that must be delivered. Cattle or, lately, money as well, are given with the betrothal gifts.

In unspecialised legal systems administration of justice is relatively informal. Legal rules are applied with great flexibility. This is so because it is the aim of the court to effect reconciliation rather than retribution (punishment), although the element of retribution is not totally absent. There is a conscious effort to solve any dispute by reconciliation rather than by formal action. The emphasis, therefore, is on the people in the context of the community, and not on the strict application of legal rules. It is also said that the rules are there for the sake of the people, and not the people for the sake of the rules.

Among indigenous people, constant consultation is an important factor in legal life. For example, a case may not be taken to court before the parties concerned and their families have discussed the matter. In court there are also court councillors who participate in the proceedings throughout by questioning, by giving information and eventually by giving their view on the matter. The court's decision is often based on the consensus of these opinions.

3.3.8 Time

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

3.3.9 Governmental functions

Specialised legal systems distinguish clearly between the judicial, executive and legislative powers of the state. Unspecialised legal systems do not, as a rule, draw this distinction. The tribal chief is, for instance, not only the law-maker and executive official, but also the judge-in-chief. Other specialised administrative officials are few in number. A standing army and a police force are exceptional.

The possibility of defective administration of justice and misrule under unspecialised legal systems was counterbalanced by the close relation between law and religion, the public nature of the administration of justice and the people's intimate knowledge of the legal system. Whereas in specialised legal systems the judge or magistrate is expected to find the law and to adjudicate (decide) accordingly, it is characteristic of unspecialised legal systems that the views of the people present in court, and not previous decisions, lead to a judgment, because the people in court interpret the public sense of justice.

Self-evaluation

(1) What is meant by "specialisation"? (5)

(2) In unspecialised legal systems, the emphasis is on group rights. How does this emphasis find expression in the education of children? (5)

(3) Discuss indigenous law as unspecialised law, with specific reference to indigenous private law. (25)

(4) Discuss indigenous law as unspecialised law, with specific reference to indigenous public law. (25)

Feedback

Your answer could have included the following:

1. A definition of "specialisation" may be found in the introduction to this lecture. It should be pointed out that specialisation has to do with the size of the community and the extent of cultural uniformity.
2. Young children are taught to accept, and to subject themselves to, the interests of the group. Each individual has a certain position or rank in the community

and is aware of this position from childhood. The rights, duties and interests of the group are always placed first. This emphasis on the group is in contrast with the emphasis on the individual in specialised legal systems.

3. The purpose of a question like this is to test your understanding of unspecialised law by applying it to indigenous private law. When discussing indigenous law as unspecialised law, you will therefore have to substantiate your answer with examples from indigenous private law only. In other words, the question is not about comparing specialised law and unspecialised law. Furthermore, it does not require a general discussion on indigenous private law exclusively.
4. See the approach adopted in 3 above.

LECTURE FOUR

Customary law and the Constitution

Compulsory reading

Bennett TW "The conflict of laws" in *Introduction to legal pluralism in South Africa* (2006) ch 2.

Recommended reading

Bekker JC *Seymour's customary law in Southern Africa* (1989) ch 1.

Bennett TW *Application of customary law in Southern Africa* (1985) 39–49, ch 4-5.

Bennett TW *Human rights and African customary law* (1995) 23–50, 51–65.

Kerr AJ "Customary law, fundamental rights and the Constitution" (1994) 111(4) SALJ577–592.

SA Law Commission The harmonisation of the common law and the indigenous law: conflicts of law (1998) Discussion Paper 76, Project 90.

Outcomes

After having studied this lecture, you should be able to

- discuss the recognition of customary law before 1994
- discuss to what extent customary law is recognised by the Constitution
- discuss the implications of section 30 and 31 of the Constitution with regard to the recognition of customary law
- explain how the conflict between the principles of customary law and fundamental rights should be dealt with

4. MAIN PRINCIPLES

4.1 Introduction

Prior to the enactment of the 1994 Constitution, indigenous law was given uniform recognition with the promulgation of the Black Administration Act 38 of 1927. In terms of this Act, some courts had discretion to apply indigenous law in cases between indigenous African people. This discretion was extended to all courts in 1988.

The most important provision of Act 38 of 1927 for the recognition of indigenous law was section 11. This section was later re-enacted as section 54A of the Magistrates' Courts Act 32 of 1944. Section 54A was repealed by section 1 of the Law of Evidence Amendment Act 45 of 1988. Section 1, which still applies today, and which provides for the judicial notice of law of foreign states and of indigenous law, reads as follows:

(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 lobolo 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 that 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 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 Black law or customs as applied by the Black tribes in the Republic or in territories which formerly formed part of the Republic.

The most important **implications** of section 1 are the following:

- All courts may take judicial notice of indigenous law (subsection 1), although they are not obliged to do so.
- Judicial notice is limited in so far as indigenous law may be ascertained readily and with sufficient certainty. The courts are thus not obliged to apply indigenous law in cases where indigenous law is the obvious system to apply, but cannot be readily ascertained.
- There is no duty on the courts to take judicial notice of indigenous law by, for instance, calling in expert witnesses.
- It is not necessary for judges or magistrates to have any formal or practical knowledge of, or training in, indigenous law.
- In terms of subsection 2, evidence about indigenous law may be submitted to the court by the party himself (or herself). So, in terms of subsection 2 read with subsection 1, the onus is on the party or parties to prove indigenous law in court. This places a financial burden on the litigant, who must obtain the services of an expert witness.

- A further condition is that indigenous law must not be opposed to the principles of public policy or natural justice. A court may, however, not declare that lobolo or other similar customs are opposed to such principles. (The phrase "opposed to the principles of public policy or natural justice" is often used as an equivalent for *contra bonos mores* ["against good morals"].)
- Subsection 3 contains rules for cases involving different systems of tribal law.

The Black Administration Act 38 of 1927 also contained other provisions which recognised indigenous law. Sections 12 and 20, for instance, gave limited recognition to tribal chiefs to try civil and criminal cases. A measure of recognition was also given to indigenous criminal law, law of procedure and law of evidence.

Furthermore, recognition was given to indigenous tribal authorities under the Black Authorities Act 68 of 1951. Although this recognition was limited in nature, it still meant that the indigenous system of authority was amended by statute.

In summary, therefore, before the adoption of the Constitution, indigenous law:

- enjoyed only limited recognition
- could be applied by all courts
- could be amended or repealed by legislation
- could not be opposed to the principles of public policy and natural justice

In terms of the Constitution of the Republic of South Africa, 1996, all existing legislation remains in force until amended or repealed (section 241, read with Schedule 6, section 2). This means, among other things, that the Black Administration Act 38 of 1927 and the Black Authorities Act 68 of 1951 are still in force.

Please note, however, that certain sections of the Black Administration Act 38 of 1927 have been repealed. These sections will be dealt with in study unit 3, lecture 2, of this study guide.

Section 211 the Constitution of the Republic of South Africa, 1996, gives clear and unambiguous recognition to customary law. Recognition is also expressed indirectly in various other provisions of the Constitution. These provisions and their implications are discussed in detail below. At this stage, it is important to remember that the Constitution contains a Bill of Rights (Chapter 2, sections 7–39). All law, including customary law, is subject to this chapter (section 8 (1)).

What follows is a discussion of those provisions of the Constitution that govern the recognition and application of customary law. The provisions concerned are not necessarily discussed in numerical order.

4.2 Section 211

This section reads as follows:

(1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.

(2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.

(3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

The implications of section 211(3) can be summarised as follows:

- All courts must apply and therefore also recognise customary law.
- The recognition and application of customary law are subject to the Bill of Rights.
- The recognition and application of customary law are subject to legislation that specifically deals with this matter. This implies that only legislation aimed at amending customary law is relevant and not legislation in general.
- The courts determine when customary law is applicable. Courts therefore have a discretion to decide whether customary law is applicable in a particular case. This discretion should be exercised in agreement with the general principles of choice of law.

With regard to the general principles of choice of law, we are of the opinion that, where it is not clear whether customary law is applicable, a party can, by appealing to the right of choice of culture (sections 30 and 31), request that customary law be applied. This freedom of choice is not absolute, however: the choice of one person may, for example, not infringe the rights of another. Where rights have been derived from customary law, the courts are obliged to protect those rights, assuming that both parties reasonably expect to be subject to customary law.

Another approach would be to consider who has a duty in terms of the particular legal relationship. At this stage, it should be remembered that a right leads to certain responsibilities, that is, the right of one person creates a responsibility (duty) for another. For instance, where an individual has the right, in terms of sections 30 and 31, to adhere to the culture of his or her own choice, this means that there is a relation between the state and that particular individual; it also means that the state is obliged to make it possible for that individual to adhere to the culture of his or her choice. In this example of the individual and the state, we are dealing with the vertical application of a fundamental right, namely the right to culture. This right to culture does not impose any duties on the individual, however; it merely makes that individual entitled to that right.

If an individual exercises his or her right to culture, however, other individuals are obliged to respect this. In this example, we are dealing with the horizontal application of fundamental rights between individuals (or groups of individuals). In this instance the horizontal application of the right to culture therefore also creates responsibilities for individuals.

In the previous section, we mentioned that section 1 of the Law of Evidence Amendment Act 45 of 1988 provides that courts may take judicial notice of indigenous law, provided that indigenous law is not in conflict with the principles of "public policy and natural justice". This condition is aimed primarily at preventing the enforcement of those rules of indigenous law that conflict with Western moral standards.

The principles of public policy and natural justice are not synonymous with the fundamental rights contained in the Bill of Rights. Nor should these principles be used to avoid the serious questions about the constitutional validity of customary law. Section 211(3) is explicit in that the application of customary law is subject to the Bill of Rights, implying that these principles are no longer necessary. Bennett (*Human rights* 60) is also of the opinion that this condition must be seen as part of the colonial past, and regarded as being of historical significance only.

4.3 Sections 30 and 31

Sections 30 and 31 form the basis of a new approach to customary law. Section 30 provides as follows:

> Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.

The recognition given to customary law in section 30 is derived from the right to participate in the culture of one's own choice. The concept "culture" does not have a single or unambiguous meaning, however. It may be interpreted as including systems of personal law (i.e. rights regarding the person, anywhere in the world) that are associated with specific cultures. It may, however, also be interpreted as including only the non-legal aspects of social life.

Since other systems of personal law are given express recognition in the Constitution, the concept of "culture" mentioned in section 30 may well be interpreted as including customary law. Section 15(3)(a), for instance, provides as follows:

> This section does not prevent legislation recognising
>
> (i) marriages concluded under any tradition, or a system of religious, personal or family law; or
>
> (ii) systems of personal and family law under any tradition or adhered to by persons professing a particular religion.

This section particularly applies to Hindu and Islamic law, specifically the polygynous nature of marriage under these laws. "Polygyny" refers to a system of marriage in which a man may be married to more than one wife at the same time. (Note the difference between "polygyny" and "polyandry". "Polyandry" refers to a system of marriage in which a woman may be married to more than one husband at the same time. Polygyny and polyandry are forms of polygamy.) Please note that section 15(3)(a) merely provides for legislation to be enacted that recognises marriages concluded under any tradition, or a system of religious, personal or family law. In other words, section 15(3)(a) does not have the effect of granting recognition to such marriages. Consequently, the only type of polygynous marriage recognised in South Africa (i.e. by specific legislation and at the time of writing this study guide), is the customary marriage entered into by the indigenous African peoples of South Africa.

Section 39(1) of the Constitution provides that:

> (1) When interpreting the Bill of Rights, a court, tribunal or forum:
>
> (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
>
> (b) must consider international law; and
>
> (c) may consider foreign law.

Based on this section, read with section 30, it may be argued that the state is obliged to apply and recognise customary law. Section 30, however, confers no express right to insist that customary law be applied. It simply provides that individuals have the right to take part in the culture of their own choice. Literally, this means that individuals may demand access to a cultural group and may take part in the activities of that group. A right to apply customary law would, however, impose a duty on the state to maintain African culture.

Section 30 is given further force by section 31, which provides as follows:

> (1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community–
>
> (a) to enjoy their culture, practise their religion and use their language; and
>
> (b) to form, join and maintain cultural, religious and linguistic association and other organs of civil society.

In terms of section 31, the state has two duties, namely:

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

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

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

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

4.4 Customary law and the Bill of Rights

Customary law has been accepted and recognised as part of the South African legal system. The other "parts" of the South African legal system are statute law (legislation), common law and case law (court decisions). Customary law, like common law, is subject to the Bill of Rights.

Customary law must therefore be interpreted in the light of these so-called fundamental rights, and particularly in the light of the equality clause as contained in section 9. Section 9 (3) provides that:

> The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

This limitation on discrimination implies that any legal relationship regulated by customary law is subject to the Bill of Rights. Section 8(2) provides as follows:

> A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

By recognising customary law on the one hand and prohibiting discrimination on the other, the Constitution gave rise to a conflict between two opposing principles: namely the right of the individual to equal treatment and the right of the group to adhere to the culture of its choice.

Conflict between customary law and the Bill of Rights is unavoidable. The principle of male primogeniture (whereby the eldest son of the family head is the heir upon the death of the family head) is inherent in African culture and customary law, but obviously discriminates against women. Further, the Bill of Rights emphasises individual rights, whereas in customary law the emphasis is on the group, the community, and the individual in the context of the community; again. Another difference is that the Bill of Rights emphasises rights, as its name implies, whereas customary law emphasises duties.

The question is: how should this conflict be dealt with? The Constitution does not contain a clear answer to this question. There are, however, indications that fundamental rights have priority over customary law. These indications are the following:

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

If it is accepted that the application of customary law is a constitutional right, and not merely a freedom, which means that customary law is equal in status to any of the other fundamental rights. In the event of conflict, the fundamental rights that are in conflict must be balanced against one another. The fundamental rights mentioned in the Constitution are not arranged in a hierarchical order, that is, from more important to less important. The promotion and protection of one category of fundamental rights does not exempt the authority (state) from promoting and protecting another category of rights and may not lead to oppression of, or discrimination against, certain categories of people (e.g. women).

It appears that conflicts between customary law and the bill of fundamental rights cannot be solved through the Constitution alone: other means outside the Constitution should also be looked at. One could, for instance, consider the social implications of enforcing a fundamental right upon a certain cultural group or examining the origin of certain legal conflicts to decide which matters are more

important and more urgent than others. In this way suitable techniques for solving the problem could be identified.

4.5 Judicial revision of customary law

It is the responsibility of the Constitutional Court and the High Courts to resolve any conflict between customary law and fundamental rights. The Constitutional Court may, in the last instance, decide on cases regarding the interpretation, protection and enforcement of the Constitution. The Constitutional Court has specific authority to remedy any alleged or threatening violation of fundamental rights and to adjudicate on the constitutional validity of any Act (legislation).

The High Courts also have jurisdiction over any alleged or threatening violation of fundamental rights. They may also investigate the validity of any statute, except Acts of the national Parliament (section 169). The other courts, such as magistrates' courts and courts of traditional leaders, are obliged to refer all constitutional matters to the High Courts.

Any party to an action may query the constitutional validity of any rule of customary law on the grounds of its harmful effect on that particular party. In terms of section 38, this right may also be enforced by:

- anyone acting in their own interest
- anyone acting on behalf of another person who cannot act in their own name
- anyone acting as a member of, or in the interest of, a group or class of persons
- anyone acting in the public interest
- an association acting in the interest of its members.

In any specific case, a rule is presumed to be constitutionally valid. This means that the validity of customary law is presumed until decided otherwise by a competent court. Voidness (i.e. a law not being legally binding) must be proven on a preponderance of probabilities. Everything which has been done in terms of a right is valid until that right is later declared invalid. Rights and duties arising from a customary marriage, therefore, are valid, even if they are later found to be in conflict with fundamental rights.

4.6 The amendment of customary law by statute

Parliament has a duty to further fundamental rights. This duty may lead to the amendment of customary law by statute. The Human Rights Commission (section 184) helps Parliament to fulfil this duty.

Section 187 provides for a Commission for Gender Equality. This Commission may advise Parliament on, for example, legislation affecting the status of women.

Legislation may originate from two sources: the national Parliament and the provincial legislature. Provincial legislatures have limited powers. This is because provincial legislation is subject to parliamentary legislation, and because provincial legislators have jurisdiction only in certain cases. Provincial legislatures, however, do have concurrent jurisdiction with the national Parliament in matters that concern customary law (Schedule 4, Part A).

The fact that provincial legislation may be applied only in that particular province (section 104 (1)) could lead to a conflict between the principles of territoriality and personal law. This may be explained as follows: a person living in KwaZulu-Natal is subject to the laws of that province. If that person moves to another province, he or she will be subject to the laws of the new province, even if those laws conflict with his or her personal rights.

Self-evaluation

(1) Discuss the implications of section 1 of the Law of Evidence Amendment Act 45 of 1988 on the recognition of indigenous law in South Africa. (15)

(2) What is the main point of conflict between customary law and its recognition and the fundamental rights included in the Constitution? Is there a clear solution to this problem? (25)

(3) Does the Constitution provide solutions to this conflict? (25)

(4) Discuss the implications of section 211 for the recognition of customary law. (15)

(5) Discuss the relevance of public policy and natural justice in the application of customary law. (5)

(6) Discuss the implications of sections 30 and 31 of the Constitution for the recognition of customary law. (15)

(7) List and briefly discuss the provisions in the Constitution that Indicate which of the two conflicting principles has priority over the other. (12)

Feedback

Your answer should include some of the following points:

1. The implications of section 1 were discussed in detail in this lecture. In your answer, you should have emphasised the fact that all courts may take judicial notice of indigenous law.

2. The main point of conflict concerns the right of the individual to equal treatment, as opposed to the right of the group to adhere to the culture of its choice. Your answer should include a discussion of the principles concerned, and why these principles conflict with each other. The Constitution does not give a clear answer to the question of how to solve this problem. In your answer, you should also discuss the different sections of the Constitution that make it clear that fundamental rights may well have priority over customary law. You should also discuss the implications of sections 30 and 31.
3. The Constitution does not contain a clear answer to this question. There are, however, indications that fundamental rights have priority over customary law.
4. Discuss this principle, and its implications. Indicate the contradictions contained in this principle, and discuss how these contradictions may be resolved.
5. To answer this question, you need to discuss what is meant by these two principles, when these principles were applied, and whether, in the light of the Constitution, they are still relevant today.
6. Sections 30 and 31 provide for a new approach to customary law. Indicate what this approach is, and state the implications of this approach. Explain the difference between a "constitutional freedom" and a "constitutional right".
7. See page 33 of the study guide.

STUDY UNIT 2

CUSTOMARY LAW OF PERSONS, CUSTOMARY FAMILY LAW, AND MARRIAGE LAW

OVERVIEW

This study unit consists of six lectures. Lecture 1 deals with the concepts of "legal subject" and "status" in customary law. The following are some of the questions that must be answered:

- Who may be the bearer of rights and duties in customary law?
- What is understood by "status" in customary law?
- What factors can influence status in customary law and what influence do these factors have on status?

Customary family law is undoubtedly the most important category of customary private law. Customary private law concerns the relationship between husband and wife within the marriage, and the relationship between parents and children. The polygynous nature of marriage among the indigenous African people has a profound influence on customary family law. Note that there are various types of marital unions in African customary law. Each type of union has its own particular characteristics and consequences.

In this study unit, we shall confine our discussion to the traditional indigenous marriage, the customary union and the customary marriage. We will pay particular attention to the nature and characteristics of these marital unions, the legal requirements for these unions, and their consequences. We will also discuss how these marital unions come into being and how they are nullified or dissolved.

The civil marriage and its effect on the customary union and the customary marriage, as well as on the relationship between parents and children (guardianship) are covered in an advanced module.

In this study unit, we will therefore discuss the traditional indigenous marriage and its recognition in modern indigenous law. In other words, the customary marriage is the modern version of the traditional indigenous marriage. In most rural areas, marriage is concluded with the traditional indigenous marriage in mind. In the event of a dispute in respect of such a union, the indigenous courts usually adjudicate in terms of the rules and concepts of traditional marriage. If the dispute is not settled in these courts and has to be adjudicated by the High Court or the divorce court, the rules that are applied are those pertaining to the customary marriage.

You should keep in mind that, prior to 1999, an indigenous marriage was not formally recognised as a marriage, so we have to consider the principles of the traditional indigenous marriage and the customary union. On 15 November 2000, the Recognition of Customary Marriages Act 120 of 1998 came into operation. The Act now regulates all marriages entered into before and after 15 November 2000. This situation may well lead to specific problems, but we will not be discussing these problems here. We simply want you to be aware of the fact that these problems do occur. One such problem is the case where a man enters into a customary marriage with a woman before Act 120 of 1998 came into operation, and after this Act came into operation, he enters into a customary marriage with another woman. The legal requirements for and consequences of these two types of marital union differ and this can lead to various difficulties. By now you should understand why it is important for you to know something about traditional indigenous marriages and customary unions, since these were the only types of marital union that indigenous African people could enter into prior to the enactment of the Recognition of Customary Marriages Act 120 of 1998.

Outcomes

After having studied all six lectures, you should to be able to

- distinguish between the important concepts and the principles of the indigenous law of persons
- the legal significance of these concepts and principles
- distinguish between the traditional indigenous marriage, the customary union and the customary marriage
- discuss the legal requirements for the different types of marital unions
- state and explain the consequences of these marital unions
- discuss the ways in which these marital unions can be dissolved
- describe the effect of the age of majority on relationships within the household
- show that you are familiar with the legal concepts found in customary family law
- apply these concepts and principles to hypothetical problems

Structure of the study unit

LECTURE 1:	Introduction to customary law of persons
LECTURE 2:	The nature and characteristics of customary family law and the law of marriage
LECTURE 3:	The betrothal in customary law
LECTURE 4:	The legal requirements for customary marriages
LECTURE 5:	The consequences of customary marriages
LECTURE 6:	The dissolution of customary marriages

LECTURE ONE

Introduction to customary law of persons

Compulsory reading

Bekker JC, Rautenbech C & Goolam N (eds) *Introduction to legal pluralism in South Africa* (2010) LexisNexis Butterworths

Recommended reading

Olivier NJJ, Olivier NJJ (jr) & Olivier WH *Die privaatreg van die Suid-Afrikaanse Bantoetaal-sprekendes* (1989) 1–8

Outcomes

After having studied this lecture, you should be able to

- identify and explain the factors that may influence a person's status in African customary law
- distinguish between status and rank
- explain how house rank influences a person's status in customary law

1.1 Introduction

As you know, the agnatic group is composed of a group of related houses. The agnatic group is, therefore, also the household. In most cases, these houses consist of a man and his wives. In a few cases, a man's married son with his family or families may also form part of the household. In this module, we will be focusing on those families that consist of a man and his wives.

In a certain sense, the composition of each household is unique. Among the majority of indigenous African people, the household consists of at least the following persons:

- the father, who is the family head, or, if he is deceased, his successor
- the wife or wives of the former
- usually the natural and adopted children of the father and his wife (wives)

The household may also include the following persons:

- natural and adopted married children of the father with their wives and children; and
- any other married or unmarried dependent relatives, or even unrelated persons, possibly including the following persons:
  - unmarried brothers and sisters of the husband and his wife (wives)
  - any parent of the husband and his wife (wives)
  - grandchildren of the husband and his wife (wives)
  - unrelated persons, such as servants among some peoples, or strangers who live with the group under the protection of the family head

The family unit in customary law is the household (or "kraal" as it is most commonly referred to in the law reports). The family group of each wife forms a "house". Whenever a man has more than one wife there are two or more "houses" in one "household" (or "kraal"). Since the concepts of both "house" and "household" refer primarily to groups of persons it makes no difference whether the geographical place of residence is rural or urban. The rule concerning the liability of the head of the household may even be applied (if the court decides to apply customary law) if the husband and wife are united in a South African common law marriage.

The term "family" or "house" refers to each individual married couple with their unmarried children. The polygynous marriage allows a man to be the head of several houses or families at the same time. The term "family" is generally used in the sense of the nuclear or core family, but sometimes has a much wider meaning. The term "family law" has a specialised meaning, which will be discussed in the next lecture.

Broadly speaking, the law of persons may be described as that division of private law which determines the following:

- Who and what are legal subjects?
- What classes of legal subjects can be identified?
- What is the legal status of each class of legal subject?
- When and how do legal subjects originate and lapse?

1.2 The legal subject in indigenous law

For the purposes of this module, a "legal subject" may be described as any human being who can be the bearer of rights and duties.

Original indigenous law recognised only a natural person as opposed to a juristic person (a juristic person can be an entity such as a company, with its own legal personality) as a legal subject.

(Original indigenous law refers to the customary laws of the indigenous African people prior to the enactment of the Black Administration Act 38 of 1927). The individual human being is the bearer of rights, powers and duties. However, the

individual has always shared his or her rights, powers and duties with his or her agnatic group. An individual's share in the rights of the agnatic group depended on his or her status within the group. The agnatic group consists of members of a household who live together and are related by marriage or kinship in the male line of descent.

Juristic persons were unknown in original indigenous law. The term "juristic person" refers to an association of persons which, according to the law, is regarded as a legal subject. Despite the individual persons forming the association, each constituting a legal subject, the association itself is regarded as an independent legal subject and is called a "juristic person". Although the agnatic group is also an association of people, there was no question of two sets of legal powers. In original indigenous law, the agnatic group could not therefore be classified as a juristic person, since individual members did not have rights, powers and duties that were independent from the agnatic group. The converse was also true: the agnatic group did not have rights, powers and duties that were independent from the members of the group.

An individual's status within the agnatic group was influenced by factors such as age, sex, marital status, legitimacy or illegitimacy of birth, adoption, disinheritance, family and house rank and mental state. The head of the agnatic group held the highest rank within the group. In original indigenous law, only men could hold this position. By virtue of his status, the head had certain powers distinguishing him in a significant way from other members of the group. However, he did not form a separate entity from the group. Sometimes he is portrayed as the representative of the group, but it is more accurate to say that he was their spokesman. His powers cannot, therefore, be compared with patria potestas in Roman law. (Patria potestas refers to the authority of the father. In Roman law, this authority included authority over the life and death of members of the family. In customary law, the head of the agnatic group does not have this authority.)

In modern indigenous law, the emphasis is on the individual person as a human being. (Modern indigenous law refers to the customary laws of the indigenous African people after the enactment of the Black Administration Act 38 of 1927.) The individual is the bearer of rights, powers and duties. Within the context of the agnatic group, the individual is therefore independent of the other members. The head of the group is regarded as the person in whom the group's rights are vested to the exclusion of other members. The head is therefore regarded as the owner of the group's assets, for example, and is the person who has the power to dispose of them; his successor is regarded as the heir to the group's property. However, the individual should not be separated from the group. An interpretation that sees the individual as separate from the group may result in injustice. In other words, emphasising one individual within the group means, in effect, undermining the rights and privileges of the other members of the group.

1.3 Status

"Status" is linked to a person's legal position or standing, and it is this status that determines a person's powers. In this connection, reference is sometimes made to a person's competencies, that is, powers derived directly from objective law. Usually, legal capacity, contractual capacity and capacity to appear in court are considered the most important competencies. Before we proceed, we need to define these terms:

- "Legal capacity" refers to the capacity to have rights and duties.
- "Contractual capacity" is the capacity to enter into legal acts, such as entering into a sales contract.
- "Capacity to appear in court" is the capacity to uphold rights and duties in legal proceedings.

Status may either give or deny the individual certain powers. For example, the family head must uphold his authority within the family, juveniles may not marry, in many communities, unmarried women may not have sexual intercourse and the feeble-minded may not succeed to positions of authority.

In original indigenous law, the individual shared his or her rights with the other members of the agnatic group. The individual's share in the rights depended on his or her status within the group. This status, again, was influenced by factors such as family rank, house rank, age, sex and marital status. Note that this list is not complete and these are only examples.

The principle of shared rights meant that there was no question of absolute majority or minority. A person could thus be a major although, in terms of age, he or she was a minor. On the other hand, a person could be a minor although, in terms of age, he or she had attained majority. In original indigenous law, the idea of a fixed age at which a person attained majority was unknown. The higher a person's status, the more powers he or she obtained. However, a person never reached a position where, as an individual, he or she could act independently from the agnatic group.

In modern indigenous law, a person's status is influenced strongly by the specific age (18) at which majority is attained, as prescribed in section 17 of the Children's Act 38 of 2005. The implications of this will be elaborated on below.

In customary law, a distinction must be drawn between status and rank. Status determines the powers derived from objective law. Rank is just one factor which may influence a person's status. Rank plays a significant role in customary law. Thus, the wives of a polygynist (a man with two or more wives) each have a particular rank, as does each of their houses. Sometimes, this rank is also affected by the specific division within the household. The members of the agnatic group also have a particular rank, according to their order of seniority within the group.

In what follows, we will discuss only age, sex and rank as factors influencing a person's status in customary law. Factors such as marital status, legitimacy or illegitimacy of birth, adoption and disinheritance fall under family law and the law of succession and will be dealt with in that context.

1.3.1 Age

In original indigenous law, minority and majority were unknown, as we have said. Age was not without legal significance, however. Thus, a child was not considered accountable until he or she had reached the age of six years. A person could not marry until he or she had reached puberty. A boy who was considered mentally immature was not qualified to succeed to a position of status and was temporarily replaced by a deputy until he was mentally mature.

On the other hand, no person was altogether a minor. Even a newborn baby shared in the rights, powers and duties of its agnatic group. Age as such did not have a specific legal significance. Greater importance was attached to physical development. Puberty was strongly emphasised by some groups by means of specific ceremonies, generally known as "initiation ceremonies". A person was considered marriageable once he or she had undergone these initiation ceremonies. Such a person was then generally considered an adult. Among some groups, initiation ceremonies had nothing to do with puberty but nevertheless as soon as a person had undergone the initiation ceremony, he or she was considered an adult.

In modern indigenous law, this position was amended drastically in that majority is now attained at a fixed age. With effect from 8 June 2006, section 17 of the Children's Act 38 of 2005 prescribes that all male and female persons reach the age of majority once they turn 18.

Section 27 of the Code of Zulu Law (Proclamation R195 of 1967) was amended and brought into line with the KwaZulu Act on the Code of Zulu Law. At present, section 14 of the Natal Code of Zulu Law (Proclamation R151 of 1987) stipulates that all female black persons aged 21 years and older are of age. Subject to the provisions of the Age of Majority Act 1972 (Act 57 of 1972) as amended by section 17 of the Children's Act 38 of 2005, a citizen becomes a major in law once he or she attains the age of eighteen and for the purposes of this subsection age may, in the absence of proof, be determined and recorded by the commissioner or magistrate, whose decision is final. Further on in this study guide, we refer to these two codes, which are still valid, as the "Codes of Zulu Law".

The effect of majority is that individual members of the agnatic group become majors, that is, they can obtain rights, powers and duties independent of those of the agnatic group.

1.3.2 Sex

In original indigenous law, sex had a significant influence on a person's status. Only male persons could succeed to positions of status. A woman could therefore never become a family head, nor could she succeed to general or house property.

Women were not without status, however, although their powers were limited. For example, a woman had a reasonable degree of freedom as far as the everyday use of house property was concerned. A man could not deal arbitrarily with house property: he had to consult his wife in the house concerned. However, this consultation was not legally enforceable. That said, a woman could call upon the wider family group if her husband dealt irresponsibly with house property.

In modern indigenous law, the position of the female is influenced by majority. This means that, today, the legal position of unmarried women compares favourably with that of males. However, under the old customary law, it was not possible for females to succeed to the position of family head. There are some indigenous African groups that do allow women to succeed to the position of family head. In such cases, the position of female family head is de facto (in fact) the same as that of the family head in customary law. However, in modern indigenous law the position with regard to females being able to succeed to the position of family head is different. The South African Constitution provides in section 9 that no person may be discriminated against on any of the grounds listed in that section, including gender.

Moreover, in the original indigenous laws of succession and inheritance, females occupied an inferior position compared with males. Today, the legal position affecting a woman's right to inherit property from the estate of a deceased relative has changed drastically.

> For more information on this, please see study unit 3, lecture 2, of this study guide.

The position regarding the succession of females to the position of family head remains unchanged, however, although it is in dire need of reconsideration, especially in the light of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. Section 8(d) of the aforementioned Act provides that:

> Subject to section 6, no person may unfairly discriminate against any person on the ground of gender, including any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and well-being of the girl child

(If you are interested in knowing the legal implications of this section, please see Albertyn C, Goldblatt B & Roederer C Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (2001) 60–65.)

In terms of section 9(3) of the Constitution of the Republic of South Africa, 1996, the state may not discriminate unfairly against a person on the grounds of sex, among other factors. This section is given further emphasis by section 6 of Act 4 of 2000, which provides that "neither the State nor any person may unfairly discriminate against any person". The commencement date for this section was 1 September 2000. It can be expected that these sections will have a far-reaching influence on the position of females in customary law.

1.3.3 Rank

We distinguish as follows between "family rank" and "house rank":

- "Family rank" refers to the hierarchy of family members within the family group.
- "House rank" refers to the hierarchy of the various houses that make up a household.

1.3.3.1 Family rank

The elementary or nuclear family consists of a husband and wife and their children. A family therefore consists of persons who differ in sex and age. Among the indigenous African peoples of South Africa, males occupied a higher rank than females. Females were therefore always under the authority of males, and only males could become family heads.

Within the context of a person's sex, age and other factors played a role. Within the context of the family, it can be said that a person's rank was determined by the principle of primogeniture. The eldest son held a higher rank than his younger brothers, and younger brothers therefore ranked below their older brothers. The same principle applied to sisters.

The position of twins is of significance. The question regarding twin brothers is: Who is regarded as the eldest? What is their rank (independently)? In this introductory module we shall simply note that there are various conceptions and customs among the indigenous African groups. Among some groups, the first born of twins is regarded as the elder, while others regard the last born as the oldest. (Should you wish to read more about this, look up the article by Thomas V McClendon "A dangerous doctrine: twins, ethnography and the Natal Code" (1997) 39 Journal of Legal Pluralism 121–140.)

Within the broader family group, however, the rank of children was qualified by their father's rank within his family of origin. If the father was the eldest brother, his children held a higher rank than any of the children of his brothers.

For the sake of simplicity, only male persons have been indicated in the diagram. A, B and C are three brothers, A being the eldest and C the youngest. The brothers are married, and they each have two sons. The sons of A, namely D and E, hold a higher rank than those of B and C, regardless of whether the sons of B and C are older or younger than those of A. For example, if F and H are older than D, D still has a higher (genealogical) rank than F and H on the grounds that the rank of his father, A, is higher than that of B and C.

> Make sure that you understand this principle. The rules of succession are based on these principles of ranking.

1.3.3.2 House rank

As you know, indigenous African people practise polygamy. "Polygamy" means a marriage with more than one spouse. In anthropology, we distinguish

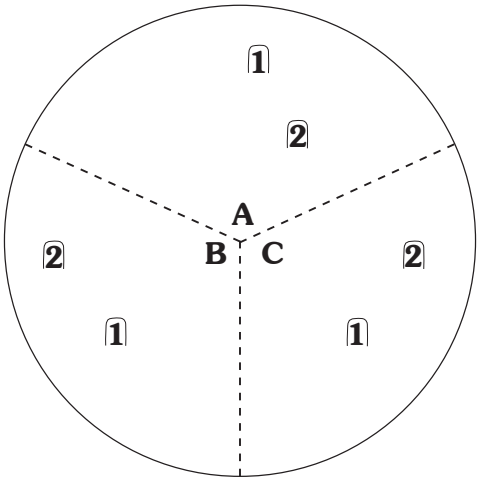
between two forms of polygamy, namely polygyny and polyandry. "Polygyny" refers to the form of marriage in which a man is married to more than one woman at the same time. "Polyandry" refers to a form of marriage in which a woman is married to more than one man at the same time. Today, polygyny is still a common practice among African people. Polyandry is foreign to indigenous African people and, in fact, is not common anywhere in the world.

One consequence of a polygynous marriage is that each marriage establishes a separate family, the husband being the common spouse to all the families. This unit, that is, where all the families are headed by one husband, is known as a "household". In the South African context, this unit of families is generally referred to as an "agnatic group" and the head is described as the "family head". A number of related households or agnatic groups form a family group where, once again, the most senior male exercises powers according to his rank. The members of the family group often came together as a family council in order to discuss matters of common interest, such as entering into a marriage or settling disputes between members.

The various households within this unit each hold a particular rank. The basis on which this ranking rests differs among various indigenous African peoples. In some cases, the rank of each house is determined by when it came into being, that is, according to when the man married the women. The wife whom he married first is known as the "main wife". The rank of the children within such a household is determined by the rank of their mother's house. The children's rank in such a household is thus dependent on their mother's house rank. The children of the main wife hold the highest rank within the household, irrespective of their actual age.

In some cases, the main wife must come from a particular descent group, and might not be the wife whom the man married first. In these cases, the order of marriage is not decisive for the hierarchy. This means that the children's rank within the agnatic group is not determined by birth, but by their mother's rank.

Sometimes the ranking system is quite complex; this is particularly true of the Nguni-speaking people. Among this group the household is divided into sections. Each section has a specific rank vis-à-vis the other sections. Within each section, each house also has a specific rank. This principle is illustrated by the following diagram:



The household comprises three sections, namely A, B and C. Within each section, there are two houses in a particular hierarchy. These are indicated as "1" and "2". Among some people, all the houses in section A have a higher rank than those in sections B and C. The houses in section B have a higher rank than those in section C. In order to determine the rank of a particular person, therefore, one must take into account his or her position within a specific section and within a specific house.

The above example is based largely on a hypothetical case, and has been greatly simplified. You need to be aware of the principles underlying the hierarchy. When required to apply these principles, you must first establish what the principles are in each specific case and then apply them. This part of the law will be discussed in greater detail in an advanced module.

Self-evaluation

(1) In customary law, who can be the bearer of rights? (2)

(2) Distinguish between "status" and "rank" in customary law. (5)

(3) How is status in customary law influenced by

- age? (6)
- sex? (3)
- family rank? (4)
- house rank? (6)

(4) Study the following hypothetical case and answer the questions that follow.

Consider all possibilities and justify your answers in full.

> In 1960, Thabo entered into a valid customary union with Zandi. Twin boys, namely Jabu and Zazu were born of their marriage in 1969. In 1964, Thabo decided to enter into a customary marriage with Fikile. Fikile gave birth to a son named Senzo and a daughter named Lungile. In 1985 Thabo died. In the same year (1985), Zandi's house (from now on referred to as house Z) concluded an agreement with Fikile's house (from now on referred to as house F), in terms of which house Z had to provide five head of cattle to house F, which house F required as lobolo for Senzo (21). House F appointed Lungile (19) as the source from which the debt was to be repaid. House Z delivered the five head of cattle, but when house F received lobolo for Lungile in 1987, house F refused to transfer the lobolo to house Z because the debt had prescribed. As a result, house Z decided to take house F to court for the outstanding debt.

Discuss the legality of the following:

(a) The legal position of twins with regard to succession as head of the family. (5)

(b) The agreement between house Z and house F and the defence of house F that the claim had prescribed. (4)

(c) The decision of house Z to take house F to court. (4)

Feedback

Your answer could have included some of the following points:

1. Your answer regarding twin brothers should emphasise which twin is regarded the eldest. What is their rank (independently)? In this introductory module we simply note that there are various conceptions and customs among the various indigenous African groups. Among some groups, the first born of twins is regarded as the elder, while others regard the last born as the oldest. Only natural persons within the context of the group can be the bearers of rights. "Status" refers to a person's legal position in general, while "rank" is only one factor influencing status.

   In customary law, age influences a person's accountability, that is, whether a person has the ability to perform legal acts. In original indigenous law, a person was neither a minor nor a major, because rights were shared among the group. Today, however, legislation entails that certain people are majors, and these majors can acquire rights and duties independently of the agnatic group.

   In customary law, gender is important. Certain status positions are restricted to males. Nevertheless women did have a certain status.

   Family rank relates to a person's legal position or status within the household. A person's rank within the family was determined by a combination of factors, such as age and gender. The most important factor, however, is the rank of the father and the mother within the broader family group.

   House rank relates to a person's legal position within a nuclear family. Here, order of birth and gender are important factors influencing a person's status.

2. Your answer should state that the agreement between the houses is legal. The transfer of property between houses must be reasonable and for a just cause. Such transfer cannot take place arbitrarily. The family head must consult the members of the house concerned. The claim that the debt has prescribed is invalid. There is no such thing as prescription in customary law.

3. House Z cannot take house F to court. This is because the family head, namely Thabo, cannot simultaneously represent one house as plaintiff and the other house as defendant. The principle involved here is that a household cannot be divided against itself. In modern indigenous law, however, the

woman belonging to the house with the claim can initiate the claim against the family head or the other house

LECTURE TWO

The nature and characteristics of customary family law and the law of marriage

Compulsory reading

Gumede (born Shange) v President of the Republic of South Africa and Others (CCT 50/08) [2008] ZACC 23; 2009 (3) BCLR 243 (CC); 2009 (3) SA 152 (CC) (8 December 2008)

Bekker JC, Rautenbech C & Goolam N (eds) *Introduction to legal pluralism in South Africa (2010)* LexisNexis Butterworths

Recommended reading

Bekker JC *Seymour's customary law in Southern Africa* (1989) 96–105

Bennett TW *Human rights and African customary law* (1995) chs 6–8

Myburgh AC *Papers on indigenous law in Southern Africa* (1985) 83–89, 111–112

Olivier NJJ, Olivier NJJ (jr) & Olivier WH *Die privaatreg van die Suid-Afrikaanse Bantoetaal- sprekendes* (1989) 9–40

Outcomes

After having studied this study unit, you should be able to

- explain the scope and nature of customary family law
- discuss the consequences of polygynous marriage for customary family law
- distinguish between the traditional indigenous marriage, the customary union and the customary marriage
- discuss the characteristics of the traditional indigenous marriage, the customary union and the customary marriage

2.1 The scope and nature of customary family law

Family law is that part of private law which regulates legal relationships within the family. The family comes into being through marriage. The law concerning marriage or the law of marriage is, therefore, an important part of family law.

The main principles of customary law hold for all African ethnic groups of South Africa. However in numerous instances there are so many variations that, technically, there are as many systems of customary law as there are ethnic groups. Kerr "The Constitution and Customary law" (2009) 126 SALJ 39 42–43.

Marriage has specific consequences. These consequences concern relationships between people and relationships regarding property. Marriage, by its very nature, creates a relationship between at least a husband and a wife, as well as between parents and children (guardianship). The consequences concerning family property are known as patrimonial consequences. Patrimonial consequences refer to the legal consequences of the marriage for the married couple's property.

Customary family law is slightly more complicated than indicated in the general outline above. The principles referred to above also apply to customary law. Marriage in customary law may be either monogamous or polygamous. This means a man could either have one wife or have valid marriages with more than one woman at the same time.

What effect does the polygynous marriage have on family law? On the basis of your present knowledge of customary law, can you mention a few relevant points in response to this question? First write down the points you can think of, and then compare them with the following:

The polygynous marriage influences customary family law in the following ways:

- Potentially, there are two families or more, and this family unit is known as the agnatic group.
- The legal relations within the family also apply to each family within the household.
- The various families are bound to one another in particular relationships of rank by means of the husband, who is the common spouse of each. This means that every component family has a particular rank which differs from that of the other families.
- Multiple families require a complicated system of property relations. One of the results of this is that a distinction is made between family or house property and general property.

Do you understand that the legal relations between families within the household are not simply a duplication of the legal relations within the family? A new set of relationships comes into being, regulating the legal position between the component houses.

> The implications of the ranking structure on the status of persons were pointed out in lecture 1 of this study unit. Read it again to refresh your memory.

We need to mention the effect that this particular combination of families may have on other divisions of private law. We have already indicated the specific consequences this combination may have for the law of succession. The separation of property into house and general property has consequences in terms of the law of things. The component families constitute the agnatic group. However, each family within the agnatic group does have certain rights and powers that it can exact from other houses in the same household and protect against the claims of the other houses. The houses can thus become involved in contractual relationships with each other.

The houses cannot, however, oppose each other in a lawsuit. In other words, a house could not protect its rights in court against another house. Thus each house as such does not have the power to appear in court. Do you know why this is so? Who has the most powers in the house? As head of the family, the husband does. However, he is also the head of the other houses. He cannot represent one house in court as the plaintiff and another house as the defendant. The relevant principle here is the following:

> A group (here the agnatic group) cannot be divided against itself.

This principle, however, does not mean that a dispute between two houses cannot be resolved. When there is such a dispute, a call is made upon the wider kinship group, in particular the family group, to settle the dispute. We are therefore dealing with disciplinary action within the family group. (The procedure for dealing with these cases in customary law is discussed in study unit 4 of this module).

The recognition of the age of majority according to the Children's Act has particular implications for customary family law. For example, it affects the relationship between parents and children and relationships between the head of the agnatic group and other members of the group. The consequences of the age of majority are fairly complicated. Because of economic and other factors, and owing to urbanisation, the composition of the household has changed, with the result that, in most cases, we are dealing with a single family rather than a household.

2.2 The nature and characteristics of the customary law of marriage

2.2.1 Introduction

In the customary law of marriage, a distinction is made between the traditional indigenous marriage, the customary union and the customary marriage enter into under the Recognition of Customary Marriages Act 120 of 1998. Before the Recognition of Customary Marriages Act came into operation, prospective spouses/parties in traditional customary marriages, or customary unions, could also enter into a civil marriage. In this introductory module we will only deal with the first three types of marital unions. Civil marriage, in combination with indigenous marital unions, is dealt with in an advanced module.

2.2.2 The traditional indigenous marriage

2.2.2.1 Background

For various reasons, you need to know the background of the traditional indigenous marriage. Do you know why you need to know this? Can you give two reasons?

Compare your reasons with the following:

- This was marriage in terms of customary law, which occurred or took place mainly in the rural areas; it was living law at local level.
- The ideas underlying the traditional marriage also largely apply to the customary marriage, particularly ideas concerning the ancestral spirits and the role of the family group in the marriage.
- Because customary marriages now enjoy statutory recognition and have adopted the form of a traditional indigenous marriage, it becomes important to properly understand the origins of customary marriages.
- Like traditional indigenous marriages, customary unions were usually polygamous in nature but could also be monogamous, and thus share significant features. The same applies to customary marriages in terms of the Recognition of Customary Marriages Act, in that the customary marriages are all polygynous in nature, and thus share a significant feature.

2.2.2.2 The features of a traditional indigenous marriage

The most important features of a traditional indigenous marriage may be summarised as follows:

- The marriage is polygynous, that is, one man can be involved in a marital union with more than one woman at a time.
- The marriage does not concern only two persons of the opposite sex; instead, it is a union between two family groups. Other characteristics result from this. We will mention only two of these:
  - The death of one spouse does not dissolve the marriage.
  - In the case of a deficiency on the part of one spouse, such as infertility, a person from the family group of the deficient spouse may be substituted. Substitution is dealt with in an advanced module.
- The marriage is accompanied by the delivery of marriage goods, commonly known as lobolo, by the man's agnatic group to the woman's agnatic group.
- The procreation of children, particularly male children, is of great importance. Certain Tswana groups say: *Tsêô ke go tsala bana* ("to marry is to bear children"). This characteristic is particularly related to the belief in ancestral spirits. Briefly, this belief boils down to the following: the ancestral spirits live a life in a spirit world that is similar to that of the living on

earth. The living must care for the ancestral spirits by continually making various sacrifices to them. The ancestral spirits, in turn, care for their living kin by ensuring their prosperity and wellbeing. Because humans are mortal, the husband and wife must procreate children in order to ensure that they will be taken care of when they are ancestral spirits.

- Marriage is a process of growth rather than a legal transaction which comes into being at a specific time. The conclusion of a marriage is thus a lengthy process. It is usually accompanied by a variety of ceremonies. Some ceremonies are merely customs, while others, again, have a specific legal meaning. All ceremonies, however, have value since they are evidence of the marriage process.
- Marriage creates a legal unit, or a potential legal unit, in the form of a family or house which, in the course of time, together with related families, develops (through the husband) into a household.
- Marriage is accompanied by a change in the status of the spouses. A married man and woman have more powers than an unmarried man and woman.

2.2.2.3 The requirements relating to the powers of the spouses

The most important requirements relating to the powers of the spouses were/are the following:

- There were no fixed age requirements. Among some Tswana, betrothal agreements were made between family groups even before the birth of the boy and girl. The marriage was, however, concluded only once the boy and girl were sexually mature. In most cases, no one could marry until they had undergone the traditional initiation ceremonies. Even today, sexual maturity, rather than a stipulated age, is required.
- Marital unions within certain degrees of kinship are forbidden. These restrictions vary from group to group. Among all groups there is a prohibition on marriages between ascendants and descendants on the father's and mother's side, and between the children of the same mother and father.

Among most Nguni groups these limitations cover a very wide range of kin. This includes all persons who have the same family name *(isibongo, isiduko)*. This means that marriage between people with the same family name as that particular person, or the same family name as the person's mother or father, is forbidden.

Among the Sotho-Tswana, on the other hand, preference is given to marriage within a particular degree of kinship. Marriage between cross-cousins is particularly encouraged. This means marriage between a man and his mother's brothers' daughters or between a man and his father's sisters' daughters. Such marriages are viewed as preferential marriages.

- Serious mental illness (e.g. insanity) rendered a person unfit for marriage.

- Impotence and serious physical defects could be substituted for by most groups, but were recognised as grounds for the dissolution of marriage.
- Because of the polygynous nature of marriage, a married woman was not competent to enter into another marriage. A married man, however, could enter into further marriages.

> Some writers object to describing this type of marital union as a marriage. What do you think? Can you remember what we said in study unit 1? Read that section again.

In our opinion, the purpose of marriage among indigenous African people is the same as that of marriage among all types of people, namely, to regulate the relations between spouses and their offspring. This purpose is, however, juristically realised through channels specific to each.

2.2.3 The customary union

Prior to the commencement of the Recognition of Customary Marriages Act 120 of 1998, the customary union was the statutory recognised version of the traditional indigenous marriage. It did not, however, replace the traditional marriage. Traditional marriages were still concluded in many rural areas. It was only when aspects of this marriage came before the former commissioner's court (now the magistrate's court) that the traditional marriage was deemed a customary union. The customary union was defined in section 35 of the Black Administration Act 38 of 1927 as:

> the association of a man and a woman in a conjugal relationship according to Black law and custom, where neither the man nor the woman is party to a subsisting marriage.

The "subsisting marriage" in this definition refers to civil marriage, and shows clearly that the customary union was recognised as a "marital union", but not as a "marriage" (see below). The phrase "according to black law and custom" implies that recognition was given to the polygynous nature of the traditional indigenous marriage, and to the possibility of substitution or supporting unions (as stated earlier, substitution is dealt with in an advanced module). Please note, however, that as far as the customary union is concerned, all such valid unions have been converted into customary marriages – there are no longer any customary unions. Note also that since 1985 customary unions in KwaZulu-Natal have been recognised as customary marriages in terms of the KwaZulu Act 16 of 1985.

Registration of customary marriages was compulsory in KwaZulu-Natal in terms of section 45 of the Codes of Zulu Law. The registration of customary marriages was not compulsory outside KwaZulu-Natal, and these unions were regulated by Government Notice R1970 of 25 October 1968. The legal requirements for valid

customary marriages prior to 15 November 2000 will be discussed in detail in lecture 4 below.

2.2.4 The customary marriage

Section 1(iii) of the Recognition of Customary Marriages Act 120 of 1998 defines a customary marriage as: "a marriage concluded in accordance with customary law". The Act, which came into operation on 15 November 2000, distinguishes between customary marriages that were validly in existence before 15 November 2000 and marriages entered into after this date. In this regard, sections 2(1) and 2(3) of Act 120 of 1998 state that:

(1) A marriage which is a valid marriage at customary law and existing at the commencement of this Act is for all purposes recognised as a marriage.

(2) If a person is a spouse in more than one customary marriage, all valid customary marriages entered into before the commencement of this Act are for all purposes recognised as marriages.

This means that the validity of customary marriages entered into prior to the commencement of this Act should be determined in terms of the requirements for a customary marriage prior to 15 November 2000.

Customary marriages entered into after 15 November 2000 have to meet the requirements of the Act. Act 120 of 1998 provides in sections 2(2) and 2(4) that:

(2) A customary marriage entered into after the commencement of this Act, which complies with the requirements of this Act, is for all purposes recognised as a marriage.

(4) If a person is a spouse in more than one customary marriage, all such marriages entered into after the commencement of this Act, which comply with the provisions of this Act, are for all purposes recognised as marriages.

In terms of the regulations promulgated customary marriages have to be, or may have been, registered.

Some provisions of the Act apply to all customary marriages, others only to those entered into before the date of commencement of the Act. When the Act was passed section 7(2) contained the words "entered into after the commencement of this Act" but the words were severed from the subsection by para 59(e) of the Constitutional Court's decision in *Gumede (born Shange) v President of the Republic of South Africa and Others* (CCT 50/08) [2008] ZACC 23; 2009 (3) BCLR 243 (CC) ; 2009 (3) SA 152 (CC) (8 December 2008).

Self-evaluation

(1) Briefly discuss the legal relations arising from a traditional indigenous marriage. (15)

(2) Explain the implications of the age of majority in terms of section 17 of the Children's Act 38 of 2005 for customary family law. Refer to the information in lecture 1 of study unit 2 for more on this. (10)

(3) Name the characteristics of traditional indigenous marriages. (10)

(4) Discuss the indigenous prescriptions regarding competence to enter into a traditional indigenous marriage. (8)

(5) Briefly compare the traditional indigenous marriage with the customary union and customary marriage. See also lecture 4 below. (8)

Feedback

Your answer could include some of the following points:

1. In your answer, you should have referred to the fact that the legal relations arising from a traditional indigenous marriage concern relations between people and relations in terms of property. You were expected to discuss each of these relationships briefly. Make sure you refer to the relationship between the particular family groups, the man and the woman, and between parents and children. Indicate the role played by house rank.
2. This particular Act strongly emphasises the rights and duties of the individual. The individual can now act against the agnatic group although, traditionally, the individual shared in the group's rights. Refer to the implications of the Act for relations between group members and for relations regarding property.
3. These characteristics are dealt with fully in section 2.2.2.2. Briefly name these characteristics.
4. These prescriptions are fully dealt with in section 2.2.2.3.
5. In any comparison, you must indicate the similarities and differences. If you like, you can use a diagram to do this. Consider the following points as a basis for a comparison: parties, consensus, requirements, marriage goods, statutory prescriptions.

LECTURE THREE

The betrothal in customary law

Compulsory reading

Jansen RM "Family Law" in *Introduction to legal pluralism in South Africa* (2006) 31-33

Recommended reading

Bekker JC *Seymour's customary law in Southern Africa* (1989) 96–105

Myburgh AC *Papers on indigenous law in Southern Africa* (1985) 83–84

Olivier NJJ, Olivier NJJ (jr) & Olivier WH *Die privaatreg van die Suid-Afrikaanse Bantoetaal-sprekendes* (1989) ch 3

Outcomes

After having studied this unit, you should be able to

- describe the nature of the act of betrothal
- discuss the consequences of betrothal
- explain how an indigenous betrothal can be terminated
- discuss the legal consequences of the termination of an indigenous betrothal

3.1 The nature of the legal act

The betrothal is a legal act which has specific consequences. In original indigenous law, a betrothal comprises an agreement between two family groups with regard to a future marriage between a male member of the one group and a female member of the other group.

Myburgh (83-84) describes this act as being a specific contract. The elements of the contract are the agreement and performance or part performance by the man's group. This performance comprises the delivery of all or some of the marriage goods, plus other gifts. Earnest cattle are sometimes mentioned.

Not all indigenous groups recognise the betrothal as an independent legal act if the agreement and transfer of the woman to the man's group and the transfer of marriage goods (lobolo) takes place within a single ceremony which stretches over a few days.

In modern indigenous law, the parties to the contract are individuals. The individuals concerned are the man, the girl and her father. If the man is not a major, he has to be assisted by his father. Note that the betrothal agreement does not create an enforceable right or obligation to marry. The betrothal agreement can be repudiated or terminated at any time without the aggrieved party being able to demand compensation on the grounds of breach of contract. The legal consequences of the termination of the betrothal agreement are restricted chiefly to the patrimonial aspects of the betrothal.

3.2 Consequences of the betrothal

The betrothal gives rise to particular rights and duties for the man and the woman. In particular, the woman should not pay too much attention to other men during the betrothal period. The man must not neglect her. Because of the polygynous nature of the marriage, the man may pay attention to other women during this period but should, nevertheless, make sure he does not neglect his betrothed. The man also has to deliver the betrothal goods during this period.

Property delivered during the betrothal period has a dual nature. Sometimes there are fixed rules regarding the type of articles which must be delivered to the woman's group. These are usually blankets, clothing or other household articles. These articles can, correctly, be described as "betrothal gifts". Upon delivery, property rights over these articles are transferred to the woman or her group. If the betrothal is terminated for some reason or other, the articles are not automatically returned to the man or his group. It would appear that the guilt factor determines whether the articles are returned or not. If the termination of the betrothal is the woman's fault, the goods normally have to be returned. If the man is guilty, the goods are not returned.

With the marriage in mind, other goods, usually cattle or lately also money, are given together with the betrothal gifts. These goods can be regarded as marriage goods. Some peoples demand that all the marriage goods be delivered before the marriage is concluded. The legal position regarding these goods differs from that regarding the betrothal gifts. Ownership of marriage goods remains vested in the giver until the marriage is concluded. Before the marriage, the man's group remains the owner of this property. If the betrothal is terminated, these goods have to be returned.

3.3 Termination of the betrothal

The betrothal can be terminated in one of three ways:

- by the death of the man or the woman
- by mutual agreement
- by unilateral termination

Each of these ways will now be discussed separately.

3.3.1 *By the death of the man or the woman*

The death of the man or the woman does not automatically terminate the betrothal. Various peoples, such as the Pedi and the Venda, and some Tswana groups, make provision for substitution. This means that the man or the women is replaced by another man or woman. This illustrates the point that the betrothal is not simply the concern of two individuals. Betrothal is an agreement between two family groups.

3.3.2 *By mutual agreement*

The parties can mutually agree to terminate the agreement. There can be various reasons for this. The parties will usually also agree on what is to happen to the betrothal goods. A mutual agreement between the man and the woman to terminate the betrothal is, however, unlikely. The reason for this is that, in modern indigenous law, the woman's father is also a party to the agreement. In original indigenous law, the family groups concerned, and not the man and the woman, had to agree to terminate the betrothal agreement.

3.3.3 *By unilateral termination*

The agreement can be terminated by either party with or without good cause. For the man's group, the following is regarded as good cause:

- Unreasonable postponement of the marriage by the woman's group, particularly if this is accompanied by demands that more cattle or money should be delivered despite the delivery of the amount agreed upon, or the delivery of a reasonable quantity.
- The woman's misconduct with other men and neglect of her betrothed.
- The woman's immorality. If the man condones her misconduct, he cannot, with good cause, terminate the agreement; there has to be a new cause.
- A physical injury incurred by the man after the betrothal which renders him unfit for marriage. In such a case, he has to compensate the woman's group for all the reasonable expenses which have been incurred with the proposed marriage in mind.

The following can be regarded as good cause for the woman:

- The man enters into an indigenous marriage with another woman during the betrothal period (*Mkehle v Rulman,* 4 BAC 113).
- The man's immorality where a monogamous marriage was contemplated, provided the woman does not condone this (*Binase v Ngqase,* 4 BAC 115).
- Continuous neglect, so that the woman's guardian has to instruct the lover to proceed with the marriage (*Kulati v Bonkolo* 1939 BAC 8 & O) 66).
- Too much attention paid to other women and neglect of the man's betrothed and her family (Schapera 183).

Where the woman's group terminates the betrothal, the Appeal Court for Commissioners' Courts in *Mehlomakulu v Jikejela* (1942 BAC C & O) 110) established the following principles.

- The woman alone decides whether she wishes to terminate the betrothal; her guardian has no say.
- The woman also has to decide whether she wishes to reject the man or condone his misconduct.
- Condonation or rejection by the guardian without the woman's agreement has no effect.

3.4 Consequences of termination

The legal consequences of the termination of a betrothal are particularly related to the question of the disposal of the goods which have already been delivered with the proposed marriage in mind. Among the Sotho, the principal is that betrothal gifts are not returned. However, the position regarding marriage goods varies among the indigenous African peoples.

3.4.1 Upon death

Where the betrothal is terminated by the death of one of the betrothed, the marriage goods are returned to the giver (the man's group). Compensation has to be paid for losses of cattle only if these have not been reported in good time. The woman's group has a duty to care for the cattle and to report any losses as soon as possible to the man's group. Should they fail to report these losses in time, they have to pay compensation for them.

Where the man has caused the woman's death, however, the goods are not returned. This applies particularly where the man has made the woman pregnant during the betrothal period and she dies in labour.

3.4.2 By agreement

The parties usually also come to an agreement regarding the disposal of the goods. In most cases, these are returned to the giver.

3.4.3 By unilateral termination

Among the Zulu, the marriage goods are returned regardless of which party has brought about the termination of the betrothal. Among other peoples, the guilt factor often plays a role. If the man terminates the betrothal with good cause, the marriage goods which he has delivered are returned. If the man terminates the betrothal without good cause, or if the woman terminates the betrothal with good cause, the man usually forfeits the goods he has already delivered.

Self-evaluation

(1) What are the consequences of betrothal in customary law? (10)

(2) In customary law, the betrothal can be terminated in various ways. List these ways, and indicate the consequences of each. (15)

Feedback

Your answer could have included some of the following points:

1. The betrothal does not create an enforceable right or duty towards a customary marriage. It has, however, certain obligations for the man and the woman, and you must indicate what these are. The betrothal also entails the delivery of betrothal goods. You must indicate the legal position of this property. You must also make it clear who has ownership, and what happens to these goods if the betrothal is terminated.
2. The different ways and consequences of termination of the betrothal are fully dealt with in sections 3.3 and 3.4.

LECTURE FOUR

The legal requirements for customary marriage

Compulsory reading

Bekker JC, Rautenbech C & Goolam N (eds) *Introduction to legal pluralism in South Africa* (2010) LexisNexis Butterworths

Jansen RM "Family Law" in *Introduction to legal pluralism in South Africa* (2006) 33–42

Recommended reading

Bekker JC *Seymour's customary law in Southern Africa* (1989) 105–122

Vorster LP & De Beer FC "Is huweliksgoed 'n essensiële regsvereiste vir 'n geldige inheemse egtelike verbintenis?" (1988) 11(4) *SA Journal for Ethnology* 182–188

Vorster LP "Legislative reform of indigenous marriage laws" (1998) 39(1) *Codicillus* 38–49

Outcomes

After having studied this unit, you should be able to

- explain the concept of "legal requirements"
- discuss the legal requirements for a traditional indigenous marriage
- discuss the legal requirements for a customary union and a customary marriage
- indicate the similarities and differences between the legal requirements for a traditional indigenous marriage and those for a customary union and customary marriage

4.1 Introduction

What is meant by legal requirements? These refer to the requirements which have to be fulfilled in order to effect a valid juristic act. It is not necessary, however, that all the legal requirements be satisfied simultaneously in order to effect a valid juristic act. Some requirements must be satisfied beforehand, while others may be met later, without the validity of the juristic act being affected.

Requirements which must be satisfied beforehand are known as absolute requirements. If these requirements are not met, there is no juristic act. In this case, we say that the act is null and *void ab initio* (from the beginning). These requirements arise from law, and cannot be excluded or amended by mutual agreement between the parties concerned. In other words, they are unalterable.

Apart from these absolute requirements there are other legal requirements that we can call relative requirements. The interested parties can mutually agree to alter these requirements to suit their particular circumstances. We can further distinguish between requirements which apply, unless the parties decide otherwise, and additional requirements. If the parties do not so decide, the usual provisions of the law come into operation. In addition there are the additional legal requirements to which the parties have agreed. A valid juristic act may be effected where the relative requirements are deficient or are not fulfilled. Such juristic act can be fulfilled by satisfying the deficient requirements, or it can be terminated by a failure to do this. All the consequences of a valid juristic act arise from a juristic act of this kind.

The question we will consider in this lecture is whether we can distinguish such absolute requirements for the traditional indigenous marriage, the customary union (i.e. the statutory indigenous marriage) and the customary marriage.

4.2 The legal requirements for customary marriages entered into before 15 November 2000

Before embarking on a discussion of the requirements for the different types of marriages, a few preliminary points need to be made. In lecture two of this study unit, you were told that the Recognition of Customary Marriages Act 120 of 1998 distinguishes between customary marriages that were validly in existence before 15 November 2000 and marriages entered into after this date.

The legal requirements for a valid customary marriage entered into before 15 November 2000 are the same as the legal requirements for the traditional indigenous marriage and the customary union. (These marriages will be discussed in detail immediately below.) In other words, the validity of customary marriages entered into before 15 November 2000 must be determined by testing the marriage against the requirements for the traditional indigenous marriage or the customary union, depending upon where the parties resided and who was involved in the marriage process.

The legal requirements for a customary marriage entered into after 15 November 2000 have to meet the requirements found in section 3(1)(a)(i) of Act 120 of 1998. In other words, the validity of customary marriages entered into after 15 November 2000 must be determined by testing the marriage against the requirements found in section 3 of Act 120 of 1998.

If a person is a spouse in more than one customary marriage, all valid customary marriages entered into before or after the commencement of the Act are, for all purposes, recognised as marriages (sections 2(3) and(4)). The Act therefore confers

legitimacy on polygyny, that is, the form of marriage in which one man is entitled to be married to more than one wife simultaneously.

For further commentary on this subject, please consult the relevant section in your prescribed textbook.

4.2.1 The legal requirements for a traditional indigenous marriage

The following appear to be the absolute legal requirements for the establishment of a valid traditional indigenous marriage:

- The man and the woman concerned must not be related to one another within the prohibited degrees of kinship.
- There must be consensus between the two family groups concerned regarding the following:
  - the two individuals to be united in marriage
  - the marriage goods which must be delivered
- The bride must be transferred by her family group to the man's family group.
- As far as the woman is concerned; there is a further requirement, namely, that she is not already involved in a marital union. Because of the polygynous nature of indigenous marriages, this requirement does not apply to the man.

In traditional indigenous marriage, the marriage negotiations and the contracting of marriage were accompanied by various ceremonies and customs. These ceremonies had particular value as proof of the marriage process, but were apparently not legal requirements. What are the implications of the absolute legal requirements? If you remember, we said that non-fulfilment of this class of requirements resulted in a juristic act being null and void. In the case of a marriage, this means that there is no marriage despite the fact, for example, that all the ceremonies have been performed.

You will also notice the absence of age requirements. Although some people recognised child betrothals, the marriage was not contracted before the parties intending to marry had reached adulthood. Among all the indigenous African people, this stage in a person's life was accompanied by ceremonies. Among some peoples, this stage coincided with puberty or sexual maturity. In other cases, circumcision was an important part of the ceremonies. While these ceremonies varied in form and content from group to group, the consequence everywhere was recognition of adulthood. An adult person was marriageable. If a person contracted a marital union before undergoing the initiation ceremonies, the marriage was valid. In this case it was important that the ceremonies were performed as soon as possible after

the marriage. In practice this situation (i.e. marriage before the initiation ceremonies) seldom occurred. What follows is an analysis of each of these requirements.

4.2.1.1 Marriage within the prohibited degrees of kinship

A marriage within the prohibited degrees of kinship is regarded as incest. Among most peoples, incest is regarded as dangerous for the community because it pollutes or defiles the community itself. Where incest occurs the ancestors could visit supernatural punishment upon the community in the form of droughts, hailstorms or heat waves, etc. Because of the pollution that accompanies incest, the community had to be purified by means of certain ceremonies. In most communities, the persons who had committed incest had to be killed. If they were not killed, the offending parties had to undergo purification ceremonies to free the community from the polluting effects of their deed.

4.2.1.2 Consensus between the two family groups

Without consensus between the family groups concerned, no marital union could take place. Note that individual members of the group could not agree on behalf of the group. Some groups have certain customs which can be seen as ways in which the young man and woman attempt to force the family groups to agree to their marriage.

4.2.1.2.1 Forms of indigenous customary marriages

One such custom is when the man and the woman "elope", thus presenting their family groups with an accomplished fact. The Zulu know this custom as *ukubaleka* (to flee). Another such custom is to "kidnap" the bride. The young man and his friends take her to his people, apparently against her will. This custom is known among the Nguni peoples as *ukuthwala* (to carry).

The customs mentioned above are variations of the customary form of negotiations when the young man's family group negotiates with the woman's group over the marriage. Various matters are discussed during these negotiations. The most important of these concern the marriage partners and the marriage goods. The woman's family group satisfies itself about the young man's capabilities, his good name, and his ability to maintain one of the daughters of their group. At the same time, the young man's family group satisfies itself about the woman's qualities.

4.2.1.3 Marriage goods *(ilobolo)*

The Zulu word *ilobolo* (n; v: *ukulobola*) is known among other peoples as *ikhazi* (Xhosa), *bogadi* (Tswana), *bohali* (Southern Sotho), *magadi* (Pedi), *lovolo* (Tsonga), and *thaka* (Venda) (Bennett *Customary law in South Africa* (2007) 2 ed 220). Nowadays, the term *lobolo* is specifically used to indicate the marriage goods given by the man's group to the wife's group. Section 1(1) of the Codes of Zulu Law defines lobolo as:

> cattle or other property which, in consideration of an intended customary or civil marriage, the intended husband, his parent or guardian or other person agrees to deliver to the parent or guardian of the intended wife.

In terms of section 1(iv) of the Recognition of Customary Marriages Act, 120 of 1998, lobolo is described as:

> property in cash or kind ... which a prospective husband or the head of his family undertakes to give to the head of the prospective wife's family in consideration of a customary marriage.

Lobolo is probably the most important contract in customary law. Even in modern times this contract is frequently encountered. The general rule is that payment of *ikhazi* is an essential requirement for entry into a customary marriage. Payment may be made to the bride's father (or guardian), because he is entitled to dispose of the cattle, or to the head of the household where she is residing at the time, because he has to hold the cattle until such time as he can hand them over to her father or guardian, which he is obliged to do. (See *Mabena v Letsoalo* 5 1998 (2) SA 1068 (T)).

What are the performances to be delivered? Performance and counterperformance consist of the transfer of the marital guardianship (for the purpose of marriage) over a woman by her group, on the one hand, and delivery of property, usually cattle and nowadays also money, by the bridegroom and his group on the other. This contract can be described as an agreement between the parties concerned, by which one party undertakes to deliver a certain female person as a bride for a certain male person in return for the delivery of cattle or other property. Originally, the parties were the family groups of the man and the woman. Nowadays, the parties may even be specific individuals, namely the man, the girl and her father.

Delivery and transfer of cattle may take place through description and indication (constructive delivery). Lobolo cattle are usually driven to the cattle kraal of the girl's people. Delivery can also be made at any pre-arranged place. Among some groups a fixed number of cattle is delivered, among others the number depends on agreement, and among yet others the number depends on the husband.

The following are the most important requirements for the lobolo contract.

- Consent of the father or guardian of the bride-to-be. In a dispute, the following points may indicate whether a father has given his consent or not:
  - his acceptance or refusal of the lobolo cattle
  - his permission or refusal to allow the girl to stay with the man on the understanding that lobolo will be paid later

- Consent of the bride. In original indigenous law, her free consent was not necessary; in modern indigenous law, her free consent is a requirement.

- Consent of the bridegroom. Formerly, his consent was not necessarily required before negotiations for the marriage could commence. However, the former custom, according to which fathers consented on behalf of their children, is rejected in modern indigenous law for public policy reasons. The consent of the man and the girl are now absolute requirements.
- Transfer of the bride effects the marriage. The transfer need not be accompanied by ceremonies. The physical consummation of the marriage is not necessary and the bridegroom need not be present at the transfer of the bride.
- Transfer of the lobolo. Among some groups, all, or part of, the lobolo should be transferred before the bride is transferred. Among other groups it is customary that the lobolo be delivered after the bride has been transferred. Transfer is made to the bride's father or guardian, but it can also be made in the form of description and indication.

Lobolo is a contract peculiar to customary law. It can also be stipulated for a civil marriage, in which case an express agreement is required. This aspect will not be dealt with in this module.

There are various customs regarding the marriage goods. Among some groups, the number of cattle that must be delivered is fixed by custom. Some Sotho groups leave the question of the number of marriage cattle to the man's people; their honour demands that the man's people deliver as many cattle as possible. Among the Zulu, particularly, the families concerned come to a mutual agreement, sometimes after protracted negotiation, about the number of cattle that must be delivered as marriage goods. In the case of some South Nguni groups, the number of marriage cattle is not agreed upon beforehand. These people have the custom of *ukutheleka*, whereby the wife's people "impound" her from time to time. Her husband then has to deliver a beast as marriage goods to free her. This process continues until the wife's group has received a fair and reasonable number of cattle as marriage goods.

Note that delivery of the marriage goods is not set as an absolute legal requirement. We must qualify this, however. The time at which the marriage goods must be delivered varies. Some groups, such as the *Fokeng* and *Mogopa* of North West, require that all the marriage goods be delivered before transferring the bride. For these groups, therefore, it would not be wrong to recognise the delivery of marriage goods as an absolute legal requirement.

Among other groups, at least one beast or a portion of the marriage goods must be delivered before the bride is transferred, that is, part performance must be rendered. It is the custom among many Tswana groups that marriage goods for a woman be delivered from marriage goods received in the future from her daughter's marriage. In these cases, the marriage goods are delivered at least a generation later. The *ukutheleka* custom mentioned in a previous paragraph is found among some South Nguni. Here, too, the marriage goods are delivered in "instalments" after the wife has been transferred to her husband's group. The

delivery of marriage goods cannot be regarded as an absolute requirement in these cases. We cannot, therefore, state as a general principle that the delivery of marriage goods is an absolute requirement. Such a statement would not take account of the variations which occur among the various groups.

4.2.1.4 The transfer of the bride

Myburgh (84, 111) states that the marriage is effected by the transfer of the bride to the man's family group. The transfer of the bride need not take place physically, but there must be a formality of some kind indicating this transfer. In most cases, the bride is brought by her people to the man's dwelling place, and specific ceremonies are carried out there. The bridegroom need not be personally present; this indicates that the transfer is indeed to his family group.

For some groups, it is sufficient for the transfer if the bridegroom is allowed to sleep with the bride. It does not matter whether any ceremonies have been carried out, as long as the family groups concerned have agreed on the marriage. It would perhaps be more correct to speak of transfer of guardianship over the woman, because the woman herself does not have to be physically transferred. It is, however, certain that there can be no question of a marriage until this transfer has taken place by agreement.

4.2.1.5 Pre-existing marital union

The woman may not already be involved in a marital union since a married woman may not have two husbands. In such a case the later union is null and void.

4.2.2 The legal requirements for a customary union

The legal requirements for a customary union are not uniform in all the areas of the Republic of South Africa. The position in KwaZulu-Natal differs from that in the rest of South Africa.

4.2.2.1 The legal requirements for a customary union in KwaZulu-Natal

In KwaZulu-Natal, section 38(1) of the Codes of Zulu Law lays down the following requirements for the conclusion of a valid customary union:

- consent of the bride's father or guardian if she is still a minor, which consent must not be unreasonably withheld
- consent of the bridegroom's father or family head, if the bridegroom is still a minor
- a public declaration by the bride to the official witness that the union takes place with her consent

These are statutory requirements, and are therefore absolute requirements. All these requirements have to do with consent, namely consent of the bride, and if either the bride or the bridegroom is a minor, the consent of the father or guardian of such party is required. The consent of the father or guardian is therefore not essential for a major or a person who, in terms of the Code, has the contractual capacity to conclude a customary marriage. The mere fact that the consent of the father or guardian of the major bride is no longer essential for her to enter into a customary marriage should not be construed as prejudicing the right of any person entitled to the marriage goods.

The bride's consent must satisfy fixed requirements. Her consent must be made to the official witness in the form of a public declaration. This declaration must be made during the marriage ceremony (s 42).

The codes further stipulate that a customary union must be registered. Non-registration does not, however, render the union invalid or null and void. The codes contain no requirements concerning the delivery of lobolo. Delivery is thus not an absolute legal requirement. The codes do, however, contain stipulations regarding the maximum number of cattle that may be delivered as lobolo (ss 61 and 62).

With the conclusion of a civil marriage and, in KwaZulu-Natal, with the conclusion of a customary union, the parties to the lobolo contract are limited to the bridegroom and the person who is entitled to the girl's *lobolo*. If the girl is a major, in KwaZulu-Natal the customary union is concluded without the consent of her father. We can therefore conclude that in this instance, as is the case with a civil marriage, lobolo is a separate contract which is supplementary to the customary union.

4.2.2.2 The legal requirements for a customary union outside KwaZulu-Natal

Bekker (105) mentions the following requirements for a customary union outside KwaZulu-Natal:

- consent of the bride's guardian
- consent of the bride
- consent of the bridegroom
- payment (or rather delivery) of marriage goods
- transfer of the bride

Olivier et al (44) mention the following requirements:

- consent of the bridegroom's father in certain circumstances, namely if the bridegroom is a minor
- consent of the bride's father
- consent of the bridegroom

- consent of the bride
- the handing-over of the girl to the man or his family group
- an agreement that lobolo will be delivered
- the non-existence of a common-law (civil) marriage

A further analysis of these requirements shows that the sources mentioned above agree on the requirements of consent and the transfer of the bride. Note that Bekker does not refer to a civil marriage. However, we can accept that, in terms of section 22 of the Black Administration Act 38 of 1927, a civil marriage excludes a subsequent customary union. What follows is an analysis of only two of the requirements mentioned under 4.2.2.2 above.

a. The position of marriage goods

The two sources (Bekker and Olivier) differ in what they say about the requirement of marriage goods. Bekker claims that payment of the marriage goods is required, while Olivier claims that there is only a requirement to agree to deliver the marriage goods. We believe that Olivier is correct here. If actual payment is seen as one of the absolute requirements, this would mean that no union could be effected until all the marriage goods had been paid. Partial payment is, of course, not payment. However, the customs relating to the delivery of marriage goods which are found among some groups would never be able to satisfy the payment requirement immediately. One example is the *ukutheleka* custom mentioned previously. Another example is the custom among many Sotho groups that marriage goods may be delivered from the marriage goods obtained in the future for a daughter who may be born of the marriage.

If we accept what Olivier says, this requirement means that the delivery of marriage goods depends on both parties coming to an agreement. The only problem with this requirement is that some groups do not specifically enter into an agreement concerning the delivery of marriage goods. Among these groups, the quantity of marriage goods and the time of delivery are regulated by custom and are adhered to without entering into an agreement. In these cases, we could say that the requirement regarding marriage goods is one of the relative requirements of the contract between the parties. In other words, an express agreement regarding the marriage goods is not a requirement here.

b. The consensual requirements

Concerning the consent requirements, you must bear in mind that the consent of the bridegroom's father or guardian is required only when the bridegroom is a minor. The consent of the bride's father or guardian as a party to the agreement is required whether the bride is a minor or not. We can therefore accept that, where the bride's father or guardian has come to an agreement with the bridegroom concerning the marriage goods, he has also consented to the customary union.

Note that, in original indigenous law, the agreement to marry was between the family groups concerned, whereas in modern indigenous law it is concluded by particular individuals. Also note that, in modern indigenous law, the bride's father or guardian is also a party to the agreement in addition to the bride and bridegroom. In other words, the possibility of a conflict of interests between the bride and her father or guardian is not excluded in modern circumstances. Bear in mind that the bride's father or guardian only has a material interest in the relationship (the claim to *lobolo*), while the bride, of course, is one of the spouses.

For additional information, please study Jansen's commentary on these requirements in your prescribed textbook.

4.3 The legal requirements for customary marriages entered into after 15 November 2000

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

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

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

4.3.1 Age requirements

Originally, the indigenous African people of Southern Africa had no specific age requirements for entering into a marriage, apart from the general requirements such as puberty and, among some groups, passage through initiation rites. The Act now lays down specific age requirements for the conclusion of a valid customary marriage. In order to achieve formal gender equality, the minimum age requirement is 18 for both males and females. The Act nevertheless makes provision for the customary marriages of minors. In this regard, sections 3(3),(4) and (5) of Act 120 of 1998 are applicable. They provide as follows:

(3) (a) If either of the prospective spouses is a minor, both his or her parents or, if he or she has no parents, his or her legal guardian, 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.

In this regard, section 25 of the Marriage Act provides that "the commissioner of child welfare may grant consent to the marriage of a minor if he or she is satisfied, after proper inquiry, that the minor has neither parent nor guardian, nor is, for any good reason, in a position to obtain consent of his or her parents or guardian". The commissioner is not entitled to give consent if either of the parents or guardian refuses to grant consent. The commissioner of child welfare should also establish whether the marriage will be in the interests of the minor and whether it will be in the interests of the minor to conclude an antenuptial contract. Should he or she be satisfied that this would be in the minor's interests, he or she must ensure that such a contract is entered into before granting consent to the marriage.

(4) (a) Despite subsection 1(a)(i), the Minister (of Home Affairs) 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 the marriage in writing to be a valid customary marriage.

(5) Subject to subsection (4), section 24A of the Marriage Act, 1961, 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.

Section 24A provides that an application for annulment must be brought by a parent, guardian or by the minor personally. The application must be lodged with the high court within the prescribed time limits set by the section. If the parents or guardian of a minor apply for annulment, they must do so before the minor reaches the age of 21 years, or within three months after the minor has turned 21 (Jansen 37).

> For further commentary on the issues pertaining to age and majority and for reasons as to why the legislature included sections 3(3) and (4) in the Act, please consult the relevant section in your prescribed textbook.

4.3.2 Consensual requirements

According to Act 120 of 1998, both prospective spouses must consent to be married under customary law. This section was included in order to prevent the conclusion

of forced marriages; the provision is also in line with the equality clause, that is, section 9 of the Constitution of the Republic of South Africa, 1996.

4.3.3 Negotiation and celebration in accordance with customary law

According to Act 120 of 1998, the marriage must be negotiated and entered into or celebrated in accordance with customary law. This means that, although there are some statutory requirements for the validity of a customary marriage the negotiation, entering into and celebration must be in accordance with customary law. Note that the negotiations, entering into and celebration of a customary marriage differ from group to group. For example, generally speaking, the family groups of the two spouses must negotiate and consent to the two individuals being united in marriage and to the delivery or payment of *lobolo*. This indirectly renders *lobolo* a requirement for a customary marriage. Some groups also require the physical transfer of the bride to the bridegroom's family group for the conclusion of a marriage.

Although the Recognition of Customary Marriages Act 120 of 1998 makes no reference to *lobolo*, at least not in the sections setting out the requirements for the marriage. *"By implication thereof, it is now also a contractual accessory to marriage"* (Bennett TW *Customary law in South Africa* (2004) 236).

> For further commentary on the issues pertaining to this particular requirement, please consult the relevant section in your prescribed textbook.

4.4 The relationship between civil and customary marriages

The Act also regulates the relationship between customary and civil marriages. Section 3(2) provides that:

> 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, 1961 (Act No. 25 of 1961) during the subsistence of such customary marriage.

This does not, however, prevent a husband and a wife in a monogamous customary marriage from converting their marriage into a civil marriage. In this regard, section 10(1) of the Act provides that:

> a man and a woman between whom a customary marriage subsists are competent to contract a marriage with each other under the Marriage Act 25 of 1961, if neither of them is a spouse in a subsisting customary marriage with any other person.

The legislature's intention in enacting this proviso was to avert situations which existed previously. Before 1998, where a person concluded a marriage to another by customary law and subsequently entered into a civil marriage with someone

else, the said customary marriage was automatically dissolved and the woman and children automatically discarded. However, the material rights of the discarded wife were protected by section 22(7) of the Black Administration Act 38 of 1937. Where a man who had married by civil rites married another woman by customary law, that subsequent marriage would be null and void. In this case, the wife in the void customary marriage enjoyed no protection under the law.

For further information on this subject, please study the comments in the relevant section of your prescribed textbook.

4.5 Marriage within the prohibited degrees of kinship

The Act maintains the prohibition of a customary marriage between persons related to each other within the prohibited degrees of kinship. Section 3(6) of the Act provides that the "prohibition of a customary marriage between persons on account of their relationship by blood or affinity is determined by customary law". Prohibited marriages cannot be discussed in general terms because the laws and customs of each ethnic group vary.

For the tribal guidelines on prohibited marriages, please study the relevant section in your prescribed textbook.

4.6 Registration of a customary marriage

Previously, only customary marriages entered into in KwaZulu-Natal had to be registered. The Recognition of Customary Marriages Act 120 of 1998 now makes provision for the registration of all customary marriages entered into in South Africa. Failure to register a customary marriage does not, however, affect the validity of the marriage (section 4(9)). Registration, therefore, merely provides proof that a customary marriage does indeed exist.

The spouses in a customary marriage have a duty to ensure that their marriage is registered (section 4(1)). Either spouse may apply to the registering officer in the prescribed form for the registration of his or her customary marriage and he or she must furnish the registering officer with the prescribed information and any additional information which the registering officer may require in order to satisfy himself or herself of the existence of the marriage (section 4(2)). A customary marriage entered into before the commencement of this Act, and which is not registered in terms of any other law, must be registered within a period of 12 months after that commencement or within such longer period as the Minister may from time to time prescribe by notice in the *Gazette*. A customary marriage entered into after the commencement of this Act must be registered within a period of three months after the conclusion of the marriage or within such longer period as the Minister may from time to time prescribe by notice in the *Gazette* (sections 4(3) (a) and (b)).

A registering officer must, if satisfied that the spouses concluded a valid customary marriage, register the marriage by recording the identity of the spouses, the date of the marriage, any lobolo agreed to and any other particulars prescribed. The registering officer must issue to the spouses a certificate of registration, bearing the prescribed particulars (sections 4(4)(a) and (b)).

If, for any reason, a customary marriage is not registered, any person who satisfies a registering officer that he or she has a sufficient interest in the matter may apply to the registering officer in the prescribed manner to enquire into the existence of the marriage. If the registering officer is satisfied that a valid customary marriage exists or existed between the spouses, he or she must register the marriage and issue a certificate of registration as contemplated in subsection (4) (sections 4(5)(a) and (b)). If a registering officer is not satisfied that a valid customary marriage was entered into by the spouses, he or she must refuse to register the marriage (section 4(6)). A court may, upon application made to that court and upon investigation instituted by that court, order the registration of any customary marriage; or the cancellation or rectification of any registration of a customary marriage effected by a registering officer (sections 4(7)(a) and (b)).

A certificate of registration of a customary marriage issued under this section or any other law providing for the registration of customary marriages constitutes *prima facie* proof of the existence of the customary marriage and of the particulars contained in the certificate (section 4(8)).

The Act provides that the Minister of Justice, in consultation with the Minister of Home Affairs, may make regulations relating to –

(i) the requirements to be complied with and the information to be furnished to a registering officer in respect of the registration of a customary marriage;

(ii) the manner in which a registering officer must satisfy himself or herself as to the existence or the validity of a customary marriage;

(iii) the manner in which any person including any traditional leader may participate in the proof of the existence or in the registration of any customary marriage;

(iv) the form and content of certificates, notices, affidavit and declarations required for the purposes of this Act;

(v) the custody, certification, implementation, rectification, reproduction and disposal of any document relating to the registration of customary marriages or of any document prescribed in terms of the regulations;

(vi) any matter that is required or permitted to be prescribed in terms of this Act;

(vii) and any other matter which is necessary or expedient to provide for the effective registration of customary marriages or the efficient administration of this Act (section 11(1)(a)).

The Act also provides that "the Minister of Justice, in consultation with the Minister of Home Affairs, may make regulations relating to prescribing the fees payable in

respect of the registration of a customary marriage and the issuing of any certificate in respect thereof" (section 11(1)).

Self-evaluation

(1) What are the legal consequences of a void juristic act? (2)

(2) What are the legal consequences of a juristic act where some of the relative requirements have not yet been fulfilled? (2)

(3) What do you understand by the term legal requirement? What are the consequences of non-fulfilment of a legal requirement? (5)

(4) Discuss the legal requirements for a traditional indigenous marriage. (8)

(5) Discuss the various legal requirements for a customary union. (10)

(6) What is the effect of the age of majority on the legal requirements for a customary union? (5)

(7) Discuss the legal requirements for a valid customary marriage. (6)

(8) What is the effect of minority on the legal requirements for a customary marriage in terms of the Recognition of Customary Marriages Act 120 of 1998? (10)

(9) Compare and contrast the legal requirements for a traditional indigenous marriage, a customary union and a customary marriage. (15)

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

> In 1960, Thabo (a 17-year-old boy)) and Zandi (a 16-year-old girl) and their respective fathers concluded an agreement in terms of which Thabo had to deliver six head of cattle and R5000 as lobolo to Zandi's family. Thabo delivered the *lobolo* agreed upon and shortly afterwards Zandi was allowed to reside with Thabo and his family. In 1962, twin daughters were born to them, namely Nonhlanhla and Bongiwe. However, Zandi experienced some complications during childbirth and she died shortly afterwards. A few years after her death, Thabo discovered that Zandi was actually a member of the clan of his mother's people.

(a) Did a legally valid marriage come into being between Thabo and Zandi? (7)

(b) Would a legally valid marriage have come into being between Thabo and Zandi if they had concluded their marriage on 10 December 2000? (8)

(10) What is the effect of non-registration on the validity of a customary marriage? (2)

Feedback

Your answer could have included some of the following points:

1. No legal consequences flow from a void juristic act, that is to say, an act in which the absolute legal requirements were not fulfilled.
2. Where the relative legal requirements have not been met, the juristic act is valid, and all the legal consequences of a valid juristic act flow from this fact.
3. A legal requirement is a requirement that is prescribed by law in order for it to be a valid juristic act. Non-fulfilment of a legal requirement can have the consequence that the juristic act is null and void, or merely voidable.
4. The legal requirements for a traditional indigenous marriage are fully dealt with in section 4.2.1.
5. The legal requirements for a customary union are fully dealt with in section 4.2.2.
6. Major persons can agree to a customary union. Despite this, a major woman must also have her father's consent because he has an interest in the marriage goods.
7. The legal requirements for a valid customary marriage are contained in section 3 of Act 120 of 1998, which has been quoted in full.
8. The effect of minority on the legal requirements for a customary marriage in terms of the Recognition of Customary Marriages Act 120 of 1998 is fully dealt with in section 4.3.1.
9. In a comparison you must indicate the similarities and differences. Refer to the similarities with reference to the parties, the prohibited degrees of kinship, delivery of the marriage goods and transfer of the woman. The differences here relate mainly to the emphasis placed on the consensus between certain individuals and the declaration, in KwaZulu-Natal, by the woman to the official witness.
10. a. Thabo and Zandi entered into their marriage in 1960, which was before the Recognition of Customary Marriages Act 120 of 1998 came into operation. Therefore, in KwaZulu-Natal, section 38(1) of the Codes of Zulu Law would apply. This section requires the following for the conclusion of a customary union:
    - Consent of the bride's father or guardian if she is still a minor, which consent must not be unreasonably withheld.
    - Consent of the bridegroom's father or family head, if the bridegroom is still a minor. These requirements have been met, since both Thabo and Zandi were minors but they had the consent of their respective fathers.
    - A public declaration by the bride to the official witness that the union is taking place with her consent.

    The facts do not indicate that Zandi made a public declaration to the official witness to the effect that her union with Thabo was taking place

with her consent. As a result, there is no legally valid customary union between Zandi and Thabo. Furthermore, the prohibition against marrying within the prohibited degrees of kinship extends to KwaZulu-Natal and this is another reason why their marriage is not valid.

Outside KwaZulu-Natal, the requirements for a valid customary union are:

- consent of the bride's guardian
- consent of the bride
- consent of the groom
- payment or delivery of the marriage goods
- transfer of the bride

The facts show that all these requirements were met. Therefore, if Thabo and Zandi resided outside KwaZulu-Natal, their union would be valid.

b. If they were married on 10 December 2000, the Recognition of Customary Marriages Act 120 of 1998 would apply to their marriage. The legal requirements for a valid customary marriage entered into after 15 November 2000 are provided for in section 3 of Act 120 of 1998 and are as follows:

- The prospective spouses
  - must both be above the age of 18 years

  In this case, neither Thabo nor Zandi was above the age of 18 years. According to the Act they therefore required the consent of both their parents and not just their respective fathers in order to enter into the customary marriage. Their marriage is therefore not valid, since it did not comply with this requirement.

  Section 3 of Act 120 of 1998 also states that the parties:

  - must both consent to be married to each other under customary law

  The facts tell us that Thabo and Zandi concluded an agreement. From this we can assume that they did give such consent.

  Section 3 of Act 120 of 1998 states the following:

- The marriage must be negotiated and entered into or celebrated in accordance with customary law.

  The facts reveal that this requirement has been fulfilled. The *lobolo* was paid and Zandi was allowed to reside with Thabo and his family.

  The Act provides that a customary marriage between persons related to each other within certain degrees of kinship is prohibited. Section 3(6) of the Act provides that the prohibition of a customary marriage between persons on account of their relationship by blood or affinity is determined by customary law. Their marriage is therefore also invalid because Thabo and Zandi were related to each other.

11. Non-registration of a customary marriage has no effect on the validity of such marriage; the marriage is valid.

LECTURE FIVE

The consequences of customary marriages

Compulsory reading

Jansen RM "Family Law" in *Introduction to Legal Pluralism in South Africa* (2010) 43–45

Gumede (born Shange) v President of the Republic of South Africa and Others (CCT 50/08) [2008] ZACC 23; 2009 (3) BCLR 243 (CC); 2009 (3) SA 152 (CC) (8 December 2008)

Bekker JC, Rautenbech C & Goolam N (eds) *Introduction to legal pluralism in South Africa* (2010) LexisNexis Butterworths

Recommended reading

Recognition of Customary Marriages Act 120 of 1988

Divorce Act 70 of 1979

Bennett TW *Customary law in South Africa* (2004) 243–263

Olivier NJJ *Indigenous law* (1995) 41–48

Outcomes

After having studied this lecture, you should be able to

- distinguish between and explain the general, personal and patrimonial consequences of customary marriages
- discuss the single and complex systems of ranking
- explain the patrimonial relations between houses

5.1 Introduction

The consequences of traditional indigenous marriages, customary unions and customary marriages concern interpersonal relationships and patrimonial relations. Interpersonal relationships refer to relationships between the parties concerned in the marital union. Initially, these relationships are the relationship between the husband and wife, but later they include the relationships between parents and children. In customary law, however, a marital relation is not confined to

the husband, wife and children. It reaches much further; if you remember, it was traditionally the concern of family groups.

Like all marriages, the marital relation in customary law brings with it a unit of assets and liabilities. We call these assets and liabilities the "family estate". This estate is controlled in a particular way, and is related to the patrimonial consequences of the customary marriage.

The position in customary law is more complicated than we have indicated so far. Do you know why this is? Think about the characteristics of traditional indigenous marriages and the polygynous nature of these marital unions. Usually, the traditional indigenous marriage concerns more than one family. The relationships between these families, therefore, are also relevant.

5.2 General consequences

The most important and most common consequences of the traditional indigenous marriage, the customary union and the customary marriage may be summarised as follows:

- A new and separate unit, namely a family or house, comes into being. This unit is also a legal unit.
- The husband and wife have a mutual obligation to live together. Some groups allow a woman to live with her eldest son once he occupies his own independent residence.
- The husband and wife have a mutual duty to allow sexual intercourse. Each group has its own particular customs. These customs take reasonableness of demand into account. Greater fidelity is expected from the wife than from the husband, since customary marriages are potentially polygynous.
- The status of the man and woman changes. As far as the traditional indigenous marriage and the customary union are concerned, the powers of the woman's group in respect of marital guardianship over her are transferred to the husband and his group. Children born of these unions fall under the guardianship of their mother's husband and his family. In her own house, the wife enjoys a considerable degree of independence. She does, however, have to consult her husband on important matters. The husband, as family head, has specific powers. He represents his unit in matters that are external to the family. He is responsible for order and discipline within the family and for its needs and interests.

Regarding the customary union outside KwaZulu-Natal, section 11(3)(b) of Act 38 of 1927 provides that a wife in a customary union is under the guardianship of her husband. She becomes a minor and holds a position similar to that of her minor children, a situation which was unthinkable in original indigenous law.

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

- The traditional indigenous marriage and the customary union result in the establishment of a new house estate. Initially, this is controlled by the man's father, but the son's powers gradually increase. The husband has the most control over this property. The husband's wider family circle also has a measure of control, however. This means that the wife and her house are protected against the possibility of her husband's mismanagement.

5.3 Personal consequences

Each wife in a polygynous traditional indigenous marriage and customary union occupies a particular rank within the greater composite household. Her rank influences her status, her relationship with her husband's other houses and her children's rights to succession. The position differs from group to group. However, we are not going into detail here. Students who wish to learn more about this are advised to consult the additional reading for the lecture. We also suggest that you reread lecture 1 of this study unit.

It is not clear what the position would be in a polygynous customary marriage. We suggest that there would also be a form of ranking in spite of the requirement of equality, since such marriages "must be negotiated and entered into or celebrated in accordance with customary law" (section 3(1)(b) of Act 120 of 1998).

In this lecture, we shall confine our attention to the main principles. Two forms of ranking are found among the indigenous African people of Southern Africa. These are the simple and the complex ranking systems.

5.3.1 The simple ranking system

This ranking system is found only among those Tsonga groups who have not been influenced by the Zulus. No married woman establishes a house. In this system, the woman whom a man marries first becomes his main wife. All other wives are ranked in the order of their marriage. The husband has control of the property of the group as a whole. At the husband's death, the eldest son of the main wife assumes control of the common property. The wives and children have a claim to maintenance from the common property. The household means are, therefore, not divided.

5.3.2 The complex ranking system

Here we distinguish between two forms, that which is found among most Nguni-speaking peoples in which the household is divided into sections, and that found among other peoples in which the household is not divided into sections.

Among the Southern Nguni, the household is usually divided into two, but sometimes three, sections. The first two women whom a man marries become the main wives of the two sections. All further wives are added to these sections as subordinate wives. The first wife is the main wife, and her house is the great house (*indlunkulu*). The second wife forms the right-hand house (*indlu yasekunene*). All further wives are known as "rafters" (*amaqadi; sing: igadi*). They are added, in turn, to the great house and the right-hand house. This means, for example, that the third and fifth wives are added to the great house and the fourth and sixth wives to the right-hand house.

Each house forms a separate legal unit with its own property. The *iqadi*-house is naturally subordinate to the main house of the relevant section. In most cases, once a wife's rank has been fixed, it cannot be altered. Among some groups, however, a wife's rank can be changed. Such a change must take place publicly, and requires convincing evidence if it is disputed. In general, the principle is that a wife's rank cannot be lowered. Among the Swazi, the rank of wives is often determined only after the death of the family head.

This form of ranking may vary from group to group. Furthermore, the situation regarding traditional leaders differs from that of commoners. In the case of a lawsuit, the principles of ranking which apply in the ethnic group of the particular litigants should be taken into account.

The position in KwaZulu-Natal is regulated by the Codes of Zulu Law. You can familiarise yourself with the statutory provisions. The principles of ranking do not differ materially from those of the Southern Nguni. Among the Nguni groups, where a man marries a "seed-raiser" in substitution for a main wife who is infertile or has died or whose marriage has been dissolved, such a "seed-raiser" does not establish a new house. She forms part of the house of the woman for whom she has been substituted. Where the main wife has died or been divorced, the "seed-raiser" takes her place in all respects. A "seed-raiser's" position must be made public during her marriage ceremony. If this is not done, she establishes a house with a separate rank. A "seed-raiser" wife must be distinguished from an *igadi* wife. Every *igadi* wife has her own house estate.

Among the Sotho-Tswana, the household is not divided into sections. The general rule is that the first woman married becomes the main wife. This rule, however, needs to be qualified. Where there is a preferential marriage, the wife in this case generally becomes the main wife, regardless of the order in which she was married. Among other groups, the main wife is the woman to whose marriage goods the man's father has contributed. Besides the main wife, the rank of all the other wives is determined according to their order of marriage. Each wife establishes a separate house with its own property. The position of a "seed-bearer" wife is the same as among the Nguni.

5.4 Relationships between husband and wife

It has already been pointed out that the husband and wife have a mutual obligation to live together and a mutual duty to allow each other sexual intercourse. Furthermore, the husband and wife have particular rights and duties regarding the care of the family. The husband must provide the family with the means of subsistence. In rural areas the means of subsistence formerly included a dwelling area and agricultural land as well as seed, stock and clothing. The wife had to care for the house, prepare food and cultivate food on the fields.

In a traditional indigenous marriage, the wife was under the guardianship of her husband. The wife in a customary union (outside KwaZulu-Natal) was also considered a minor and was under the guardianship of her husband (in terms of s 11(3)(b) of Act 38 of 1927). This provision was repealed by Act 120 of 1998. The wife is no longer under the guardianship of her husband, but is now a major.

Although the wife in a customary union was under the guardianship of her husband, she enjoyed a considerable measure of independence in the running of her house. She had and still has a particular claim to the *ubulungu* beast. This beast was given to her by her family group at her marriage. It was usually a female. The progeny was then used for the wife's maintenance. This beast also maintained her link with her ancestral spirits in her husband's home. The animal formed part of the house property.

The legal position regarding the *ingquthu* beast (given to thank the mother of the girl for looking after her and guarding her virginity) is more or less the same as that regarding the *ubulungu* beast. The *ingquthu* beast is given to the mother of a girl when she is married or seduced. According to the Codes of Zulu Law, the *ingquthu* beast is the personal property of the girl's mother. She can dispose of it as she deems fit, or to the benefit of her house. If her marriage is dissolved, however, the beast becomes part of the property of her house, and she forfeits her claim to it. It would thus appear as if she has a particular interest in the beast as long as she remains a member of her house, although it forms part of the house property.

As far as the customary marriage is concerned, section 6 of Act 120 of 1998 provides the following:

> A wife in a customary marriage has, on the basis of equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity, including the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers she might have at customary law.

5.5 Proprietary consequences

The traditional indigenous marriage and the customary union create a separate house estate. The only exception to this are those Tsonga groups who have not come under the influence of the Zulus. What this property consists of is dis-

cussed in study unit 3, which deals with the customary law of things. We advise you to study this lecture and study unit 3 together. In this lecture we shall deal with the control of house property, and with the relationship between houses in respect of such property.

5.5.1 Control over house property

House property belongs to the husband, the wife of the house and their children. They all share in this property, and they each have a duty to contribute to the property. The husband controls the property on behalf of the house, but in consultation with the wife and the older children.

This position has, to some extent, been amended as far as customary unions are concerned. The members of the house are seen more as individuals, each with particular rights and powers. The husband is considered the only person who can dispose of house property. Children who have attained their majority earn their own living, and thus have an estate separate from the house. They are, however, expected to contribute part of their earnings to the house. The married woman has no legal control over house property. It is unlikely that her original rights of disposal over house property would be recognised in modern law. However, where the husband irresponsibly disposes of house property and ignores his wife's objections she can institute an action against him on behalf of her house.

The position of a wife in a customary marriage is provided for in terms of section 7 of Act 20 of 1998. She has the capacity to acquire and dispose of assets, to enter into contracts and to litigate in court (section 6).

5.5.2 Relationships between houses

According to original indigenous law, the property of every house forms a separate unit. Section 21 of the Codes of Zulu Law compels a family head to keep the property of his houses separate. The general rule found among all groups is that one house may not be enriched at the cost of another house. In other words, a family head may not impoverish one house to enrich another.

Sometimes, for one reason or another, the property of one house is used to benefit another house. The transfer of property between houses must be reasonable and for a just cause. In other words, such a transfer cannot take place arbitrarily. The family head must consult the members of the house concerned.

The following are examples of instances where such transfer of property is allowable:

- Where a house has to repay a particular debt and does not have the necessary property to do so.
- Where the property of one house is used as marriage goods for a son from another house. In such cases, a daughter from the latter house is usually appointed as the source from which the debt is to be repaid. This

means that the marriage goods received for this daughter must be used to repay the debt.

- Where house property is used to marry a subordinate wife. Such a wife is usually affiliated to the house that supplied the property. This custom is known as *ukwethula*.

The transfer of property from one house to another results in a debt relationship between the two houses. Sooner or later this debt must be repaid. In the second example, reference is made to a fairly common method of settling this debt. The death of the family head does not extinguish his debt. Previously, the house that originally supplied the property could not sue the other house (the debtor) in court for repayment of the debt. Can you think why this is? By whom must these houses be represented in court? The answer is: the family head. The family head cannot, however, simultaneously represent the one house as plaintiff and the other house as defendant. The principle involved is that a household cannot be divided against itself. In modern indigenous law, however, the woman belonging to the house having the claim can initiate the claim against the family head or the other house (see Olivier et al 154).

Act 120 of 1998 contains no specific reference to arrangements regarding relations of debt between "houses" or wives. Unless such relations are provided for in a contract, we are of the opinion that customary law should apply to such relations of debt.

5.5.3 Reform under the Recognition of Customary Marriages Act

In terms of section 7(1) of Act 120 of 1998, the proprietary consequences of a customary marriage entered into before the commencement of the Act continue to be governed by customary law. What this essentially means is that the position concerning polygynous marriages (i.e. the creation of separate houses with their own house property that is controlled by the husband) has been retained.

Section 7(2) provides that a monogamous customary marriage entered into after the commencement of the Recognition of Customary Marriages Act 120 of 1998 results in a family estate that is in community of property and of profit and loss, unless such consequences are specifically excluded in an antenuptial contract that regulates the matrimonial property system of the marriage. The matrimonial property system determines exactly how the marriage affects the financial position of each marriage partner.

Section 7(1) and 7(2) proposes a differential treatment of spouses in terms of consequences that are likely to follow from their customary marriages. The implications of these provisions were that for spouses married before the commencement of the Act, the proprietary consequences of their marriage continue to be regulated by customary law, with the husband as the controller of such property; whereas for those spouses married under the Act the proprietary consequences of their

marriage are in accordance with community of property, where both parties have equal right of control to the marriage property.

The differential treatment of spouses in a customary marriage was the subject of a court application in the case of *Gumede (born Shange) v Gumede*. This dispute regarding the proprietary consequences of customary marriages entered into before the Recognition of Customary Marriages Act came before the Constitutional Court. The provision was challenged which provided that the proprietary consequences of a customary marriage entered into before the commencement of the Recognition Act continue to be governed by customary law.

The following dispute regarding the proprietary consequences of customary marriages entered into before the Recognition of Customary Marriages Act was passed came before the Constitutional Court. The challenged provision provided that the proprietary consequences of a customary marriage entered into before the commencement of the Recognition Act continue to be governed by customary law.

Elizabeth Gumede entered into a customary marriage in 1968. This was the only marriage to which the applicant's husband was party. The marriage has since broken down irretrievably, and in January 2003 her husband instituted divorce proceedings. Mrs Gumede did not work during the marriage, but maintained the family household as well as caring for the four children. The family acquired two pieces of immovable property during the course of the marriage. The value of these properties, together with the furniture and appliances, amounted to approximately R40 000 each.

Moseneke DCJ, writing for a unanimous Court, examined sections 7(1) and 7(2) of the Recognition Act, which have the effect that marriages concluded prior to the enactment of the Recognition Act ("old" marriages) will continue to be governed by customary law, whilst those concluded after the enactment of the Recognition Act ("new" marriages) are to be marriages in community of property and of profit and loss, except where the parties agree otherwise. He also examined the codified customary law of marriage in KwaZulu-Natal, which subjects a woman married under customary law to the marital power of her husband, who is the exclusive owner and has control of all family property. Moseneke DCJ found these impugned provisions to be self-evidently discriminatory on at least the one listed ground of gender. Only women in a customary marriage are subject to these unequal proprietary consequences. Because this discrimination is on a listed ground it is presumed to be unfair, and the burden fell on the respondents to justify the limitation on the equality right of women party to "old" marriages concluded under customary law.

Moseneke DCJ found that the respondents had failed to provide adequate justification for this unfair discrimination. He held that section 8(4)(a) of the Recognition Act, which gives a court granting a decree of divorce of a customary marriage the power to order how the assets of the customary marriage should be divided between the parties, is no answer to or justification for the unfair discrimination based on the listed ground of gender. This is because section 8(4)(a) of the Recognition Act

does not cure the discrimination which a spouse in a customary marriage has to endure during the course of the marriage. The matrimonial proprietary system of customary law during the subsistence of a marriage, as codified in the Natal Code and the KwaZulu Act, patently limits the equality dictates of our Constitution and of the Recognition Act.

In light of these findings, Moseneke DCJ confirmed the order of constitutional invalidity issued by the High Court and held that the following provisions are inconsistent with the Constitution and invalid:

(a) Section 7(1) of the Recognition Act insofar as it provides that the proprietary consequences of a marriage entered into before the commencement of the Recognition Act continue to be governed by customary law.

(b) Section 7(2) of the Recognition Act, insofar as it distinguishes between a customary marriage entered into after and before the commencement of the Recognition Act, by virtue of the inclusion of the words "entered into after the commencement of this Act".

(c) Section 20 of the KwaZulu Act on the Code of Zulu Law because it provides that during the course of a customary union the family head is the owner of and has control over all family property in the family home.

(d) Section 20 of the Natal Code of Zulu Law because it provides that the family head is the owner of and has control over all family property in the family home.

(e) Section 22 of the Natal Code of Zulu Law because it provides that the inmates of a kraal are in respect of all family matters under the control of and owe obedience to the family head.

The unanimous Court also ordered that the government parties pay the legal costs of Mrs Gumede.

The effect of the ruling in this case therefore is that the proprietary consequences of marriages entered into before and after the commencement of the Act now enjoy the same status as they are both in community of profit. Effectively both spouses in the customary marriages irrespective of when they were concluded have equal control over the marriage property.

Customary marriage is further reformed by the provisions of Chapter III and sections 18, 19, 20 and 24 of the Matrimonial Property Act 88 of 1984, which applies to a customary marriage which is in community of property. Chapter III and sections 18, 19, 20 and 24 of the Matrimonial Property Act 88 of 1984 apply to a customary marriage which is in community of property. Chapter III gives equal powers to the husband and wife to administer and control the joint estate.

The Act also makes provision for spouses in a customary marriage entered into before 15 November 2000 to jointly apply to a court for leave to change the matrimonial property system governing their marriage or marriages. The court may grant the application if it is satisfied that:

- there are sound reasons for the proposed change
- sufficient written notice of the proposed change has been given to all creditors of the spouses for amounts exceeding R500 or such amount as may be determined by the Minister of Justice by notice in the *Gazette*
- no other person will be prejudiced by the proposed change

Provided that these requirements are met, the court will order that the matrimonial property system applicable to such marriage or marriages will no longer apply. The court will authorise the parties to such marriage or marriages to enter into a written contract in terms of which the future matrimonial property system of their marriage or marriages will be regulated according to conditions determined by the court (section 7(4)(a)).

In the case of a husband who is a spouse in more than one customary marriage, all persons having a sufficient interest in the matter, and in particular the applicant's existing spouse or spouses, must be joined in the proceedings (section 7(4)(b)).

Section 21 of the Matrimonial Property Act (which allows indigenous African people to approach a court to make the provisions of the Matrimonial Property Act 88 of 1984 applicable to their marriage) applies to a customary marriage, entered into after the commencement of the Act, in which the husband does not have more than one spouse (section 7(5)).

In the case of a polygynous customary marriage, where the husband intends to enter into a further customary marriage with another woman, the provisions of the Recognition of Customary Marriages Act 120 of 1998 state that the husband must apply to the court to approve a written contract that will regulate the future matrimonial property system of his marriages (section 7(6)). In terms of section 7(7), when considering such an application, the court must:

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

(ii) ensure an equitable distribution of the matrimonial property; and

(iii) take into account all the relevant circumstances of the family groups which would be affected if the application is granted.

The court may –

(i) allow further amendments to the terms of the contract;

(ii) grant the order subject to any condition it may deem just; or

(iii) refuse the application if, in its opinion, the interests of any of the parties involved would not be sufficiently safeguarded by means of the proposed contract.

It is not clear, however, what the position would be if the court refused the application. Would that exclude a second customary marriage or further customary marriages?

All persons having a sufficient interest in the matter, and in particular the applicant's existing spouse or spouses and his prospective spouse, must be joined in the proceedings instituted in terms of section 7(6) (section 7(8)). If a court grants an application contemplated in sections 7(4) or 7(6), the registrar or clerk of the court, as the case may be, must furnish each spouse with an order of the court. This order must include a certified copy of such contract and the registrar or clerk of the court must cause such order and a certified copy of such contract to be sent to each registrar of deeds of the area in which the court is situated (section 7(9)).

Self-evaluation

(1) Explain the general consequences of an indigenous marriage. (20)

(2) Explain the legal significance of the ranking system of wives. (10)

(3) Explain the consequences of a marital union for a husband and wife under customary law. (10)

(4) The indigenous marital union has definite proprietary consequences. Discuss the issue of control over house property. (7)

(5) Briefly discuss the proprietary relationships between houses under customary law. (7)

(6) Discuss the reform which has taken place in terms of the Recognition of Customary Marriages Act 120 of 1998, with regard to the proprietary consequences of a customary marriage. (25)

Feedback

Your answer could have included some of the following points:

1. The general consequences of indigenous marriage are fully dealt with in section 5.2.
2. The hierarchy of wives is linked to their status, their relationship with the other wives and their children's right to succession. In your answer, you need to distinguish between simple and complex systems of ranking.
3. The consequences of a marital union for a husband and wife are fully dealt with in section 5.4.
4. The proprietary consequences concerning the control over house property in indigenous marital unions are fully dealt with in section 5.5.1.

5. The proprietary relationship between houses is fully dealt with in section 5.5.2.
6. The reform which has taken place in terms of the Recognition of Customary Marriages Act 120 of 1998 regarding the proprietary consequences of a customary marriage is fully dealt with in section 5.5.3 and section 3.3.6 of your prescribed textbook.

LECTURE SIX

The dissolution of customary marriages

Compulsory reading

Jansen RM "Family Law" in *Introduction to legal pluralism in South Africa* (2006) 45–50

Recommended reading

Bekker JC *Seymour's customary law in Southern Africa* (1989) 172–214

Bennett TW *Customary law in South Africa* (2004) 266–293

Whelpton FPvR & Vorster LP "Dissolution of customary marriages" (2001) 24 (2) *SA Journal for Ethnology* 56–61

Vorster LP, Ndwandwe N & Molapo J "Consequences of the dissolution of customary marriages"' (2001) 24 (2) *SA Journal of Ethnology* 62–66.

Outcomes

After having studied this lecture, you should be able to

- differentiate between the various ways in which indigenous marriages can be dissolved
- discuss the grounds for the dissolution of indigenous marriages
- explain the effect of such dissolution on marriage goods
- discuss the consequences of dissolution

6.1 Introduction

As you know, a traditional indigenous marriage was a matter between the family groups concerned. The customary union, on the other hand, was a matter between a husband, a wife and the wife's father. From this it necessarily follows that the relevant marital unions could not be dissolved by the husband and the wife as individuals. Originally, the various family groups were involved. At present, the wife's father or his successor is often also involved.

The traditional indigenous marriage was concluded without any state involvement. Likewise, it was also dissolved without any interference from the state. The

conclusion and dissolution of a traditional indigenous marriage were therefore matters of private law. This position also holds for the customary union outside KwaZulu-Natal. In KwaZulu-Natal, however, the government appoints an official witness who should be present at the celebration of a customary union (Codes of Zulu Law, sections 40, 42). A customary union in this province, therefore, can only be dissolved by a court (see section 50). In terms of Act 120 of 1998, section 8(1) provides that a customary marriage may only be dissolved by a court.

In this lecture, we will consider the means of, and grounds for, dissolution, the effect of dissolution on the marriage goods and the consequences of dissolution.

6.2 Ways of dissolution

In customary law, the marital union can be dissolved either by way of court action or outside the court.

6.2.1 Dissolution by court action

6.2.1.1 The traditional indigenous marriage

Originally, a traditional indigenous marriage was not dissolved by an indigenous court. Instead, the marriage was dissolved by the spouses and their respective families. The court was involved only when the parties could not come to an agreement about the consequences of the dissolution, especially regarding the disposal of the marriage goods.

6.2.1.2 The customary union

In KwaZulu-Natal a customary union must be dissolved by a competent court. Previously the former Commissioner's Court was the proper court (Codes of Zulu Law, section 50). At present, any competent court has this power. In areas outside KwaZulu-Natal, the parties are not compelled to institute a court action for the dissolution of a customary union. The parties may approach the court to decide on the return of the marriage goods (lobolo), and in so doing dissolve the customary union in an indirect way. The court of the chief was previously also competent to dissolve a customary union.

The action can be instituted by the husband. It is instituted against the wife's father for her return or, failing this, for the return of the marriage goods. The action can also be instituted by the wife and her father. The action is instituted for the "dissolution of the marriage" and for a declaration of forfeiture of marriage goods. An action in this form implies that the court can dissolve the customary union by way of a decision. The correct procedure should, instead, be that the court be approached for a declaration that the customary union has been dissolved as a result of the husband's conduct and for a declaration that he has forfeited the marriage goods that have been delivered (see Olivier et al 165, 203; *Duba v Nkosi*,

1948 BAC (NE) 7: Nelspruit). The wife's father cannot institute the action as sole claimant (*Matumba v Rangaza*, 1948 BAC (C) 29).

It appears from earlier court decisions that a wife can, without assistance, institute an action for the dissolution of a customary union (see *Nonafu v Pike*, 1 BAC 120 (1906)): *Nqamakwe; Noenjini v Ntota*, 2 BAC 106 (1911): St. Marks). In later decisions it was ruled that a wife cannot institute an action without assistance (*Nqambi v Nqambi*, 1939 BAC (C & O) 57: *Bizana; Mqokweni v Nyenyane*, 1945 BAC (C & O) 9: *Bizana; Nhlabati v Lushaba*, 1958 BAC (NE) 18: Piet Retief). Section 50(1) of the Codes of Zulu Law has now resolved this contradiction, by providing that the wife in KwaZulu-Natal can now institute an action for dissolution without assistance.

6.2.1.3 The customary marriage

The Recognition of Customary Marriages Act 120 of 1998 now provides that the only competent authority to dissolve a customary marriage is a court, irrespective of where the spouses reside (see section 8(1) of the Act). In terms of this Act, the court is defined as a family court or a competent division of the High Court or a divorce court.

6.2.2 Dissolution without the interference of the court

In original indigenous law, the traditional indigenous marriage was dissolved by the family groups concerned. This principle is recognised in modern indigenous law for customary unions in areas outside KwaZulu-Natal. There are various possibilities here.

- The marital union can be dissolved by mutual agreement between the parties involved. In this case there need not be particular grounds, and the agreement usually also provides for the consequences.
- The marital union can be dissolved on the husband's initiative, with or without good reason.
- The marital union can also be dissolved on the initiative of the wife and her father, with or without good reason.

6.2.3 Dissolution as a result of the husband's or wife's death

6.2.3.1 The traditional indigenous marriage

In original indigenous law, the death of the husband or wife did not dissolve the traditional indigenous marriage as a matter of course. In many cases, depending on the circumstances, a relative was substituted for the deceased husband or wife. As stated earlier, substitution is dealt with in a later module.

6.2.3.2 The customary union

In modern indigenous law, the death of the wife terminates the customary union, although substitution is also possible (Bekker 175). The house of the deceased wife continues to exist, however. If she has not given birth to a successor (son), her husband may marry a "seed-raiser" in her place.

The death of the husband does not dissolve the customary union. The "widow" remains a wife in the household. Should she still be able to bear children, a male relative, and among some groups a non-relative, could procreate children for the deceased with her. This custom is generally known among the Nguni groups as *ukungena* (to enter).

According to the Codes of Zulu Law, however, a husband's death does dissolve a customary union. This dissolution is probably without effect, since the codes also provide for *ukungena* in such cases. Should the union be dissolved, the later seed-raising cannot really be regarded as *ukungena*.

6.2.3.3 Customary marriage

The position with regard to the customary marriage is not clear. Section 8 of Act 120 of 1998 provides only for dissolution by a decree of divorce. It can be argued that, since there is no explicit amendment of customary law in this case, customary law applies. In other words, the death of one of the spouses does not terminate the marriage.

6.3 Grounds for dissolution

Traditionally, dissolution by way of divorce was unknown. However, over time this position changed. There were no fixed grounds for dissolution. Any party could dissolve the indigenous marriage, even without a specific reason. Dissolution did have an effect on the marriage goods. These were returned if the husband dissolved the marriage on good grounds. If he did not have good grounds, or if the wife's group had good grounds, the husband usually forfeited the greater part of the marriage goods. Among the Tswana the marriage goods were not returned in principle, which meant that a traditional indigenous marriage could not be dissolved. In modern indigenous law, these principles are largely recognised.

6.3.1 The position in original indigenous law

In original indigenous law, the following grounds were generally recognised:

- Non-fulfilment by the wife of her child-bearing duties; substitution was possible here.
- Failure to deliver marriage goods; note, however, that the wife's group was usually very patient about this.

- Continual violation of conjugal fidelity by the wife, amounting to repudiation; attempts by the wife to prevent her husband from taking action against her adulterous lover; a single act of incest by the wife.
- Premarital pregnancy concealed from the husband; however, there was a duty on the husband to take immediate action once he became aware of the pregnancy.
- Neglect of mutual marital duties, including sexual intercourse.
- Expulsion of the wife by her husband, either directly or indirectly; repudiation by the husband required formal action – in most cases, the husband barred the entrance to the wife's house.
- Desertion by the wife with persistent, unfounded refusal to return; however, *ukutheleka* did not constitute desertion.
- Accusations of witchcraft by the husband against the wife were sufficient reason for the wife to leave her husband. This principle was subject to the fulfilment of two conditions, namely, if the witchcraft was persistent (*Mathupa v Mahupye* 1933 NAC (N&T) 6, and was followed by a formal process of "smelling out" (*Links v Mdyobeli* 1947 NAC (C&O) 96).
- Impotence of the husband, although substitution was permissible in this case.

6.3.2 The position in modern indigenous law

In modern indigenous law the courts, excluding indigenous courts, recognise the following grounds:

- Adultery, but only if it amounts to repudiation or renders the union impossible. Concealment of the identity of the adulterer or any other method of protection, continued adultery and incest are all regarded as aggravating circumstances. In other words, the latter are not separate grounds for divorce.
- Pregnancy during marriage resulting from secret premarital intercourse with another man.
- Desertion by the wife.
- Refusal to have sexual intercourse.

In KwaZulu-Natal, according to the Codes of Zulu Law, the following are grounds (i.e. for dissolution of the marriage) for both the husband and the wife:

- adultery
- continued refusal of conjugal rights
- wilful desertion
- continued gross misconduct
- imprisonment for at least five years

- a condition rendering the continuous living together of the spouses insupportable and dangerous

In addition to the above grounds, the wife may dissolve the customary union on the following grounds:

- gross cruelty or ill-treatment by her husband
- accusations of witchcraft or other serious allegations made against her by the husband

6.3.3 The customary marriage

A customary marriage can only be dissolved on the ground of the irretrievable breakdown of the marriage (sections 8(1) of Act 120 of 1998). This is in line with existing, living customary law, provided that not only the views of the spouses but also the views of the wider family groups are taken into account when determining the fact of irretrievable breakdown. In order to grant a decree of divorce, the relevant court must be satisfied that the marriage relationship has reached such a state of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between the spouses (section 8(2)).

This means that, whether or not a marriage has irretrievably broken down is a question of fact to be determined by reference to all the relevant facts and circumstances of the case. The test to be applied or the question to be posed in every case is: In the light of all the available evidence, is there a reasonable prospect that the parties will be able to restore a normal marriage relationship between them? If the answer is in the affirmative, then the marriage has not irretrievably broken down. If the answer is in the negative, then the marriage has irretrievably broken down and must be dissolved.

According to section 8(3) of the Act, both the Mediation in Certain Divorce Matters Act 24 of 1987 and section 6 of the Divorce Act 70 of 1979 apply to the dissolution of a customary marriage. The relevant section of the Divorce Act deals with the interests and the wellbeing of minor and dependent children of divorcing spouses. The Mediation in Certain Divorce Matters Act regulates the appointment of family advocates and makes provision for family counsellors who help family advocates to draw up recommendations concerning the custody and control of minor children. The Recognition of Customary Marriages Act contains no reference to facts or circumstances which may be indicative of the irretrievable breakdown of a customary marriage.

In terms of section 4(2) of the Divorce Act, the court may, in the case of civil marriages, accept as proof of the irretrievable breakdown of a marriage evidence that:

- the parties have not lived together as husband and wife for a continuous period of at least one year immediately prior to the date of the institution of the divorce action;

- the defendant has committed adultery and the plaintiff finds this irreconcilable with a continued marriage relationship; or
- the defendant has, in terms of a sentence of a court, been declared a habitual criminal and is undergoing imprisonment as a result of such sentence.

The above are perhaps more than guidelines because it would appear that, once the existence of one or more of the situations described above has been established, the court has no option but to conclude that the marriage has irretrievably broken down. Thus, proof of the existence of any of these situations creates a presumption that the marriage has irretrievably broken down. It is, however, doubtful whether these guidelines would serve any purpose as far as customary marriages are concerned, simply because they raise so many questions.

It should be noted that the principle of irretrievable breakdown of a marriage is a vague concept which does not easily lend itself to precise definition. The question of whether or not a particular marriage has irretrievably broken down is a matter to be decided by the court and therefore depends quite heavily on the discretion of the court. However, the court's discretion is limited, particularly in cases where the parties have agreed that their marriage has broken down and ought to be dissolved. In such situations the parties would simply agree that the defendant will not challenge the plaintiff's allegation of irretrievable breakdown. In this event, the court would have little option but to accept the plaintiff's unchallenged evidence and grant a decree of divorce. In these circumstances, therefore, divorce would essentially be an option provided there is consensus between the parties.

6.4 The effect of dissolution on marriage goods

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

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

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

- the amount of blame on either side
- the number of children born of the marital union
- the portion of marriage goods already delivered

What follows is an explanation of each of these guidelines.

6.4.1 The amount of blame on either side

As far as the guilt factor is concerned, we can state that the party who is to blame forfeits the marriage goods. Should the husband dissolve the union with good reason, in other words, where the wife is to blame, the marriage goods are usually returned. Should the wife dissolve the union with good reason, in other words where the husband is to blame, the marriage goods are not returned. It has, however, become customary to return at least one beast to the husband to indicate, in a concrete manner, that the marriage has been dissolved.

6.4.2 The number of children born

Among most groups, the wife's group is allowed certain deductions should they have to return the marriage goods. In most cases, one beast is allowed as a deduction for every child the wife has borne. Note that this does not refer to living children only, but to all children the wife has given birth to, as well as miscarried children (*Mayeki v Kwababa* 4 NAC 193 (1918)). Should the wife have had more children than the number of marriage beasts, at least one beast should be returned to the husband as concrete proof that the marriage has been dissolved.

6.4.3 The portion of marriage goods already delivered

It is argued that there can be no dissolution should the wife's group keep the full marriage goods (lobolo). If the husband has not delivered all the marriage goods upon the dissolution of the union, and if he was responsible for the breakdown of the marriage, he is indebted for the balance. The converse is also true. That is, if the wife was responsible for the breakdown of the marriage and if, at the time of the dissolution of the marriage, the husband still had not delivered all the marriage goods, he is not indebted for the balance.

Should the parties fail to reach an agreement regarding the marriage goods, the court may be approached for a decision. Note that, in such a case, the court is not asked to dissolve the union. The union has already been dissolved, without the interference of the court. The court is merely being asked to decide on the marriage goods.

The position in respect of the customary marriage is not clear. In lecture 3 we said that an agreement concerning the payment of lobolo is not an absolute requirement for the conclusion of a valid customary marriage in terms of Act 120 of 1998. Nor does the Act refer to lobolo when dealing with issues pertaining to divorce. The suggestion here is that the parties make a specific point of agreeing on the fate of the marriage goods during the dissolution of the marriage or that the court be approached to make a decision.

6.5 The consequences of dissolution

Can you think what the general consequences or results of the dissolution of a marital union are? The marital union is, of course, terminated. The marital union is primarily between husband and wife. Particular consequences have resulted from this union. In most cases, children have been born to the parents. Furthermore, a property unit has been created. The question now is: What happens when the marriage is dissolved? The position in customary law differs from the position under South African law. Let us consider the consequences (see below).

6.5.1 Consequences for the husband and wife

Given the polygynous nature of the customary marriage, the husband's status is not seriously affected should one of his marriages be dissolved. However, the wife's position changes drastically. She now becomes a divorced woman and is no longer under her husband's guardianship. In original indigenous law, she reverted to being under the guardianship of her agnatic group of birth. A wife in a customary union also reverts to the guardianship of her father or his successor unless she is above the age of 21. Should she be older than 21 years, she is a major. By virtue of sections 6 and 9 of the Recognition of Customary Marriages Act 120 of 1998, her status as a major continues when she contracts a customary union. A wife in a customary marriage is therefore a major and remains a major on the dissolution of her marriage.

6.5.2 Consequences for the children

Although the marital union has been dissolved, the wife's house is not dissolved. Under original indigenous law, the children remained members of the house. Infants could accompany their mother to her people, but when they were older they usually had to return to their father's home.

This position has been changed in respect of a customary union. According to the Codes of Zulu Law, the children fall under the guardianship of the husband. The court may, however, make an order regarding their custody and maintenance. The court may, for example, place the children under the custody of their mother and her guardian.

"Parental rights are determined by payment of *lobolo:* if obligations under the *lobolo* agreement have been fulfilled, the husband and his family are entitled to any children born of the wife" (Bennett 285). In terms of section 8(4)(d) and (e) of Act 120 of 1998, when granting a decree for the dissolution of a customary marriage, the court may make an order regarding the custody or guardianship of any minor child; and may, when making an order for the payment of maintenance, take into account any provision or arrangement made in accordance with customary law.

In original indigenous law, a father had an absolute right to the custody and guardianship of any child born of the marriage. The mother (except in KwaZulu-Natal) had no parental rights to the custody or guardianship of her children because

she was not a party to the lobolo contract. The court, as the upper guardian of all minors, and section 28(2) of the Constitution of the Republic of South Africa, 1996, have, however, adapted customary law in this respect by emphasising the best interests of the child as being decisive in every matter concerning the child. Furthermore, section 1 of the Guardianship Act 192 of 1993 now grants equal powers of guardianship to both parents of a minor child.

In cases where the wife instituted action for custody of her children, she had to prove that the father was not a fit and proper person by reason of his ill-treatment or neglect, or that he lacked the necessary ability to care for them. Where very young children were involved, the court would generally award custody to their mother until they were able to live away from her without harmful results. If she was sued for custody by her husband, he had to prove that she was not a fit and proper caregiver for the children, and that she lived in unsuitable conditions which could endanger the physical or moral wellbeing of the children. The court would also consider the effect it would have on the ancestral connection for the children if custody was given to someone other than the father's family. In African custom there are certain rituals that have to be performed on behalf of the child at different stages of his or her life by the paternal family to ensure that the child remains connected with the ancestors.

Among the South Nguni people, the original indigenous law position was recognised. It was also accepted that the wife, duly assisted, may institute an action against her husband for custody over her children. In the former Transvaal, it was furthermore accepted that the wife should be joined in any court action between her husband and her father concerning the custody of the children.

6.5.3 Proprietary consequences

The house, as a patrimonial unit, continued to exist after the dissolution of the marriage. The wife lost all the rights and powers she had in respect of house property. She could not claim maintenance from house property. In this regard, original indigenous law was recognised virtually in a virtually unchanged form.

The Recognition of Customary Marriages Act 120 of 1998 makes specific provision for maintenance and matrimonial estate sharing. In terms of section 8(4)(a) of the Act the court, when granting a decree for the dissolution of a customary marriage –

(a) has the powers contemplated in sections 7, 8, 9, and 10 of the Divorce Act, 1979, and section 24(1) of the Matrimonial Property Act, 1984 (Act No 88 of 1984) [These sections are concerned with the issue of the allocation of assets and benefits of the marriage.]

Section 9 of the Divorce Act deals with forfeiture of benefits and section 10 deals with the costs of the divorce action. For the purposes of this module, we will only deal with section 9. The underlying principle governing the forfeiture of patrimonial benefits is that:

> no person ought to benefit financially from a marriage which he (or she) has caused to fail. (For example), if the marriage was in community of property, the spouse against whom a court has ordered total forfeiture will receive only those assets which he brought into the joint estate himself. Forfeiture of benefits, therefore does not mean that a spouse loses his own assets, but merely that he loses the claim which he has to the assets of the other spouse. (Cronje DSP & Heaton J *South African family law* (1999) 150.)

Customary law also provides for "forfeiture of benefits"; this is expressed in the Northern Sotho maxim of *monna/mosadi o nkga le sa gagwe*: "a man or woman who smells (stinks), smells with all that is his/hers". This means that divorce is effected by the abandonment by the wife and her family, of all the rights in the marriage, or by the forfeiture by the husband and his family of all their rights. A court order in terms of section 9 of the Divorce Act 70 of 1979 for the forfeiture of patrimonial benefits of a customary marriage would therefore be in line with customary practice.

In terms of section 8(4)(b) of Act 120 of 1998, a court must make an equitable order regarding polygynous marriages and must consider all relevant factors, including contracts, agreements or court orders, in terms of section 7(4) to 7(7) of the Divorce Act 70 of 1979. Expectations and liabilities regarding the marriage goods *(lobolo)* should also be considered when determining the assets of the estate that is to be divided. The present practice among some groups is that these remain with the father (husband): he is obliged to help his sons give lobolo for their first wives, and he receives lobolo for his daughters when they marry. The court may also order that any person who, in the court's opinion, has a sufficient interest in the matter be joined in the proceedings (section 8(4)(c)).

Self-evaluation

(1) Discuss the ways in which the various types of indigenous marital unions can be dissolved. (20)

(2) Discuss the grounds for dissolution of the various types of indigenous marital unions. (15)

(3) What effect does the dissolution of an indigenous marital union have on marriage goods? (6)

(4) What are the consequences of the dissolution of an indigenous marital union? (15)

Feedback

Your answer could have included some of the following points:

1. The ways of dissolving indigenous marriages are fully discussed in section 6.2.
2. The grounds of dissolution are fully discussed in section 6.3. In your answer, you need to distinguish between the position in KwaZulu-Natal and the position in other areas.
3. The effect of dissolution on the marriage goods is fully discussed in section 6.4.
4. The dissolution of indigenous marriages has consequences for the husband and the wife, children, and consequences for the property owned by the couple. You need to briefly discuss these consequences.

STUDY UNIT 3

CUSTOMARY LAW OF PROPERTY AND SUCCESSION

OVERVIEW

The most important question in this section is: what is meant by "property" in customary law? In this study unit we will answer this pertinent question and discuss the various issues arising from this concept. The law of property also involves control over and transfer of property, and what happens to property in the case of death.

The customary law of property may be divided into the customary law of things and the customary law of succession and inheritance. The customary law of things concerns the rules of ownership, and the customary law of succession and inheritance concerns the transfer of, and control over, rights in property following someone's death.

Outcomes

After having studied this unit you should be able to:

- explain and identify the main concepts of the customary law of property
- discuss the types of property and how they are controlled
- explain and apply the general principles of the customary law of succession and the order of succession
- discuss the powers and duties of a successor
- discuss the relevant case law affecting the principles of intestate inheritance

Structure of the unit

LECTURE 1: Customary law of property

LECTURE 2: Customary law of succession and inheritance

LECTURE ONE

Customary law of property

Compulsory reading

Bekker JC & Maithufi IP "Law of Property" in *Introduction to legal pluralism in South Africa* (2006) 55–60

Recommended reading

Bennett TW *Human rights and African customary law* (1995) 129–132, 137–152

Outcomes

After having studied this lecture, you should be able to

- describe the nature and scope of indigenous real rights
- explain the differences between, firstly, movable and immovable property, and secondly, between general, house and personal property in customary law
- discuss control over property in customary law

1. MAIN PRINCIPLES

1.1 Introduction

The law of property is that division of private law in which "things" are defined, and which expresses the rules and principles concerning rights in things. According to Maithufi (in "The Law of Property" in *Introduction to legal pluralism in South Africa: Part 1 Customary Law* (2002) 53) property may be defined as:

> anything that is capable of being owned or possessed and which is useful and beneficial to a person.

The things concerned are material things, and may be movable or immovable. An example of immovable property is land, while animals (cattle, sheep, chickens) and household necessaries (groceries, furniture, fridges, radios) are examples of movable property.

Rights in things are known as "real rights". There are various categories of real rights. We shall mention only a few of the best-known of these, namely ownership, servitudes, pledge, mortgage, quitrent tenure and mineral rights. The most com-

prehensive real right which can be acquired over material things is ownership. All other categories of real rights are limited.

It would appear that originally the only real right known in customary law was ownership. Other real rights were apparently unknown, although some groups did recognise a form of pledge.

In original indigenous law, the agnatic group, or the house as a subdivision of the agnatic group, was the bearer of rights and thus of real rights. Rights in property were therefore vested in the agnatic group. The head of the group exercises this right on behalf of, and in the interests of, the agnatic group. In modern indigenous law, real rights can also be vested in individuals, particularly majors.

In study unit 2, (Family law), we saw that among most peoples each house is also a property unit. Besides house property, there are the categories of general property and personal property. We can therefore distinguish three categories of property in customary law, namely general property, house property and personal property.

1.2 Categories of property

1.2.1 General property

General property belongs to the household as a whole. It is controlled by the family head. Nevertheless he is not the personal owner of this property. Each member of the household shares in the property according to his or her status within the group. The family head exercises control on their behalf and in the interests of the group. Formerly, the tribal chief (traditional ruler) could transfer control to another male relative if there was gross mismanagement. The commissioner also had this power. This power is now vested in the local magistrate. However, senior male relatives have a moral duty to restrain a prodigal family head.

General property includes the following:

- property of the family head's mother's house to which he has succeeded
- property which the family head has earned by his occupation
- land which has been allocated to the family head by the tribal authority, and which has not been allotted to a particular house.

On the death of the family head, the control of the general property passes to the head's general successor. In modern times, there is a tendency to regard this property as property to which the successor succeeds as an individual. The effect of this is that the successor becomes an heir to the exclusion of other members of the household, and is responsible for the use of such property. For example, if a member of the agnatic group has to undergo a traditional rite, the successor is expected to provide the necessary goods (eg a goat to be slaughtered as a sacrifice).

1.2.2 House property

House property refers to the property that belongs to each separate house. As you may remember, among the Tsonga, who have not been influenced by the Zulu, house property is unknown. Among all the other peoples, however, house property is known.

House property is controlled by the head of the house, namely the husband. In most cases, the husband is the head of various houses at the same time. In his disposal of house property he is morally, but not legally, obliged to consult the wife of the house and the house successor, if this person is already an adult. The wife has a reasonable degree of control over house property as far as daily household affairs are concerned. She decides, for instance, on what groceries to buy and is not expected to consult her husband about this.

When property from one house is used to the benefit of another house, a debt relationship is created between the houses concerned. Such a debt has to be repaid at some time, although no action for repayment can be instituted in an indigenous court. The principle involved here is the one we referred to earlier on: "an agnatic group cannot be divided against itself".

House property includes the following:

- earnings of family members, including the earnings of a midwife and medicine woman
- livestock which is allocated to a particular house from the general property
- property given to a woman on her marriage, such as household utensils and a certain beast that is given to her during her marriage, such as the *ubulungu* beast (among the Nguni people)
- marriage goods (lobolo) received for the daughters of the house
- compensation for the wife's adultery or the seduction of any of the daughters
- crops from the fields belonging to the house
- land allocated to a house for dwelling and cultivation purposes

The wife of a house can protect the house property in the case of her husband's prodigality. She can call on her husband's agnatic group and, today, she can also apply to the magistrate.

On the husband's death the control of the house property passes to the house successor. This successor is usually the wife's eldest son. This control over the house property, however, does not mean that the successor, as an individual, becomes the owner of the property to the exclusion of the other members of the house.

1.2.3 Personal or individual property

Maithufi (56) defines personal property as:

property that belongs to a person who has acquired it, although it may be under the control of the family head.

Originally, individual property was unknown in customary law. Although individuals could dispose of personal things such as clothing, walking sticks, snuff boxes, necklaces or weapons, the rights in these personal things were vested in the group. Individuals could not, therefore, deal with such property as they pleased, but constantly had to consult with the other members of the agnatic group.

Individual ownership is, however, acknowledged in modern indigenous law. Here the rules governing property are essentially the same as those generally applicable in South African law. In the individual's use of the property he or she is morally, but not legally, obliged to consult the family head. Individuals may dispose of property as they wish.

For the rules regulating ownership of land in customary law, please consult the relevant section of your prescribed textbook.

Self-evaluation

(1) What are the distinctive characteristics of the original indigenous law of things? (10)

(2) Distinguish between general property, house property and personal property. Give examples to substantiate your answer. (10)

(3) Who is responsible for the control of general property and house property? (4)

Feedback

Your answer could include some of the following points:

1. The distinctive characteristics of the original indigenous law of things are that the agnatic group, and the house as part of this group, was the bearer of property rights. Also, property rights were limited to ownership of movable and immovable things. Individual ownership was unknown, although personal ownership did have some relevance, since the individual could not do whatever he pleased with this property.
2. General property, house property and personal property are discussed in full in section 1.2.

3. General property is controlled by the family head, in consultation with the senior men and women of the agnatic group. House property is controlled by the family head, in consultation with the wife and senior children.

LECTURE TWO

Customary law of succession and inheritance

Compulsory reading

Rautenbach C, Du Plessis W & Venter AM "Law of succession and inheritance" in *Introduction to legal pluralism in South Africa* (2010) ch 7

Recommended reading

Bekker JC *Seymour's customary law in Southern Africa* (1989) 273–310

Outcomes

After having studied this lecture, you should be able to

- explain the difference between succession and inheritance
- explain the general principles of the customary law of succession
- discuss the rights and duties of general and house successors
- explain the order of succession in customary law
- discuss the disposal of property and the administration of indigenous estates
- discuss the contradictions between the statutory provisions regulating intestate African estates and the provisions of the Constitution of the Republic of South African, 1996

2.1 Introduction

The law of succession falls under private law and, in terms of customary law, includes those rules which determine what happens to the estate of a deceased person and who controls the agnatic group's property after the death of a deceased person. In Western legal systems, this part of the law concerns the disposal of the estate of a deceased person (assets and debts) after his or her death, and therefore deals with inheritance of property rather than succession.

Is there any real difference between succession and inheritance? We believe there is.

Inheritance is mainly concerned with the division of the assets of a deceased person among his or her heirs. The division can take place according to the provisions of a will (testament) – thus testate inheritance – or according to the rules of com-

mon law where there is no will – thus intestate inheritance. The liabilities of the deceased are first set off against the assets, and the balance is then divided up. Should the liabilities exceed the assets, the heirs inherit nothing.

In the case of succession, there is, strictly speaking, no division of property. The successor takes the place of the deceased and gains control over the property and people over which the deceased had control. Furthermore, the successor succeeds not only to the assets of the estate, but also to its liabilities. Should the liabilities exceed the assets, the successor, in customary law, succeeds to these as well. Please note that this position is not the same for all groups. We will elaborate on this at a later stage in this lecture.

In original indigenous law, the death of the family head had a significant effect on the agnatic group and its property. The family head was succeeded by a general successor but, at the same time, there was the question of succession to his position as head of his various houses. There was therefore a general successor and a successor to each house, that is, a house successor. The death of other members of the agnatic group had no effect on the control of the group and its property. In other words, when they died, succession was simply not an issue.

2.2 The customary law of succession

2.2.1 General principles

The following can be identified as general principles:

- Succession takes place only on the death of a predecessor; there is thus no question of succession while the family head is still alive.
- In original indigenous law, succession was related solely to status, but modern indigenous law does acknowledge the notion of the individual inheritance of property to some extent.
- In original indigenous law, there was no such thing as the total disposition of property by means of a will. Today, however, it is not uncommon for indigenous African people to dispose of their assets by means of a will.
- A distinction is made between general succession and special or house succession.
- In original indigenous law, the successor succeeded to the deceased's assets and liabilities; in modern indigenous law, the position differs between groups. In KwaZulu-Natal, a successor succeeds to the assets of the estate and only those debts that emanate from marriage contracts (the lobolo debts). In the rest of the Republic of South Africa, a successor succeeds to the assets and all the debts of his predecessor.
- Succession in status is limited largely to males, especially those of the patrilineage; a man cannot be succeeded by a woman, except in certain rare cases.

- Succession follows the principle of primogeniture. Primogeniture means that, on his death, a man is succeeded by his firstborn son (Rautenbach et al 94).
- Succession is a duty that cannot be relinquished or ceded.
- Male descendants enjoy preference over male ascendants; male ascendants, in turn, enjoy preference over collateral male relatives or relatives in the lateral line. ("Ascendants" are ancestors, and "collateral relatives" are relatives in the lateral line, such as brothers and sisters.)
- Disposal among the living is possible, provided the usual formalities are complied with.
- A successor may, on good grounds, be removed from the line of succession ("disinherited").

2.2.2 The general order of succession

The order of succession takes particular account of the following three principles:

- succession through death
- primogeniture
- succession by males in the male line

We distinguish between succession in a monogamous household and succession in a polygynous household. A monogamous house has one wife, whereas a polygynous household, as you know, has several wives and houses.

2.2.2.1 Succession in a monogamous household

The order of succession is briefly as follows:

- The eldest son or, if he is deceased, his eldest son.
- If the eldest son died without male descendants, the second son or his male descendants succeed, in their order of birth.
- Should the deceased die without male descendants, or if he has survived all his male descendants, the deceased's father is the successor.
- If the deceased has survived all his male descendants and his father, he is succeeded by his eldest brother or his male descendants; this is how all the brothers of the deceased and their male descendants are considered in terms of succession.
- Should the deceased's father or the deceased's brothers have no male descendants to succeed him, the grandfather of the deceased or one of his male descendants succeeds to his estate, according to seniority.
- In the same manner, the deceased's great-grandfather and his male descendants are considered in terms of succession.

- Where there are no male descendants to succeed, the traditional ruler of the deceased's traditional authority succeeds to this estate.
- Where there is no traditional ruler, the President succeeds as supreme chief.

2.2.2.2 Succession in a polygynous household

We distinguish between those peoples who divide the household into sections and those who do not. In all cases, the eldest son in each house succeeds in that particular house. If he is deceased, first all his male descendants are considered, and thereafter his younger brothers and their descendants. Should a particular house have no male descendant, a successor is obtained from the house next in rank.

Among peoples where the household is divided into sections, an attempt is first made to obtain a successor from the houses affiliated to the main house within a section before considering the next section for a successor. In other words, if there is no male within a particular section who can succeed, the senior male successor in the other section succeeds in the section that does not have a successor.

2.2.2.3 The order of succession among male children

It sometimes happens that a deceased leaves no legitimate son of his own, but does have an illegitimate son or a son from a supporting marriage. In certain circumstances, such a child could succeed as heir. Despite considerable variations among the different peoples, the ranking order of sons for purposes of succession may be summed up as follows:

- A legitimate son procreated by the man himself.
- A married man's illegitimate son by a virgin, widow or divorced woman for whom *isondlo* (maintenance) has been paid.
- *Ngena* children.
- *Adoptivi* (adopted children) or *adulterini* (adulterous children) of the wife (unless the latter have been repudiated) according to the chronological order in which they became attached to the late husband's family.
- Sons of a widow who are not born out of an *ngena* union.
- A premarital son of an unmarried woman or the extramarital son of a divorced woman for whom no *isondlo* has been paid. Here we are dealing with succession through a woman. Such a son can succeed through his mother only if the deceased has no other male relatives.

2.3 General and special succession

In the introduction to this lecture we said that the successor takes the place of the deceased. In other words, the successor "steps into the shoes" of the deceased and gains control over the property and people over which the deceased had control. Owing to the polygynous nature of the customary marriage, the deceased is therefore succeeded by a general successor and a house successor (Bekker 273).

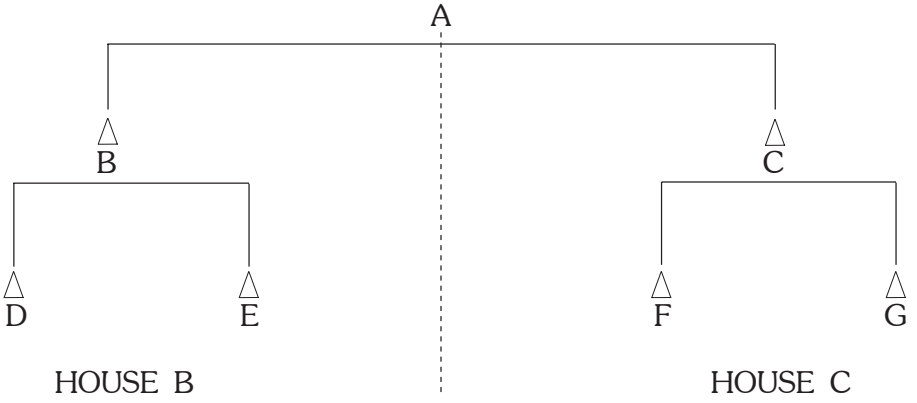
General succession is concerned with control over the household and property of the general estate, that is, property belonging to the agnatic group as a whole. You already know that the agnatic group comprises various houses. And, if you remember, the houses differ in rank. We can therefore deduce that the general successor obtains overall control over all the various houses. In most cases the general successor would also be the successor to the main house. Where the household is divided into sections, the successor to the main house of the main section (*indlunkulu*, among the Nguni groups) is also the general successor. In other words, in due course, the original household develops into various independent households, with the overall control of the general successor as a binding factor in respect of what now forms a family group.

The senior members of the family group also form a family council which, to a greater or lesser extent, exercises control over the constituent agnatic group and its independent houses. Such a family council could discipline a family head should he misuse the general property, for example.

Special succession is concerned with control over the house and house property. There are therefore as many house successors as there are houses. How is this possible? This situation must be understood as follows: although there is no question of a division of the deceased's estate, each house successor succeeds to all the powers of the deceased in respect of the relative house. Each house successor thus obtains control over the members of the relevant house and the house property, and this control is exercised in consultation with the house members. After the death of the family head, each house forms a potentially independent unit from which a new household may eventually emerge. The general successor, however, obtains overall control over all the houses and thus, to a certain extent, maintains the original unity.

> In order to fully understand the concepts discussed above, you need to understand the difference between general property and house property. If you do not, then go back to lecture 1 of this study unit and refresh your memory.

The distinction between general and special succession can be explained by means of the following diagram.



In the diagram above, A has two wives, namely B and C. Each marriage creates a separate house, namely house B and house C, and A is the common spouse in each house. He has two children with B, namely D (the firstborn son) and E (a daughter). He also has two children with C, namely F (a son) and G (a daughter). If A dies, D will be both the general successor (because he is the firstborn or eldest son) and the house successor in B's house. In other words, D will control the general property and the house property belonging to B's house. F will only be the house successor in C's house. In other words, he will only assume control over the house property belonging to C's house.

2.4 Powers and duties of the successor

In original indigenous law, succession meant that the successor inherited both benefits and duties. When a family head died, his powers and duties passed to the general successor and to the house successors in more or less direct proportion to the rank of each house. Each house successor had a considerable measure of autonomy over the affairs of his house. Among other duties, he had to care for and support the house members, see that debts were paid and collected, and provide the marriage goods for sons and the wedding outfits for sons and daughters.

The general successor's powers and duties regarding the house to which he had succeeded were the same as those of the other house successors. As general successor, he also acted in the place of the deceased family head and obtained control over the general property. He had the same powers and duties as his predecessor, although he had less authority over the various houses than his predecessor. He was therefore responsible for the general debts of the household, and could collect outstanding debts.

Modern indigenous law, however, has changed the original mechanisms through which a successor succeeded to assets and liabilities. In KwaZulu-Natal, the position is governed by statute and is currently as follows (briefly):

- The successor is generally liable only for debts equivalent to the assets of the estate.
- The successor is, however, fully liable for lobolo debts contracted with another house in order to establish his own house (i.e. inter-house loans).

In areas outside KwaZulu-Natal, a successor is probably still liable for his predecessor's debts, even if there is not enough patrimony. In addition, he is also liable for any lobolo debts, which implies universal succession.

A successor is also liable for the delicts of the deceased. This liability is, however, limited to cases where the action was instituted before the death of the deceased or where the deceased accepted liability during his lifetime. In such a case the successor's liability is limited to the extent of the estate (Bekker 302). In this connection, the Mpondo are an exception in the sense that the successor is not responsible for the delicts of his predecessor.

2.5 Disposition *inter vivos*

Earlier on, we said that succession, in customary law, occurred only on the death of the family head. Furthermore, the order of succession was prescribed fairly accurately. Despite this, a family head could make certain allotments during his lifetime which would remain valid after his death. These methods of making allotments are still recognised in modern indigenous law, and include the following:

- Allotment of property to a specific house or son. This allotment is accompanied by certain formalities and may occur more than once.
- Adoption, which influences the normal order of succession. An *adoptivus* is, however, excluded by a legitimate child. Note that the Zulu and Swazi do not recognise adoption.
- Transfer of a younger son from one house to another house without a son. Such a son succeeds to the latter house.
- Seed-raising is an alternative means of trying to ensure a successor in a house without a son.
- Allocation of daughters to sons in a house as a means of providing for the marriage goods of these sons. The marriage goods received for a daughter are then used as marriage goods for the wife of one of the sons. This method of providing for the marriage goods of sons is found chiefly among the Sotho groups.
- *Ukungena*, or the procreation of a successor for a deceased man by his widows.
- Disherison (disinheritance) as a means of eliminating a potential successor from the order of succession. Disherison requires special reasons and formalities which will not be discussed in this module.

All the above methods have a definite influence on the customary rules of succession. For this reason such dispositions must be accompanied by particular formalities and must be done in consultation with the wider family group.

2.6 Statutory regulation of the customary law of inheritance in South Africa

Although customary law has laid down the principles of succession and inheritance, there has nevertheless been considerable statutory intervention, in South Africa, regarding the regulation of the estates of black persons. These regulatory provisions are largely found in the Black Administration Act 38 of 1927.

2.6.1 Testamentary dispositions

In original indigenous law, the total disposition of property by means of a will was unknown. The main reason for this was that rights and duties were held by the agnatic group. The individual was not the bearer of rights and could not,

therefore, dispose of the property of the agnatic group. In modern indigenous law, however, wills are recognised. In addition, **on 1 January 1929, the Black Administration Act commenced**. Section 23 of this Act sought to regulate succession among the indigenous African people of South Africa (Rautenbach et al 100). In this regard, sections 23(1), (2) and (3) provided as follows:

(1) All movable property belonging to a Black and allotted by him or accruing under Black law or custom to any woman with whom he lived in a customary marriage, or to any house, shall upon his death devolve and be administered under Black law and custom.

(2) All land in a tribal settlement held in individual tenure upon quitrent conditions by a Black shall devolve upon his death upon one male person, to be determined in accordance with tables of succession to be prescribed under subsection (10).

(3 All other property of whatsoever kind belonging to a Black shall be capable of being devised by will.

From the above we can conclude that all movable property allocated to a house or a wife in a customary marriage was inherited according to the rules of original indigenous law and could not be bequeathed by means of a will. All other property, however, could be disposed of by means of a will. Furthermore, where the estate of a black person had been partially or totally bequeathed by a will it had to be administered in terms of the Administration of Estates Act 66 of 1965 (section 23(9)).

Persons who had contracted a civil marriage (but never a customary marriage); and unmarried men and all women, in so far as they were individual holders of rights, could dispose of their whole estate by means of a will.

2.6.2 Intestate inheritance

Until the Constitutional Court in the *Bhe* case declared sections 23 (1), (2) and (7) of the Black Administration Act 38 of 1927, which regulated the inheritance of property by persons living under customary law unconstitutional, the estate of a black who died without a valid will devolved according to the rules contained in Government Notice R200 of 1987. Now, in terms of section 2 (1) of the Reform of Customary Law of Succession and Regulation of Related Matters Act No 11 of 2009 –

> The estate of or part of the estate of any person who is subject to customary law who dies after the commencement of this Act and whose estate does not devolve in terms of that person's will, must devolve in accordance with the law of intestate succession as regulated by the Intestate Succession Act, subject to subsection (2).
>
> 2(2) In the application of of the Intestate Succession Act –
>
> (a) where the person referred to in subsection (1) is survived by a spouse, as well as a descendant, such a spouse must inherit a child's portion

of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed from time to time by the Cabinet member responsible for the administration of Justice by notice in the Gazette, whichever is the greater;

(b) a woman, other than the spouse of the deceased, with whom he had entered into a union in accordance with customary law for the purpose of providing children for his spouse's house must, if she survives him, be regarded as a descendant of the deceased;

(c) if the deceased was a woman who was married to another woman under customary law for the purpose of providing children for the deceased's house, that other woman must, if she survives the deceased, be regarded as a descendant of the deceased.

For a full discussion of these regulations, read pages 101–102 of your prescribed textbook.

Until the Constitutional Court in the case of *Moseneke v The Master of the High Court* 2001 (2) SA 18 (CC) declared subsection (7) of section 23 of the Black Administration Act unconstitutional, the Master of the High Court who administered all the estates belonging to deceased persons who were not Africans, as well as testate estates of Africans, had no powers with regard to the administration of an intestate estate of a deceased African. Such an estate had to be administered in terms of regulation 3(1) of Government Notice R200 of 1987 by the local magistrate of the area where the deceased lived. The constitutionality of both section 23(7)(a) and regulation 3(1) was contested and they were found to be unconstitutional and therefore invalid. The Moseneke case brought the era of racial discrimination in the administration of deceased estates in South Africa to an end.

For a full discussion of this case, please consult the relevant chapter in your prescribed textbook.

Until it was declared unconstitutional in *Zondi v The President of South Africa* 2000 (2) SA 49 (N), Regulation 2 of Government Notice R200 of 1987 prescribed how the estate of a deceased black should devolve in cases where section 23(1) and (2) of the Black Administration Act did not apply and where the deceased had left a valid will, even if the will did not dispose of all the assets in the estate. This was because it distinguished, for the purposes of intestate succession, between the estate of a person who was a partner in a civil marriage (in terms of section 22(6) of the Black Administration Act) on the one hand, and the estate of a person who was a partner in a civil marriage in community of property or a marriage under an antenuptial contract on the other hand (Rautenbach C, Du Plessis W & Vorster LP "Law of Succession and Inheritance" in Introduction to legal pluralism in South Africa; Part 1 Customary Law (2002) 119). Please note that although this case was decided by the Natal Provincial Division and was therefore initially not binding on all provinces, the Constitutional Court has since confirmed it. It is

now the law throughout South Africa that illegitimacy is no longer a ground for excluding extramarital children of the deceased from sharing in his/her estate.

> For a full discussion of this case, please consult the relevant chapter in your prescribed textbook.

2.7 The administration of indigenous estates

Testate estates are administrated according to the Administration of Estates Act 66 of 1965. House property and quitrent land are, however, excluded from testamentary disposition. Intestate estates were previously administered under the regulation proclaimed in Government Notice R200 of 1987 (Government Gazette 10601 of 6 February 1987). According to the decision of the court in the *Bhe* case (which will be discussed immediately below), all estates to be wound up after the date of the judgment (i.e. 15 October 2004) will now be administered according to the provisions of the Administration of Estates Act 66 of 1965. The judgment in the *Bhe* case has had no effect on the intestate estates of blacks that were currently under administration at the time of the judgment. However, now section 2(1) of the Reform of the Customary Law of Succession and Regulation of Related Matters Act 11 of 2009 directs that all intestate estates of persons who are subject to customary law must devolve in accordance with the law of intestate succession as regulated by section 1 of the Intestate Succession Act No 81 of 1987.

2.8 Challenges to section 23 of the Black Administration Act and the regulations promulgated thereunder

Recently, section 23 of the Black Administration Act (which affords statutory recognition to the principle of male primogeniture) and the regulations promulgated thereunder in terms of Government Notice R200 of 1987 have been the subject of considerable debate and discussion in our courts. For example, the principle of male primogeniture was unsuccessfully contested in the case of *Mthembu v Letsela* 2000 ((3) SA 867 (SCA).

In 2003, however, the applicants in *Bhe and Others v The Magistrate, Khayelitsha and Others* 2004 (2) SA 544 (C), and the applicants in *Charlotte Shibi v Mantabeni Freddy Sithole and Others* successfully challenged both the constitutional validity of sections 23(10)(a), (c) and (e) of the *Black Administration Act* (including regulation 2(e) of Government Notice R200 of 1987) and the principle of primogeniture. Section 23(10) made provision for regulations to be enacted by the State President:

- prescribing the manner in which the estates of deceased blacks should be administered and distributed (subsection (a));
- dealing with the disherison of blacks (subsection (c)); and
- prescribing tables of succession regarding blacks (subsection (e)).

Both courts declared sections 23(10)(a), (c) and (e) of the Black Administration Act 38 of 1927 and regulation 2(e) to be invalid and unconstitutional. The Cape High Court found that the applicants, namely Nonkululeko and Anelisa (the extramarital daughters of the deceased) were, in fact, the sole intestate heirs to the estate of their deceased father and the Pretoria High Court found Charlotte Shibi (the sister of the deceased) to be the sole intestate heir to the estate of her deceased brother. The intestate heirs in both these proceedings then made an application to the Constitutional Court in the case of *Bhe and others v Magistrate, Khayelitsha, and Others (Commission for Gender Equality as Amicus Curiae)* 2005 (1) BCLR 1 (CC) for confirmation of the orders of the respective divisions of the High Court. Their applications were heard together by the Constitutional Court.

The Constitutional Court set aside the orders of the Cape High Court and the Pretoria High Court and declared the whole of section 23 and the regulations promulgated thereunder to be inconsistent with the Constitution and therefore invalid. The reasons given were that:

> T]he Act was manifestly racist in its purpose and effect. It discriminated on the grounds of race and colour. The combined effect of section 23 and the regulations was to put in place a succession scheme which discriminated on the basis of race and colour applying only to African people. The limitation that this scheme imposed on the right of African people to equality could hardly be said to be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The discrimination it perpetrated was an affront to the dignity of those that it governed. Section 23 was therefore inconsistent with the right to equality guaranteed in section 9(3) as well as the right to dignity protected by section 10 of the Constitution (Ngcobo J at paras [143]–[144]).

The court also declared the rule of male primogeniture; "as it applied in customary law to the inheritance of property, to be inconsistent with the Constitution and invalid to the extent that it excluded or hindered women and extra-marital children from inheriting property" (Langa DCP at para [136]). As a result, the court confirmed the rulings of the court a *quo* that Nonkululeko, Anelisa and Charlotte were indeed the sole heirs to the respective deceased's estates. The court held that:

> [T]he primogeniture rule as applied to the customary law of succession could not be reconciled with the current notions of equality and human dignity as contained in the Bill of Rights. As the centrepiece of the customary law system of succession, the rule violated the equality rights of women and was an affront to their dignity. (Furthermore) in denying extra-marital children the right to inherit from their deceased fathers, it also unfairly discriminated against them and infringed their right to dignity as well. The result was that the limitation it imposed on the rights of those subject to it was not reasonable and justifiable in an open and democratic society founded on the values of equality, human dignity and freedom (Langa DCP at para [95]).

Please note that the ruling of the court only concerned the intestate estates of blacks which were governed by section 23 of the Black Administration Act and the regulations promulgated under this Act. The rules regarding testamentary disposition of property dealt with under 2.6.1 above still apply.

The declaration of invalidity was made retrospective to 27 April 1994. This does not, however, apply to any completed transfer of ownership to an heir, unless it is established that when such transfer was effected, the transferee was on notice that the property in question was subject to a legal challenge of the statutory provisions and the customary law rule of primogeniture. The African customary law of intestate succession and inheritance has, for centuries, been underpinned by male dominance and gross discrimination against women and children. The decision of the Constitutional Court in the *Bhe* case finally brings the customary law of intestate succession into line with the values enshrined in the Constitution and eliminates the gender and birth inconsistencies prevalent in this system of law.

2.9 Legal reform

In the new human rights dispensation, customary law principles of succession have been the subject of a lot of debate as the cases discussed in the previous sections of this study unit show. The decisions in these cases have all more or less advocated for the reform of customary law principles of succession to be in conformity with the human rights values and principles enshrined in the Constitution. One of the results of this has been the passing of legislation; The Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009. One of the main aims of this Act is to modify the devolution of intestate property in relation to persons subject to customary law.

The Act reaffirms that the Intestate Succession Act will be applicable to all estates. Section 2(1) of the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009 provides as follows:

> The estate of or part of the estate of any person who is subject to customary law who dies after the commencement of this Act and whose estate does not devolve in terms of that person's will, must devolve in accordance with the law of intestate succession as regulated by the Intestate Succession Act, subject to subsection (2).
>
> 2(2) In the application of of the Intestate Succession Act –
>
> (a) where the person referred to in subsection (1) is survived by a spouse, as well as a descendant, such a spouse must inherit a child's portion of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed from time to time by the Cabinet member responsible for the administration of Justice by notice in the Gazette, whichever is the greater;

(b) a woman, other than the spouse of the deceased, with whom he had entered into a union in accordance with customary law for the purpose of providing children for his spouse's house must, if she survives him, be regarded as a descendant of the deceased;

(c) if the deceased was a woman who was married to another woman under customary law for the purpose of providing children for the deceased's house, that other woman must, if she survives the deceased, be regarded as a descendant of the deceased.

Section 2 then makes the Intestate succession Act applicable to all estates in South Africa irrespective of the race or lifestyle of a deceased. However, in the application of the intestate Succession Act, section 2 of the Act makes special provision for situations that are usually only found in customary law.

Self-evaluation

(1) What is the difference between inheritance and succession? (5)

(2) State the main principles of the customary law of succession. (10)

(3) Distinguish between "general succession" and "special succession". (5)

(4) Explain the various methods of disposition *inter vivos*. What is the legal meaning of such disposition? (10)

(5) Discuss testamentary disposition in customary law. (10)

(6) Study the following hypothetical case and answer the question that follows. Consider all possibilities and justify your answer in full.

> In 2000, Thabo (a family head) suffered a severe heart attack and died. He left behind two daughters, namely Nonhlanhla and Bongiwe, and a son named Mandla, all of whom were born from his first customary marriage to Zandi. He also left behind a son named Senzo and a daughter named Lungile, who were born from his second customary marriage to Fikile. His estate consisted of:
>
> - marriage goods received for Lungile
> - compensation in respect of the seduction of Bongiwe
> - land which had been allocated to him by the traditional authority, and had not been allotted to a particular house
>
> Thabo also had an outstanding debt to pay, namely additional cattle for his son Senzo's lobolo.

Expain how Thabo's estate will devolve. (15)

(7) What was the basic argument that was advanced by the Master and the Minister in support of section 23(2) and regulation 3(1) in the Moseneke case and how did the court respond to this argument? (6)

(8) Discuss (with the aid of relevant case law) the constitutionality of section 23 of the Black Administration Act, together with the regulations promulgated thereunder. (10)

(9) Outline the important provisions of the Repeal of the Black Administration Act and Amendment of Certain Laws Act 28 of 2005. (5)

Feedback

Your answer could include some of the following points:

1. Inheritance involves the division of the patrimony of the deceased. Succession means "step into the place of" the deceased, thus succession to the status, rights and duties of the deceased.
2. The main principles of succession were dealt with fully in section 2.2.1.
3. "General succession" refers to succession to the position of the family head (head of the household or agnatic group). "House succession" refers to succession to the position of the head of a house in terms of the houses of the deceased. Refer to section 2.3.
4. Dispositions *inter vivos* is discussed fully in section 2.5.
5. Testamentary disposition is fully dealt with in section 2.6.1.
6. In the facts before us, the marriage goods received for Lungile constitutes house property and will, therefore, be succeeded to by the house successor, that is, Senzo. The compensation received in respect of the seduction of Bongiwe also constitutes house property and will therefore be succeeded to by the house successor which, in this case, is Mandla. The land which had been allocated to him by the traditional authority, and which had not been allotted to a particular house, constitutes general property and will therefore be succeeded to by the general successor who, in this case, would be Mandla.

   Originally, the successor succeeded to the predecessor's assets and liabilities; in modern indigenous law, the position varies. In KwaZulu-Natal, a successor succeeds to the assets of the estate, and he is generally liable for debts that are equivalent to the assets of the estate. He is also fully liable for debts that emanate from marriage contracts (the lobolo debts). In the rest of the Republic of South Africa, a successor succeeds to the assets and debts of his predecessor.

   If the family lived outside KwaZulu-Natal, then the successor, namely Mandla, would be liable for all the predecessor's debts, including the additional cattle for his son Senzo's lobolo and any other debts he may have had. If the family lived in KwaZulu-Natal, then the successor would only be liable for any

debts emanating from marriage contracts. In the case before us, this means that he would be liable for the additional cattle for his son Senzo's lobolo.

7. The *Moseneke* case is dealt with fully in your prescribed textbook.
8. The constitutionality of section 23 and the regulations promulgated under this Act were fully dealt with under sections 2.6.2 and 2.8.
9. The most important provisions of the Act are dealt with under section 2.9.

STUDY UNIT 4

JUDICIAL APPLICATION OF CUSTOMARY LAW

OVERVIEW

In this study unit you are introduced to the main procedures for settling disputes in African customary law. In lecture 1 we shall discuss the customary process of negotiation. Most disputes are settled in a satisfactory manner outside the courts by means of negotiations within and between groups of relatives. If a particular problem cannot be solved in this way, the first option is to make use of a process of mediation before a formal appeal is made to the courts. Mediation entails that a party that is not involved with the dispute and that is therefore impartial tries to help the people involved in the dispute to come to an agreement or find a solution with regard to the problem.

Should this mediation fail, the next phase is the court procedure. In lecture 2 the African customary court procedure is discussed, with reference to the lodgement procedure and the trial procedure.

In lecture 3 we give an indication of the structure of the courts which can apply African customary law. We also look at those courts which can apply customary law in addition to common law and statute law.

In lecture 4 we discuss the recognised courts that can apply only African customary law. The emphasis falls on the jurisdiction of these courts. It may be asked whether this system of "special courts" is not in conflict with the concept of "non-discrimination" in the Constitution.

In lecture 5 the African customary law of evidence is discussed. Reference is made to evidential material and means that may be used to prove a case, as well as to the people who may give evidence in court.

The court procedure usually leads to a decision that must be enforced or executed. The execution of the sentence or judgment is discussed in lecture 6.

Outcomes

Having studied lectures 1–6, you should be able to

- distinguish between the process of mediation and the court procedure in African customary law
- describe the underlying principles of these processes
- identify and briefly discuss customary values such as group directedness, truth, harmony and reconciliation in these processes

- critically discuss the application of African customary law in the courts
- evaluate the jurisdiction of the courts of traditional leaders that apply African customary law

Structure of the study unit

Lecture 1: The African customary process of negotiation in disputes

Lecture 2: General principles of customary court procedure

Lecture 3: Application of customary law in the courts

Lecture 4: Jurisdiction in the courts of traditional leaders

Lecture 5: The African customary law of evidence

Lecture 6: Sentencing and execution of sentences in the customary courts

LECTURE ONE

The African customary process of negotiation in disputes

Recommended reading

Prinsloo MW & Myburgh AC *Inheemse publiekreg in Lebowa* (1983) 237–240

Myburgh AC & Prinsloo MW *Indigenous public law in KwaNdebele* (1985) 111–113

Vorster LP "Konflik en konflikhantering by die !Xu en Khwe van Schmidtsdrift: 'n verkenning" (1996) 37(2) *Codicillus* 4–13

Outcomes

Having studied this lecture, you should be able to

- discuss the processes of negotiation and mediation in African customary law
- distinguish the bodies that can bring about reconciliation, and explain the function of each of them in the reconciliation process
- explain the role of relatives, women and neighbours in the process of mediation
- explain group directedness and reconciliation as characteristics of African customary law, by referring to the process of mediation

1. MAIN PRINCIPLES

1.1 Introduction

The processes of negotiation and mediation in African customary law are aimed at bringing about reconciliation between people or groups of people who are engaged in a dispute for some reason. The process of mediation is one way in which such disputes may be handled, and could therefore be referred to as "a way of settling disputes". ("Settling" a dispute means resolving it satisfactorily.)

Today disputes between people are generally accepted as a normal phenomenon in any society. This is why procedures and rules were developed to settle these disputes. The following three phases may be distinguished in the development of a dispute:

The first phase is the grievance or latent-conflict phase. This phase refers to a condition or event that is experienced by a party as harmful. Here we have to do with the subjective judgment of the aggrieved person or party. When we refer to a party, we must remember that this could mean an individual or a group of individuals, such as a family. In customary law these "parties" are generally agnatic groups (relatives who are related on the father's side).

The second phase is the conflict phase, a phase during which the aggrieved (wronged) party communicates his or her aversion or feeling of being wronged to the other party.

The third phase is the dispute phase, during which the other party gets involved in the dispute by for instance offering apologies or a denial with which the aggrieved person does not agree.

We wish to emphasise that in practice a dispute does not necessarily always comprise all three of these phases, and not necessarily always in that order either. An aggrieved party may simply ignore the wrong, or avoid conflict with the other party. On the other hand the aggrieved party could decide to proceed directly with the dispute phase.

In all cultures strategies and procedures have been developed for handling disputes. The following seven procedures occur universally:

- disregard, so that the grievance does not lead to conflict
- avoidance, which often causes the aggrieved party (i.e. the person who has been wronged) to break off social and other relations with the other party
- self-help, where the aggrieved party acts unilaterally in order to settle the dispute – this may take the form of physical violence or even acts of sorcery
- negotiation between the parties, with a view to reconciliation and restoring existing relationships
- mediation, where a third party becomes involved in the dispute as a mediator between the disputing parties (and the disputing parties subject themselves voluntarily to the decision of the mediator)
- arbitration, where the disputing parties agree to a third party getting involved, and that the decision of this third party will be binding and enforceable
- judicial adjudication, where one or both parties appeal to a court to settle the dispute

From a human-relations point of view, and based on the above division, we distinguish procedures involving one, two or three parties. The procedures of disregard, avoidance and self-help involve only one party; the procedure of negotiation involves two parties; and the procedures of mediation, arbitration and judicial adjudication involve three parties. However, it should be noted that in each procedure involving three parties (i.e. the procedures of mediation, arbitration and judicial adjudication), the role played by the third party differs.

Most of the above-mentioned procedures are found in the customary law of southern African countries. The procedure of arbitration, however, is seldom used. Later on in this lecture the focus will be on negotiation and mediation only. In former times self-help was also a recognised procedure, but today it is not recognised in South African law.

1.2 The settlement of disputes within family groups

The head of the family group, which consists of related agnatic groups comprising at the most three generations, is responsible for the conduct of its members, and has to see to it that disputes among its members are settled. The correct procedure here is negotiation with a view to reconciliation. Family disputes are settled by the head, assisted by the adult members of the family. In many cases the dispute is reported by the mother or senior female figure in the family. If she thinks that the people involved in the dispute cannot settle the dispute, the matter is reported to the head of the family. The head of the family then arranges a meeting for the adult members of the family in order to discuss the matter with the people involved in the dispute. This meeting is usually held indoors, since it is regarded as a private matter. Family matters are generally regarded as private matters, and are not meant for the eyes and ears of outsiders, except neighbours. If a person mentions such a matter to outsiders, he or she is said to bring "the eyes" of other people into the intimate affairs of the family.

If a matter cannot be settled within the family circle, senior relatives outside the family are invited to help. If the matter cannot be settled within this circle either, the assistance of direct neighbours, who are often not relatives of the family, is called in. Sometimes the help of neighbours is called in before members of the wider family group are asked for help. In urban areas neighbours are virtually always invited to help, since the relatives of the parties concerned often do not live close by and are therefore not readily available.

During such meetings, the matter is discussed thoroughly and openly. The object is to look for ways of reconciling the parties involved in the dispute with each other. Strong emphasis is placed on restoring relations between those involved in the dispute, and between them and the other people present. Women generally also take part in these discussions. In some cases the procedure is conducted by one of the older sisters of the head of the family.

If the meeting finds a solution to the problem, the wrongdoer is reprimanded, and is also required to "wash the wrong". This usually means that a chicken or a goat must be slaughtered and cooked and eaten at a meal shared by those present. Today even tea and biscuits or bread may be used for this purpose. The meal then symbolises, in a visible way, that relations have been restored and that the disputing parties and the family group have been reconciled.

Disputes within the family group are usually settled with the help of relatives. It seldom happens that the disputing parties do not accept the proposed solution. However, if it does happen that the parties concerned do not accept the proposed

solution, they have to take the dispute to the local headman. This headman is the head of the lowest customary court, and he may settle disputes between the inhabitants of that particular ward. In such instances the parties concerned have to be assisted by their relatives, but the relatives often do not wish to give such assistance. In such cases the headman first serves as a mediator before he make a formal judicial decision.

1.3 The settlement of disputes between non-related family groups

If a dispute develops between members of non-related family groups the people involved in the dispute first try to settle the dispute among themselves by means of negotiation. If the negotiations are unsuccessful the matter may be taken to the headman's court.

We distinguish between disputes that develop between a husband and wife, and those that develop between other non-related family groups. Although a husband and wife belong to different family groups, the marital relationship between them also brings about a special relationship between their family groups.

In the event of a dispute between a husband and wife the matter is first discussed within the husband's family circle. If no solution is found during these discussions the wife's family is invited to help with the matter. If no solution can be agreed upon, it may lead to the termination of the marital relationship between the husband and wife without the headman being involved. In African customary law it is possible to dissolve a customary marriage outside court, and without the court being involved. If, however, the negotiations bring about a reconciliation, a reconciliatory meal is usually held. This meal must be offered by the party at fault.

In the event of a dispute between non-related family groups the aggrieved person first discusses the matter within his or her own family group. If it is agreed upon that a wrong has been done, the matter is reported to the family group of the wrongdoer. The wronged group usually sends two or more members, and sometimes also a neighbour, to report the matter. This is usually referred to as "throwing a kierie". On such an occasion the complaint is heard, but not acted upon. The wrongdoer's group then meets to investigate and discuss the complaint. If it is clear that a wrong has been done, this group sends representatives, sometimes including a neighbour, to the wronged party to offer its apologies. Often some goods are taken along to compensate for any damage sustained. If the apology and the damages (as the case may be) are accepted, the matter has been resolved.

If there is no reaction from the wrongdoer's group the aggrieved group will again "throw the kierie" after some time has elapsed and ask, "Where have you buried us?", meaning, "Why are you ignoring us?" The process of "throwing the kierie" is repeated up to four times before the matter is taken to court. In this regard it is said that "a cow has four teats".

This procedure shows that a dispute may not be taken directly to court. (It appears that the persons involved in the dispute must first seriously try to bring about a reconciliation.) If, however, a case is taken directly to court and the wrongdoer is found "guilty" of the offence, the group will be reprimanded for not wishing to seek reconciliation. In this regard it is said that the first blow of the stick (the phase of negotiation) does not hurt – it is the blow that comes later (the decision of the court) that hurts.

In cases where there are negotiations between the family groups concerned but the groups cannot come to an agreement, the headman is usually invited to help. The headman then acts as a mediator.

If at any stage during the process of negotiation or mediation the parties concerned come to an agreement, a reconciliatory meal is held. This is a visible and concrete way of announcing that relations and harmony between the parties and also with the broader community have been restored.

1.4 Changes

As explained previously, family groups are often no longer functional today. In both rural and urban areas it happens more and more that the local residential group takes the place of the extended family groups, and that neighbours also play a larger part in the process of negotiation than they used to.

In urban areas, where there are sometimes many "strangers" living close to one another, disputes are often not treated in the traditional way but reported to the police, church groups or civil authorities.

Self-evaluation

(1) Discuss the African customary law process of negotiation for settling disputes within the agnatic group. (10)

(2) Discuss the African customary law process of negotiation for settling disputes between agnatic groups. (10)

(3) Discuss the phases of development in a dispute. (5)

(4) Briefly discuss strategies and procedures that were developed generally for handling disputes. 10)

Feedback

1. & 2. Your answers should include information on the following:

Who are the parties involved, and what part does each of them play?

Where does the process take place, and why?

What does this particular process entail, and what is the object of this process?

What is the result of the process?

What characteristics of African customary law are apparent from this process?

3. Name the three phases and indicate what each of them entails. Also indicate that they do not necessarily develop in a particular order.

4. Name the strategies and indicate what each of them entails. Also distinguish between disputes involving one, two and three parties.

LECTURE TWO

General principles of customary court procedure

Recommended reading

De Beer FC "Inheemse prosesreg: 'n antropologiese perspektief" (1996) 19 (2&3) *SA Journal of Ethnology* 82–89

Prinsloo MW & Myburgh *AC Inheemse publiekreg in Lebowa* (1983) 251–274

Myburgh AC & Prinsloo MW *Indigenous public law in KwaNdebele* (1985) 119–132

Outcomes

Having studied this lecture, you should be able to

- describe the African customary court procedure
- explain the general principles of the African customary court procedure
- describe the nature of African customary law with reference to the African customary court procedure
- identify the characteristics of African customary law as reflected in the African customary court procedure

2.1 Introduction

In the previous study unit (study unit 3 lecture 2) you were referred to the enactment of the Repeal of the Black Administration Act and Amendment of Certain Laws Act 28 of 2005. This Act had the effect of repealing numerous sections of the Black Administration Act 38 of 1927, including those dealing with the establishment, jurisdiction, procedures and rules of the courts of traditional leaders.

However, another effect of this enactment was to create a legal vacuum in which these courts could function until other national legislation to regulate the functions of traditional leaders in their duty of administration of justice in South Africa has been finalised. Thus through the enactment of Act 13 of 2007, section 1 of the Repeal of the Black Administration Act and Amendment of Certain Laws Act 2005, as amended by the 2006 Act, was further amended on the date on which the 2007 Act came into effect so as to at least allow the policy framework to be put in place.

The African customary court procedures still apply in the recognised courts of traditional leaders (s 20(2) of Act 38 of 1927). These procedures were, however, amended by Government Notice (from now on referred to as "GN") R2082 of 1967, in which supplementary rules were promulgated. You are not expected to study these court rules, except in the few instances where reference is made to a specific rule.

The court system and the jurisdiction of traditional courts are discussed in lecture 4. At this stage it is sufficient to know that we distinguish between a headman's court and a chief's court, and that only a chief's court is formally recognised by legislation. A chief's court is not a court of record, and therefore it does not keep a written record of court proceedings. Also, a chief's court, for the purposes of the Criminal Procedure Act 51 of 1977, is neither a higher nor a lower court. According to African customary law, the headman's court is the lowest court and the chief's court is the senior or highest court.

The trial procedure in the African customary courts is basically the same for both the headman's court and the chief's court. Further, the court procedure for civil and criminal actions does not differ. Refer back to what was said about categorisation in study unit 1, lecture 3. Although the terminology for both civil and criminal actions is the same, a distinction is made between a "plaintiff" (civil action) and a "complainant" (criminal action), and between a "defendant" (civil action) and an "accused" (criminal action).

In tribal law, civil actions are instituted where an agnatic group's rights and powers have been infringed upon. These actions could, for example, involve claims for seduction, adultery, the dissolution of marriage, damage to property and contractual debts. In such cases the court may order the reparation of damage (the payment of compensation).

Criminal actions are instituted against an offender by the traditional authority. If found guilty, the offender is punished. Punishment may take the form of a fine, and previously it could also have taken the form of corporal punishment. Criminal actions are instituted for offences such as murder, contempt of the ruler and contempt of court. African customary criminal law will be discussed in study unit 5.

If an act gives rise to both a civil and a criminal action both aspects will be dealt with at the same hearing. Examples here are assault and theft. In such cases the court may impose punishment and award damages to the injured party.

2.2 The lodgement procedure

In a civil case, the plaintiff's agnatic group would first try to negotiate with the defendant's agnatic group (see lecture 1 above). If the negotiations do not lead to an agreement, the plaintiff's group reports the matter to their headman. If the defendant and the plaintiff live in the same ward, their headman sets a date for the hearing and notifies the defendant. If they do not live in the same ward the plaintiff's headman sends the plaintiff's group, together with a representative of

the ward, to the headman of the defendant in order to report the matter to the headman. The headman of the defendant then sets a date. The general principle is that a case is heard in the court of the defendant's headman.

On the day of the hearing, both parties and their witnesses must be present. The case may not be heard in the absence of one of the parties. The Northern Sotho say in this regard: *molato wa meetse o rerwa moeteng* (a case about water is heard with the pot at hand) or *mpa e sekwa ke moladi wa yona* (a pregnancy is decided on with the sleeping partner present). If one of the parties cannot be present and has tendered apologies prior to the proceedings, the case is postponed. If a party is absent without an excuse, the case is postponed and the absent party is warned to be present when the case is heard again. If a party is absent without an excuse for a second time, he or she is generally brought to the court by messengers. Such a party may be punished for contempt of court.

Under statutory court rules a civil case may be heard in a chief's court in the absence of a party (Rule 2(1), GN R2082 of 1967), and such a party may even be sentenced in his absence. This is known as "judgment by default". In such a case the party may not be punished for contempt of court as well (S v *Khuzwayo* 1969(1) SA 70 (N)).

If one of the parties is not satisfied with the decision of the headman's court the dissatisfied party may ask that the case be referred to the chief's court. The dissatisfied party and a representative of the headman's court then report the case to the chief's court. A headman's court may also refer a case to the chief's court if it is complicated. At the chief's court there is usually a person who "receives" these cases and who sets a date for the trial on the chief's behalf. The procedure in the chief's court is the same as that in the headman's court.

In a criminal case, the general procedure is that the agnatic group of the injured person reports the case to the local headman. In exceptional cases the complaint may be lodged directly with the chief's court. The headman investigates the matter and reports to the chief. If the complaint is well founded, the chief sets a date for the trial. The parties concerned are notified accordingly. Each party must see to it that its witnesses are present on the day of the trial. In criminal cases the customary procedure applies where it is not in conflict with public policy and natural justice. It was therefore decided in the high courts that a person may not be sentenced in his absence (cf R v Buthelezi 1960(1) SA 284 (N)) and that a chief may not administer justice in a case in which he himself is the complainant.

2.3 The trial procedure

The main principles of the African customary court may be summed up as follows:

- The general principle is that the onus (i.e. responsibility or burden) is on the accused to prove his innocence in court. It therefore often happens that an accused pleads guilty in a non-African customary court (such as a

magistrate's court) when asked to plead, and then wishes to lead evidence to prove his innocence.

- The sessions of the customary courts are held in public. No trials are held in camera (i.e. behind closed doors).
- All court sessions are open to members of the public and may be attended by any adult person, even strangers. In former times, only adult men were allowed to attend court sessions, but today adult women are free to attend these sessions as well. Any person present may participate in the court procedure by posing questions to the parties and by submitting information to the court about the case.
- It is a general rule that all parties must be present during the trial. Judgment by default was unknown. This principle still applies in most African customary courts, despite the statutory court rule permitting judgment by default (Rule 2(1), GN R2082 of 1967). Parties are given full opportunity to state their side of the matter without interruption.
- Legal representation was unknown. However, nobody appeared in court without assistance: every person, no matter what his or her age or sex, was assisted by relatives. Each party had to see to it that its witnesses were present. Witnesses could not be related to the parties concerned (agnates and cognates were considered a single group for the purposes of court procedures). For this reason neighbours were often the main witnesses in a case.
- All proceedings were conducted orally, and no written record of cases was kept. Today, however, all chiefs' courts keep a court record in which basic information regarding a case must be recorded. Legislation (Rules 6 and 7, GN R2082 of 1967) also requires that the judgment of a chief's court be registered. The case must be reported in quadruplicate straight after judgment. This report must contain, inter alia, the names of the parties, the particulars of the case and the judgment. The report must be signed by or on behalf of the chief and two members of the court. The original report must be handed in at the local magistrate's court for registration and each party is given a copy of the report.

Today a chief's court judgment must be registered in order to be valid. The judgment must be registered with a magistrate within two months, or else it lapses. This means that the parties are in the same position as they would have been in had the judgment not been given and the judgment cannot be implemented or be taken on appeal or on review.

In *Bhengu v Mpungose* (1972 BAC 124 (NO)) it was decided that the Court Rules place an administrative duty on a chief to submit the written judgment for registration. Failure to do so may lead to liability for the costs incurred by a party in order to implement the judgment, or for any damage suffered by a third party because of the chief's failure to register the judgment.

- The chief is the judge-in-council. Although the chief or ward headman delivers the judgment, he is guided by the opinions and the advice of those present, and particularly those of the council members present. Judgment is usually a synopsis of the consensus opinion of those present.
- The court proceedings are fairly informal (i.e. there are few formalities). The proceedings follow a specific pattern, however. First the plaintiff or complainant states his or her side of the matter, and then the defendant or accused replies. The council members and some of those present usually ask a few questions to clear up obscurities. Evidence is then presented by the witnesses of the plaintiff or complainant. The witnesses are questioned by those present. Next, the evidence of the witnesses of the defendant or accused is heard and the witnesses are questioned, after which the plaintiff or complainant and the defendant or accused may offer further explanations or question each other. The matter is then discussed by those present, after which the council members present give their views on the facts and the matter. Thereafter, judgment is given. A consensus judgment is usually considered ideal. The matter is therefore often discussed until the council members have reached consensus.

Although the proceedings are informal, they always take place in an orderly manner. Persons who misbehave are called to order and receive a warning. If they continue to misbehave they may be removed from the courtroom and may even be fined summarily for contempt of court.

- Nobody is judge in his own case. This principle is expressed by the Sotho people in the following maxim: *selepe ga se itheme* ("an axe does not chop itself"). A case involving a ward headman is heard by another headman, or the case is referred to the chief. A case involving the chief is heard by a senior relative of the chief's, usually by one of his father's brothers.
- During the hearing of a civil case, the defendant may not institute a counterclaim against the plaintiff and ask that his liability towards the plaintiff be removed.

The applicable maxims are the following:

- *molato ga o rere mongwe* ("one debt is not heard by another")
- *molato ga o lefiwe ka o mongwe* ("one debt is not settled by another")

It is also said that a person cannot pay attention to two matters at the same time:

maebana mabedi ga a rakwe ("two doves cannot be followed at the same time").

- In former times, asylum was known. A person affected by a court order could escape punishment by fleeing to a certain place, for instance to the house of the chief's mother or to the house of the tribal wife.
- Mendacity (i.e. telling lies) is not punishable. But even though a person may not be punished simply because he has told a lie, his evidence is still

considered less reliable. Further, no oath is taken by either the parties or their witnesses. Perjury (i.e. wilfully giving false evidence under oath), therefore, is also unknown, and is not punishable.

- Prescription of a debt or a claim is unknown (i.e. a debt or a case does not become invalid or unenforceable through lapse of time): *molato ga o bole* ("a debt or a case does not decay or expire"). A plaintiff is, however, compelled to submit his claim without delay. There were two reasons for this: On the one hand, a delay may make it more difficult for the plaintiff to prove the facts, because the witnesses may move or die. The plaintiff may also lose his action if he dies before the action is instituted. If the action has already been instituted and he dies, the action passes to his successor. On the other hand, he may harm the other party through his delay. The other party may for instance be denied the opportunity to examine the facts in good time. Further, as was said previously, an important witness may die or leave the area. If a plaintiff waits too long to institute an action, the court may refuse to hear the case. The reason for this is not prescription, but because the damage or the facts can no longer be established with certainty. Once a case has been instituted, it may be postponed indefinitely, even for years, until for instance an accused has returned to the area.
- The court proceedings are inquisitorial in nature. This means that it is the court's duty to try to establish the truth through questioning and cross-examination. Therefore, in principle, no evidence is excluded. Parties and their witnesses are also given ample opportunity to submit evidence to the court. The court must be satisfied that there is sufficient evidence to substantiate the facts of the case. The court is also competent to hold *in situ* investigations (i.e. investigations where the offence took place). The court may even make use of extrajudicial methods of proof, such as pointing out by a diviner (*isangoma*), in order to establish the truth. It therefore is said that time cannot stand in the place of truth.

Self-evaluation

(1) Describe the lodgement procedure. (8)

(2) Describe the main principles of the African customary court procedure and in each instance indicate the characteristics of African customary law reflected by it. (25)

(3) Discuss the implications of the principle that in African customary law a case or a debt does not prescribe. (5)

Feedback

1. In your answer you must distinguish between a civil action and a criminal action. In each case, indicate who takes the initiative in instituting the action. Also indicate to what extent the African customary procedure has been amended through legislation and court decisions.
2. You may structure your answer in various ways. One way is first to discuss the principles individually, and then to indicate the characteristics of African customary law. Another way would be to take the characteristics of African customary law as discussed in study unit 1, lecture 3, as a point of departure, and then to indicate where the respective principles of the customary law court procedure fit in. Special attention should be given to the aspect of group directedness in the court procedure, the emphasis on the concrete (or the visible), the relatively informal nature of court procedure, the emphasis on reconciliation, and the absence of a sharp distinction between civil and criminal law (i.e. there is no categorisation).
3. What is important, is the premise that time cannot stand in the place of truth. A case or a debt can therefore not prescribe because of the lapse of time. Yet an action must be instituted in good time, because of the increased burden of proof, and also because the action could be lost if the injured person or the wrongdoer were to die before the action had been instituted.

LECTURE THREE

Application of customary law in the courts

Compulsory reading

Bekker JC, Rautenbach C & Goolam N (eds) *Introduction to legal pluralism in South Africa* (2010) LexisNexis Butterworths

Recommended reading

Bekker JC *Seymour's customary law in Southern Africa* (1989) ch 2

Bennett TW *Human rights and African customary law* (1995) 47–49

Olivier et al *Die privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes* (1989) ch 16

Outcomes

After you have studied this lecture, you should be able to

- critically discuss the jurisdiction of the courts to apply African customary law
- evaluate the jurisdiction of the magistrate's court and the small claims court to apply African customary law
- discuss the jurisdiction of the divorce court

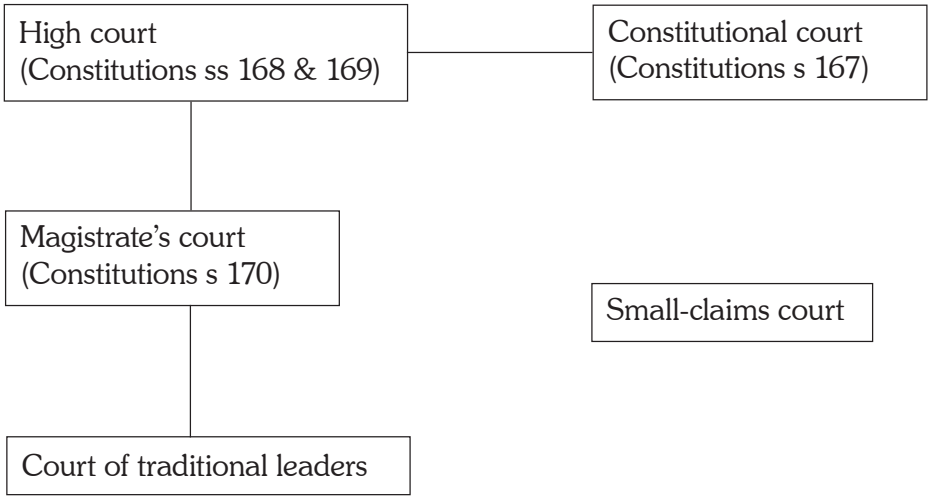
3.1 Introduction

According to section 1 of the Law of Evidence Amendment Act 45 of 1988, all courts can apply African customary law "in so far as such law is readily available and certain". Section 39(2) of the Constitution, Act 108 of 1996, makes provision for the application and development of African customary law by the courts as long as it accords with the spirit and purport of the Bill of Rights.

The question is: Which courts can apply African customary law and how are these courts linked? In addition to these courts there are also the special divorce courts which adjudicate divorce matters in respect of civil marriages between black people (i.e. marriage entered into according to the prescripts of the Marriage Act 25 of 1961).

3.2 Courts which can apply African customary law

The structure of those courts that are recognised in terms of section 166 of the Constitution and are permitted to apply African customary law is set out in the following diagram:



Cases in which African customary law is applied can be instituted either in the court of traditional leaders or in the magistrate's court or in the small claims court. The aggrieved party therefore has the choice of where he wishes to institute his claim. If a case is instituted in the court of the traditional leader as the court of the first instance, there is a right of appeal to the local magistrate's court, and from there to the High Court. A right of appeal means a person's right to take the decision of a lower court to a higher court for a final decision. We distinguish between a local, provincial and appellate division of the High Court. The Supreme Court of Appeal is the highest court of appeal. If an action is first instituted in the small claims court, there is no right of appeal to the magistrate's court.

If it appears that the African customary law which is in dispute is in conflict with the bill of fundamental rights, the matter must be referred to the Supreme Court of Appeal or the Constitutional Court. The Constitutional Court is the court of final instance over matters relating to the interpretation, protection and enforcement of the Constitution. This court has the power to adjudicate on any alleged or threatened violation of fundamental rights (s 167(3)).

The High Court has the jurisdiction to decide on a violation of the bill of fundamental rights. This court cannot, however, make a finding on the constitutionality of an Act of Parliament; only the Constitutional Court can decide this.

3.3 Application in the magistrate's court

The application of African customary law in the magistrate's court is regulated by section 1 of the Law of Evidence Amendment Act 45 of 1988. With reference to African customary law, the magistrate's court acts in two capacities. In the first

capacity the magistrate's court can be the court of first instance, that is where a matter is first instituted in the magistrate's court. In its other capacity the magistrate's court is a court of appeal, when a matter is first instituted in the court of the traditional leader and is then taken to the magistrate's court on appeal.

The powers of a magistrate in respect of an appeal against a decision of a traditional leader in a dispute are governed by section 29A of the Magistrates' Courts Act (32 of 1944). This section provides as follows:

(1) If a party appeals to a magistrate's court in terms of the provisions of section 12(4) of the Black Administration Act, 1927 (No 38 of 1927), the said court may confirm, alter or set aside the judgment after hearing such evidence as may be tendered by the parties to the dispute, or as may be deemed desirable by the court.

(2) A confirmation, alteration or setting aside in terms of subsection (1) shall be deemed to be a decision of a magistrate's court for the purposes of the provisions of Chapter XI.

The magistrate apparently has no power to review the decision of the court of the traditional leader which was the subject of the appeal. However, the magistrate does have the power to review an administrative act of a traditional leader.

When a case is instituted in the magistrate's court as the court of first instance, the magistrate has a choice whether to apply common law or African customary law. If the magistrate is hearing an appeal from the court of the traditional leader, the magistrate must apply African customary law since the court of the traditional leader can apply only such customary law. This rule applies regardless of whether the legal phenomenon is found in common law or African customary law.

The jurisdiction of the magistrate's court as the court of first instance and the jurisdiction of the court of a traditional leader may sometimes overlap with regard to a person, a cause of action, and sometimes an area. The implications of concurrent jurisdiction (simultaneous jurisdiction) have not been properly investigated. As it stands, there is no certainty on the point whether principles such as *lis alibi pendes* (an objection that the same case is pending in another court) and res *iudicata* (a matter which has already been decided and is closed) may be applied in these circumstances. Thus, although it has been held that while proceedings are under way in one court, the same action should not be instituted in another court, there is no rule which actually prohibits it (*Mdumane v Mtshakule* 1948 NAH (C20) 28). Further, this appeal is not an appeal in the ordinary sense of the word, as this could involve a retrial. A retrial means that the case which was heard previously is heard as though it had not been heard in the past. The overlapping of jurisdiction has at least two undesirable consequences. The first is the fact that a party has the opportunity to choose his own settlement forum. A plaintiff is entitled to make use of the court that will provide him or her with the most effective remedy, regardless of what prejudice it may cause the defendant. The second undesirable consequence is the possibility that an action instituted in the wrong court may have to be transferred to the correct forum, with the resultant loss of time and money.

No provision has been made for this possibility. Most legal systems in Southern Africa leave it to the clerk of the court to decide in which tribunal (court of law) the action should be instituted (see s 16 of the Swaziland Magistrate's Court Act, Reg 66 of 1938).

3.4 African customary law and the small-claims court

The establishment of small claims courts was recommended by the Hoexter Commission (Fourth Interim Report (1982) 52) to relieve the pressure on the magistrates' courts. It was hoped that they would obviate various difficulties: the high cost of engaging lawyers; delay in bringing cases before the courts; the psychological barriers many litigants experience when appearing in formal tribunals; and barriers caused by poverty, ignorance and feelings of alienation. The Commission was of the opinion that small claims courts should operate in an informal manner; that they should attempt to reconcile the parties; and that the presiding officials should play a more active inquisitorial role (par 13.6). The recommendations were translated into law by the Small Claims Courts Act 61 of 1984.

The jurisdiction of the courts is restricted to the hearing of small claims which, in terms of section 15(a) of the Act, are principally cases of action not exceeding an amount determined by the Minister from time to time in the *Government Gazette*. This amount is currently set at R3000 in value. Certain matters are specifically excluded from the jurisdiction of small claims courts (s 1b): the dissolution of African customary-law marriages, actions for damages for seduction, and breach of promise to marry. All such claims must be heard in magistrates' courts, with the consequent disadvantages of higher costs and more formalities.

The officers presiding over these courts are advocates, attorneys or magistrates and they act as commissioners. Except in the case of minors or other persons lacking *locus standi,* no legal representation is permitted. The general rules of evidence are not applicable and questioning of witnesses may be on an inquisitorial basis. According to the inquisitorial procedure, the court plays an active part in the investigation before it. This procedure is similar to the customary court procedure.

There is no requirement in the Small Claims Courts Act 61 of 1984 that the commissioners should be able to speak a Bantu language or that they should be proficient in African customary law. It may be argued that a commissioner's failure to know and apply African customary law may constitute a "gross irregularity" in terms of section 46(c), warranting review by the Supreme Court. It is unlikely, however, that the type of litigant for whom such courts were designed will have the time, education or initiative to challenge the court's decision.

Self-evaluation

(1) Discuss the structure of the courts which can apply African customary law. (10)

(2) Would you say that the institution of the small claims court has solved the problem of black litigants in regard to access to the law? Give reasons for your answer. (10)

Feedback

1. The structure of the courts is fully dealt with in section 2. Indicate in which court African customary law can be applied as the court of first instance. Indicate which court can hear an appeal where African customary law is in contention. What is the position if African customary law is in conflict with a fundamental right?
2. Briefly discuss the reasons why the small claims court was instituted. Indicate that it is an informal procedure which is similar to that of African customary law. As in customary law, there is no legal representation and certain customary law matters cannot be dealt with by these courts. Further, the commissioners are not required to have any special knowledge of African customary law. Although the small claims court is a cheaper and more informal court process, it is doubtful whether it will satisfy the needs of the black litigant.

LECTURE FOUR

Jurisdiction in the courts of traditional leaders

Recommended reading

Bekker JC *Seymour's customary law in Southern Africa* (1989) ch 2

Bennet TW *Human rights and customary law* (1995) 76–79

Olivier et al *Die privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes* (1989)

Outcomes

Having studied this lecture, you should be able to

- state whether the special courts of the traditional leaders are in conflict with the Bill of Rights
- discuss the civil jurisdiction of the courts of traditional leaders
- discuss the criminal jurisdiction of the courts of traditional leaders

4.1 Introduction

The African customary leader had *ex officio* powers to decide any matter which came before his court. The Black Administration Act 38 of 1927 imposed a radical limitation on the powers of the leader. The African customary leader is referred to in the Act as "chief" and "headman". The Constitution refers to these functionaries as traditional leaders, and we refer to them by this name in this lecture.

Under sections 12 and 20 of the Black Administration Act 38 of 1927, traditional leaders are empowered to adjudicate civil and criminal cases provided that the Minister has granted them this power. The minister referred to here is the provincial minister responsible for traditional affairs.

It is unlikely that the courts of traditional leaders will consistently draw the careful distinction between criminal and civil matters they are required to do by the Black Administration Act and by common law. Should they act in contravention of this Act and impose a criminal penalty, without the necessary authority, they will fall foul of the criminal prescription of common law. In such a case the traditional leader can be held liable for any consequences which may arise as a result.

In determining the powers of traditional leaders to hear civil or criminal matters, race is a decisive factor. Only black people have access to the courts of the traditional leaders. According to section 35 of the Black Administration Act 38 of

1927, a black person is someone who is "a member of an aboriginal race or tribe of Africa". An argument that the fact that non-black people do not have access to these courts amounts to unfair discrimination in terms of section 9(3) of the Constitution is misplaced, even though it may look like racial discrimination. It is general practice to limit institutions of a particular culture to the members of that cultural group. Such limitation does not presuppose unfair discrimination.

In *Gerhardy v Brown* (1985 159 CLR 70), the Australian High Court found a local Act to be valid although it discriminates on racial grounds, since it was a "special measure" to protect the cultural group concerned. The "reservation" of special courts for use by black people is not so much a "special measure" but rather a reasonable and justifiable limitation on the law against discrimination. Without doubt, African customary courts function for the benefit of black people who do not have access to the magistrates' courts or the Supreme Court for financial and educational reasons. Viewed in this light, the courts of traditional leaders can be seen as a special measure. The most important reason why black people should be allowed to litigate in African customary courts is the fact that these courts provide them with a forum that is in harmony with their cultural expectations.

Black people may nevertheless argue that it amounts to unfair discrimination if they are compelled to institute their cases in this court in the first instance. The discrimination may then lie in a different, and possibly lower, standard of justice on the grounds of their cultural and ethnic origin. There are important differences between the African customary courts and other courts. The African customary courts can apply only African customary law, and not common law, whereas the other courts can apply both African customary law and common law. In addition, no legal representation is allowed in the African customary courts. However, these differences are in agreement with a particular cultural orientation. The traditional method of administration of justice was and is in every respect similar to that of the other courts. One must also remember that black people have a choice as to the court in which they will institute their action and that they are not obliged to institute their action in the court of the traditional leader in the first instance.

4.2 Jurisdiction in civil matters

The Minister may, in terms of section 12(1) of the Black Administration Act 38 of 1927, empower a traditional leader, who is recognised or has been appointed, to hear and decide on civil claims between blacks. At the request of a traditional leader such powers may be granted by the Minister to a deputy (s 12(1)(b)). In terms of section 12(2) the Minister may at any time withdraw the jurisdiction granted to such persons.

A traditional leader who hears and decides civil claims constitutes a court and his finding is binding and becomes a *res iudicata* (the case is decided and thus closed), subject to the right of appeal to the magistrate's court.

A traditional leader may hear and decide civil cases which

- arise from African customary law
- are instituted by black people against black people residing within his area of jurisdiction

A traditional leader may not decide on any matter concerning nullity, divorce or separation in respect of a civil marriage between black people. This limitation is really unnecessary; as such actions do not arise from customary law.

In *Gqada v Lepheana* (1968 BAC (S)) it was decided that a claim concerning lobolo in respect of a civil marriage is a claim which originates from African customary law. Bekker (16 n 36) questions this decision. He argues that this decision assumes an expert knowledge of the general law of persons on the part of traditional leaders, especially in respect of civil marriages and their dissolution. He argues further that *lobolo* in respect of a civil marriage is a *sui generis* matter (distinctive) in which African customary law serves only as a directive, and that such a claim does not arise from African customary law. In our opinion this decision has merit as at that stage the dissolution of the marriage has already been decided by the divorce court or Supreme Court so that the lobolo issue does not arise from the dissolution of a civil marriage. A traditional leader is empowered to decide on any lobolo claim arising from an African customary marriage.

A traditional leader's powers are limited to black people who reside in his area of jurisdiction. The criterion is thus not group membership or *domicilium* (a fixed or lawful home) but rather residence. In Ex parte Minister of Native Affairs (1940 AD 53) the following interpretation of the word "resident" was given:

- The issue to decide is one of place of residence and not of *domicilium*.
- A person can be domiciled in one place and temporarily reside in another place.
- A person can have more than one place of residence but can live only in one place at a time. A person must therefore prove before the court where he was residing when the summons was served.
- The court did not give a comprehensive description of the word "reside". In determining a person's residence, there must be evidence that there are good grounds to regard such place as his regular residence at the time when the summons was served.

The procedure in the court of the traditional leader is the African customary-law procedure. Although there is no explicit reference in section 12 to rules of evidence, we can assume that African customary rules of evidence are applicable.

Section 12(4) provides for an appeal to the local magistrate's court against a sentence imposed by a traditional leader. There is, however, no right of appeal in respect of a claim for less than R10, unless the court of appeal certifies after a summary enquiry that the issue involves an important principle of law. The execution of the sentence of the traditional court is postponed until the appeal has been decided upon.

4.3 Jurisdiction in criminal matters

The Minister can in terms of section 20(1) of the Black Administration Act 38 of 1927 empower traditional leaders and their deputies to try criminal offences. The Minister can revoke this power at any time (s 20(4)).

According to *Minister van Naturellesake v Monnakgotla (1959 (2) PH (K.70),* such revocation must be done according to the *audi alterem partem principle* (hear the other side). There is a rebuttable presumption that a traditional leader has the proper powers to hear such a case (*R v Dumezweni 1961 (2) SA 751 (A) at 755).*

A traditional leader is competent to hear

- any crime in accordance with common law
- any crime in accordance with African customary law
- any statutory crime referred to by the Minister

A traditional leader's powers to hear and adjudicate on the above-mentioned classes of crimes are limited in the following way:

- His jurisdiction is limited to crimes committed between black people in an area which is under his control. The extent of his power is thus connected to residence, and not group membership.
- His jurisdiction is limited to black people.
- There are 35 offences listed in the Third Schedule to the Black Administration Amendment Act 13 of 1955 which are excluded from the traditional leader's jurisdiction. These offences are the following:

  > High treason; *crimen laesae majestatis*; mutiny; sedition; murder; culpable homicide; rape; robbery; assault with the intention to kill, to rape, to rob and to inflict grievous bodily harm; indecent assault; arson; bigamy; *crimen injuria*; abortion; abduction; every offence according to an Act on stock theft; sodomy; bestiality; bribery; specified forms of burglary; receipt of stolen goods with the knowledge that they are stolen; fraud; forgery; every offence in accordance with the Act on unlawful possession of or unlawful trading in precious metals or precious stones; every offence in accordance with the Act on carriage possession or provision of habitual-forming drugs or alcoholic drink; every transgression in connection with the monetary system; perjury; alleged sorcery; faction fights; kidnapping; incest; extortion; frustration or obstruction of the administration of justice; any plot, instigation or attempt to commit any of these above-mentioned offences.

You should take note of these offences, but we do not expect you to memorise them.

It is clear that the criminal jurisdiction of traditional leaders is limited. Although the Third Schedule does greatly limit statutory offences, traditional leaders have

jurisdiction in respect of these offences only to the extent prescribed by the Minister through regulation.

Offences not mentioned in the Third Schedule are *inter alia* neglect of children, deprivation of liberty, violation of tombs, damage to property (partially), contempt of court, offences against the prerogative and revenue of the State, offences regarding registration of births and deaths, and offences against public health.

Although the Third Schedule explicitly excludes specific offences from the jurisdiction of traditional leaders, the interpretation of these offences is not without problems. In African customary law, civil and criminal matters are heard in a single suit. Although a traditional leader is not empowered to hear any matter in connection with arson for example, he may hear a dispute in connection with damage to property. In both common law and African customary law arson is merely a form of malicious damage to property. Damage to property is also a well-known delict in African customary law.

A similar problem is encountered in connection with fraud, which a traditional leader may not hear, and theft, which he may hear, or in connection with kidnapping, which he cannot hear, and child-stealing, which he may hear. Whether traditional leaders would distinguish between these offences is open to question. In accordance with the unspecialised nature of African customary law it is unlikely that such fine distinctions on technical grounds will be made. A traditional leader might possibly decide on both the delictual and the criminal element of a case although he has no power to do so in respect of the criminal element.

In offences where any of the accused or victims are not blacks, or where the property involved does not belong to a black person, such offences may not be tried by a traditional leader. A traditional leader is, however, empowered to punish any person, including a non-black, for contempt of his court *in facie curiae* (in the face of the court): see *Makapan v Khope* 1923 AD 551; *R v Vass* 1945 GWPD 34; against Prinsloo & Myburgh 248.

The procedure for a trial and the execution of a sentence of the court of the traditional leader are given in accordance with African customary law. Although there is no reference to the application of the rules of evidence, it is obvious that the African customary rules of evidence are applicable.

Section 20(5) makes provision for an additional method of claiming for unpaid fines. If the traditional leader fails to recover a fine or part of the fine cannot be claimed, he may arrest the person concerned and, within 48 hours after the arrest, bring him or allow him to be brought before the magistrate's court which has the necessary jurisdiction (the district in which the trial took place). The magistrate before whom such a person is brought may order payment of the fine upon being satisfied that such a fine has been duly and lawfully imposed and is still unpaid, either wholly or partially. If the person fails to comply with the order immediately, the magistrate may sentence him to imprisonment for a period not exceeding three months. In such a case the magistrate must issue a warrant for his detention. In this case the magistrate's action does not amount to a retrial, but is merely an

inquiry into whether the traditional leader was empowered to try the offence and to impose a fine and why such a fine or part of it has not yet been paid. Fines must be used in accordance with customary law except where the Black Authorities Act 68 of 1951, (s 9(1)(b)), provides otherwise.

Section 20(2) contains the following explicit provisions on the punishment which a traditional leader may impose:

- He may not impose a punishment which entails death, mutilation, grievous bodily harm or imprisonment. He may not impose a fine in excess of R40 or two head of large stock or ten head of small stock. In this connection we should note that the amount which is imposed as a fine is not in accordance with the current market value of cattle.
- Moreover, a traditional leader cannot impose corporal punishment, except in the case of unmarried males below the apparent age of 30 years.

With one exception this limitation of punishment accords with section 11(2) of the 1996 Constitution. The exception is corporal punishment. This form of punishment is generally seen as being in conflict with fundamental rights (S v *Williams and Five Similar Cases* 1994 (4) SA 126 (C) at 139).

An accused may appeal against his conviction or any sentence imposed upon him to the magistrate's court having jurisdiction in the area in which the trial took place (s 20(6) as amended by Act 34 of 1986, Schedule A). These appeals are governed by Section 309A of the Criminal Procedure Act (51 of 1977, as amended by Act 34 of 1986, Schedule L). The magistrate can either uphold the appeal and set aside the conviction and sentence or confirm or alter the conviction. Should the magistrate confirm or alter the conviction, he or she may either confirm the sentence and order its immediate satisfaction or set aside the sentence and in lieu thereof impose such other sentence as (in the magistrate's opinion) the traditional leader should have imposed. In this case a magistrate could, for example, not impose a fine in excess of R40 since this is the limit a traditional leader can impose. If there is no immediate compliance with the magistrate's sentence, the magistrate may impose a sentence of imprisonment for a period not exceeding three months. The magistrate may also set aside the sentence imposed by the traditional leader and in lieu thereof impose a sentence of imprisonment for a period not exceeding three months without the option of a fine.

In terms of section 29A(1) of the Magistrates' Courts Act 32 of 1944 the court, when entertaining an appeal, may hear new evidence. This means that it would be more correct to describe the hearing as a retrial than an appeal. Although provision is made in the Rules of Court (Rule 6) for keeping a written record of the proceedings, this does not include a record of the evidence heard, and so it is quite possible that the court may consider new evidence (not heard in the court of the traditional leader). A copy of the written record must be delivered to a local magistrate within two months of the date of judgment, otherwise the judgment will lapse (Rule 7(2)).

Although the Appeal Court may nullify a traditional leader's judgment where African customary law was wrongly applied to a claim arising in the common law, it is not free to alter the cause of action at will. Hence, as a general rule, the magistrate must continue to apply African customary law on appeal.

Self-evaluation

(1) Discuss the criminal and civil jurisdiction of the courts of traditional leaders. (25)

(2) Write critical notes on appeals against findings of the courts of traditional leaders. (15)

(3) Considering the fact that the courts of traditional leaders are accessible to black persons only, these courts are a violation of the right of non-discrimination. Evaluate this statement. (8)

Feedback

1. Your answer must fully discuss the nature of jurisdiction, its limitations, the procedures and appeals against the decisions of these courts.
2. Fully discuss the appeal in criminal and civil cases. Specifically mention the court to which the appellant can appeal, when appeal is not possible and the court's jurisdiction with regard to the judgment/sentence of the court of the traditional leader. Are we really dealing with appeals?
3. This statement is not correct. Argue this statement from two perspectives: firstly in relation to non-accessibility and cultural rights and secondly in relation to the fact that access to these courts is founded on a racial basis.

LECTURE FIVE

The African customary law of evidence

Compulsory reading

Bekker JC,Rautenbach C & Goolam N (eds) *Introduction to legal pluralism in South Africa* (2010) LexisNexis Butterworths

Recommended reading

Prinsloo MW & Myburgh AC *Inheemse publiekreg in Lebowa* (1983) ch 7

Myburgh AC & Prinsloo MW *Indigenous public law in KwaNdebele* (1985) ch 5

Vorster LP "Inheemse bewysreg van die Swazi van die Mswati- en Mlondlozi-gebied (Mpumalanga Provinsie, Suid-Afrika)" (1996) 19 (2&3) *SA Journal of Ethnology* 89–94

Outcomes

After having studied this lecture, you should be able to

- discuss the nature of the African customary law of evidence
- identify and evaluate the principles regarding the African customary measure of proof
- distinguish the types of evidential material and indicate the value of each
- identify and evaluate the principles regarding competence to give evidence or to testify
- describe the process of giving evidence

5.1 Nature

Trials in African customary courts are still governed by the African customary law of evidence (s 20(2) of Act 38 of 1927; Rule 1, GN R2082 of 1967), provided that the rules applied are not in conflict with the principles of public policy and natural justice (s 11(1) of Act 38 of 1927). In the event of an appeal to a magistrate's court against the judgment of a customary court, the general South African law of evidence will apply to the evidence given in the magistrate's court (*Nombona v Mzileni et al* 1961 NAC 22 (S)). If the magistrate's court was likely to reach a different decision from that of the African customary court merely because of an

impending (interfering) rule of evidence regarding the admissibility of evidence and the measure of proof, it could lead to unfairness.

The African customary law of evidence is based on custom and does not consist of formal rules in the ordinary sense of the word. These are customs, rather than rules, that are observed, and disregarding or violating them does not constitute a contravention of the law. The African customary law of evidence is therefore fairly informal, and is based largely on reasonableness and effectiveness (see also Prinsloo & Myburgh 278). The court is interested in the merits of the case, and technical grounds for a judgment are therefore unknown.

Two characteristics of the African customary law of evidence are its inquisitorial procedure (the court plays an active part in examining the parties and their witnesses in order to determine the "truth") and its free system of evidence (in principle, no evidence is excluded: all evidence is admissible, and is judged on its merits by the court – see also Myburgh Papers 75).

5.2 Burden of proof and evidential burden

Prinsloo and Myburgh do not distinguish between burden of proof and evidential burden: they actually discuss only the latter. In our view, however, a distinction should be made between burden of proof and evidential burden in African customary law. We shall first discuss the former.

The burden of proof determines which party loses the case if the court does not have sufficient grounds in order to make a finding on an issue of fact (Schmidt 25). Such a situation is inconceivable in African customary law, because extrajudicial methods of proof are known. These extrajudicial methods of proof in African customary law have to do with referring the accused to a diviner (*ngaka; inyanga)* in order to make a finding. In former times, this could also take the form of an ordeal, such as taking poison.

Since the African customary law of evidence is so informal and free in nature, there is no scientific reasoning concerning the burden of proof. The court decides, on the merits of the evidence, which rendering of the facts is true. If, in a certain case, it is difficult to come to a decision, the court may use extrajudicial means of proof, such as referring the party or parties to a traditional healer *(inyanga* (Swazi), *ngaka* (Tswana and Northern Sotho)).

As far as the evidential burden is concerned, the principle is that a party must prove its claims in court. In a civil action, the plaintiff's group must submit evidence which, together with other evidence submitted to the court and evidence obtained through questioning by the court, proves its claim. Otherwise, judgment is given in favour of the defendant, and the plaintiff's claim is disallowed. Likewise, the defendant's group must submit proof which, together with other evidence before and in the court, rebuts (disproves) the case against it and shows the claim to be unfounded. As said above, all evidence is judged merely on its merits, and the court is not bound to technical rules of evidence. A party is therefore not required

to prove an issue of fact conclusively (i.e. decisively). The court plays an active part in examining the parties and is therefore in a position to judge the rendering of the facts itself.

In criminal cases, as well, the principle is that a party must prove its claims in court. Sometimes it is said that the onus (duty or responsibility) is on the accused to prove his or her innocence. This means that the accused is expected to submit evidence to the court that proves the charge to be unfounded. In African customary law there is no prosecutor who submits evidence on behalf of the court. The court does play an active part in the process of questioning, however, and may even call witnesses to give evidence. Notably, the principle that the case against the accused must be proved beyond reasonable doubt (see 3 below for an explanation of this concept), as it exists in the general law of the land, is unknown in African customary law.

From the above it is clear that in African customary law no court case can end in an "absolution from the instance". ("Absolution from the instance" means the dismissal of a claim by the court because it could not make a decision in favour of one of the parties on the evidence submitted to it.) In African customary law neither of the parties has the burden of proving their case. It is the court that acquires proof by playing an active part in the process of questioning so that it will be able to give judgment.

5.3 Measure of proof

As said above, absolution from the instance is unknown in the African customary law of evidence. The court plays an active part in the process of questioning and in evaluating evidential material. Also, it is not only the parties concerned and their witnesses who may give evidence. Any person present in court may submit evidence during the trial. The court is interested in the "truth", and for this reason all evidence is tested and weighed. In African customary law, unlike in the general law of evidence, the measure of a balance of probabilities does not apply in civil cases. (According to this measure, the party who, in the view of the court, appears to give the most probable rendering of the facts, is entitled to a judgment in its favour.) Likewise, in African customary law the principle of "beyond reasonable doubt" does not apply in criminal cases. (This principle means that the court must prove the accuser's guilt to that the point where there is little doubt about his or her guilt.) The primary aim of a customary hearing is not to prove who is right and who is wrong: it is to determine the "truth" and to reconcile the parties with one another, as well as with the court and the community. Judgment is given by the court after all the parties and their witnesses have given their rendering of the case and the court has tested and weighed the validity of this evidence through the process of questioning.

Some authors say that the measure of a reasonable (fair) person applies (see Prinsloo & Myburgh 280; Myburgh & Prinsloo 137). The court is interested in the "truth" as considered credible and convincing by the people in court on the basis

of their experience. There is no specific test, such as that of a "reasonable man" or person. (Briefly, "the test of the reasonable man" means that the question is asked whether a reasonable person in the same circumstances as the accused would have acted in the same manner as the accused in a similar situation. On various occasions during our research in Mpumalanga spokespeople remarked that a particular set of facts could possibly be true, but that within their cultural experience and perception it would not be probable. Facts and evidence are therefore evaluated within the local cultural context.)

In African customary courts, parties are allowed to submit their unabridged version of the case in hand. No case is decided without everybody having been heard. Disallowance of a plaintiff's case before the defendant has been heard is unknown. For a party to institute legal proceedings without good (but unfounded) reasons is inconceivable. In a civil case, as you know, the claim is first argued by the respective family groups, and only after they have failed to reach agreement is the matter referred to the headman's court. By then the parties ought to know whether the case is founded or not.

5.4 Evidential material and means

Facts in dispute, that is, those facts about which the disputing parties differ, are proved in a customary court by means of evidence and questioning. Other evidential means include admissions, judicial notice and presumptions.

5.4.1 Evidence

Evidence is the oral statement made in court by a party or a witness, either voluntarily or in answer to a question. This is the most important form of evidential material in an African customary court, because a case is tried on the basis of evidence submitted to the court.

Direct evidence, namely evidence of a person who has seen or heard something directly, is the best form of evidence. Thus, the evidence of an eyewitness is considered important. It is also emphasised that a person who presumes or sees a potential wrong should preferably take along a witness. If, for example, a man sees his wife in dubious circumstances in the company of another man, he must get a witness to observe these circumstances as well. This is why a contract must be concluded in the presence of witnesses. However, direct evidence on its own is not enough proof, and is always considered together with other evidence.

Circumstantial evidence is used to supplement other evidence and other evidential material. From the evidence of a witness who saw the accused near the scene of an alleged crime at the moment of its commission, it can therefore be concluded that the person was involved in the crime. In such matters as seduction or adultery special value is attached to circumstantial evidence supporting the evidence of the girl or woman, since in such cases direct evidence is seldom available. Also,

in such cases the evidence of one person may be accepted as sufficient evidence, provided that the other party cannot disprove this evidence.

Hearsay evidence is admissible, and is considered together with other evidence. Hearsay can also serve as a guideline in the questioning of the parties and their witnesses and is therefore admissible. However, a case relying mainly on hearsay has little chance of success.

Concrete evidential material has especially strong evidential value. A piece of clothing or some other personal belonging of an offender shown to the court has special evidential value since no person would entrust a personal belonging to a "stranger", that is a non-relative, without a sound reason. This is a form of judicial notice and a presumption. (The court takes notice of the fact that because of ritual reasons a person does not voluntarily entrust his personal belongings to others. This also leads to the presumption that the person is involved in a wrongful deed or a crime.)

Concrete evidential material can include a piece of personal clothing such as a pair of men's trousers or a personal belonging such as a kierie. Sometimes a person caught in the act is also "marked" by giving him one or two blows on the body, preferably on the back, with a *kierie*. That person must then explain to the court how his property came to be in the possession of another, or how he was injured or wounded. Injuries on the back do not point to a case of assault, because then the person would have defended himself. Concrete evidential material together with other evidence is often decisive (considered sufficient proof).

Evidence in previous cases is also taken into consideration in settling later cases. Such evidence is not decisive, since each case is decided on its own merits.

The court itself may, through questioning or an inspection *in loco*, produce evidence which can be considered together with other evidence. The members of the court council actively take part in questioning the parties and their witnesses. This is to evaluate the credibility of the persons involved. A member of the court council does not have to withdraw from the process just because he was an eyewitness in a particular case.

Also, any person present in court may submit further evidence to the court in support of the evidence given, or to query it, and may even question the parties and their witnesses. After a witness has given evidence and has been questioned, he or she may be recalled at any stage of the process to give further explanations if new evidence has come to light. The parties to a civil case may conduct their own questioning of the other parties and their witnesses. This is called an open system of questioning. A party or witness's refusal to answer a question will lead to an unfavourable conclusion, namely that the person is hiding something from the court.

5.4.2 Admissions

Civil cases are first discussed by the agnatic groups concerned. If this process does not lead to a settlement, the case is taken to the court of the headman. By that time there must be reasonable clarity about the facts in dispute. It is therefore not necessary for the court to ask the parties to admit certain facts.

In criminal cases, the case is usually investigated by the accuser's local headman and his councillors. If the accused admits all the facts, he is punished without a further hearing. If he admits certain facts and denies others, the facts that have been admitted are accepted as proven. If all the facts against a party are admitted in the course of the case, judgment may be given. Admissions made by a party outside the court may be used as evidence in court.

5.4.3 Judicial notice

The court takes notice of known facts without requiring that proof be submitted. This is particularly true where the personal particulars of the parties are concerned. This also applies to matters known to the members of the court by virtue of their position in the administration of the traditional authority, such as where certain places are situated, and the boundaries of a certain area. The court also takes notice of cultural customs, such as that a person may not enter another person's hut in the other person's absence. Notice is also taken of animal behaviour, for instance that a cow will not reject her calf in the suckling stage.

5.4.4 Presumptions

A presumption is an assumption made by the court about a fact that has not been proven directly by evidence. The fact presumed is accepted by the court as correct until it is rebutted.

The following presumptions are known:

- The children of a married woman are the children of her husband.
- An adult is mentally sound, until there is evidence to the contrary.
- A person does not voluntarily entrust pieces of personal clothing to a stranger.
- A person does not voluntarily remain prostrate (i.e. lying with the face downwards) so that another person may hit him on the back.
- An action is instituted without delay. Plaintiffs who fail to institute an action therefore intend to harm their opponents.

A person who refuses to answer a question in court is withholding information from the court. (Strictly speaking, this is not a presumption, but rather conduct that may have a harmful effect on a person's evidence.)

5.4.5 Extraordinary evidential material

In former times, the assistance of a traditional healer (*inyanga*) could be called in. If the facts of a case were difficult to prove, the court would send the parties, accompanied by two or more messengers of the court, to an inyanga. Today, members of the tribal police are used for this purpose. It is the task of the inyanga, by means of extrajudicial methods such as throwing the bones or other tests, to determine whether the accused is guilty of the charge against him or her. The finding of the *inyanga* is conveyed to the messengers. This can be done by shaving the hair of the accused, in order to indicate his or her guilt. These messengers convey the finding of the *inyanga* to the court; the *inyanga* himself or herself does not appear in court to give evidence. The finding of the *inyanga* is accepted as decisive evidence by the court: that is, no further evidence is required. All that remains to be done is for the court to give judgment.

5.5 Competence to give evidence or to testify

The general principle is that all persons, except if insane or intoxicated (drunk), are competent to testify in an African customary court. Even a young child who can remember and relate an incident or who can identify persons can testify in court. Co-accused persons may also testify for or against one another. A person who is too intoxicated to testify is given time to sober up. In these circumstances, the case is usually postponed.

A wife may testify for or against her husband, and the converse is also true: a husband may testify for or against his wife. The court will, however, weigh such evidence carefully. It must usually also be corroborated (confirmed) by other evidence.

Chiefs and headmen may not act as witnesses in a case. The same applies to members of the court council. However, they do not have to withdraw from a case merely because they know something about the case concerned. They must convey their evidence to the court. In former times, a chief was not allowed to testify in public. The chief usually testified in private to the chief councillor, who passed this information on to the court. When considering this procedure you must bear in mind that in African customary law no case is decided by an individual. The chief and the headman, together with the members of the court council, decide a case, so that the outcome of the case cannot be influenced by a certain individual's prior knowledge of the case.

5.6 Giving evidence

In a traditional court, evidence is not given under oath. Therefore, perjury (wilfully giving false evidence under oath) is unknown. No action is taken against a party or a witness who tells lies; if they do tell lies, it will merely harm their case.

The parties to an action are responsible for seeing to it that their witnesses are present on the day of the trial. If a witness cannot attend the trial, the court may, on request, postpone the trial once. Alternatively, the court proceedings can continue without the witness until it appears that the particular witness is necessary, and then the case is postponed. Further, the court is free to call upon any person to testify if it is of the opinion that the person concerned has some information. If a party cannot attend, he or she must give reasons beforehand, and if these reasons are acceptable, the case will be postponed.

Today, the names of the plaintiff's witnesses are given to the headman when the case is reported. The defendant is then notified in writing of the case against him, and of the date of the trial. He is also asked to bring along his witnesses on that day.

In court, evidence is given orally in the presence of the parties concerned, and is subject to questioning. Each party and all the witnesses are given full opportunity to testify at their discretion to the court, without interruption. The court patiently listens to the evidence and will seldom call on a witness to confine his or her evidence strictly to the case in hand. If, however, a person states his case in a very long-winded manner, without being specific, he will be asked to get to the point. If he does not do so, it can harm his case. It is the court that determines the relevance of the evidence, with due allowance for all the facts of the matter as well as the motives of the witnesses. If it later appears that a person is wasting the court's time, he may be fined.

Self-evaluation

(1) What is meant by "a free system of evidence"? (5)

(2) Is the measure of "a reasonable person" known in African customary law? (3)

(3) Indicate the value attached to the following evidential material in African customary law:

3.1 hearsay evidence (3)

3.2 concrete evidential material (5)

3.3 admissions (5)

3.4 extraordinary evidential material (7)

(4) The principles regarding competence to give evidence or to testify give expression to the free and open system of evidence in customary law. Evaluate this statement. (6)

Feedback

1. This means that there are no formal rules of evidence and that in principle no evidential material is excluded. It is the task of the court to establish the truth by considering and weighing all the evidence.
2. Although there are writers who maintain that this test is known in African customary law of evidence, this test must be qualified. The court does not test who is right and who is wrong, but rather tries to reconcile the parties with one another and with the community. The emphasis is therefore on establishing the truth within the local cultural context and experience.
3. The answers to this question are set out clearly in the text. The question that needs to be answered throughout is whether this type of evidence is admissible, in which circumstances it is admissible, and whether the evidence alone is decisive (enough).
4. This statement is correct. Everybody who knows something about a case is allowed to submit this evidence to the court. There are no technical grounds on which evidential material is excluded on principle. This is why a husband and wife may testify for and against each other and young children may testify as well. It is the task of the court to establish the "truth" and to bring about reconciliation.

LECTURE SIX

Sentencing and execution of sentences in the customary courts

Recommended reading

Prinsloo MW & Myburgh AC *Inheemse publiekreg in Lebowa* (1983) 274–277

Myburgh AC & Prinsloo MW *Indigenous public law in KwaNdebele* (1985) 132–135

Outcomes

After having studied this lecture, you should be able to

- identify and explain what is taken into consideration by the African customary court when sentencing
- explain the phenomenon of court fees in African customary courts
- discuss how the judgment of an African customary court is executed

6.1 The sentence or judgment

One of the most important functions of the modern court as a legal instrument is to "find" the law. This "finding of the law" by the court then becomes the sentence that has to be executed by the court.

How does the African customary court reach a judgment? Which factors play a role in reaching a certain judgment? Before we answer these questions we refer you to lecture 2 above, in which it is indicated that the judgment of an African customary court is based on consensus (general agreement). There is no majority or minority judgment. The African customary court makes statements on behalf of the community and must "find" the law as it accords with the current law of the community. In this process an attempt is made to bring about reconciliation between the parties, and between the parties and the community. This reconciliation also entails that the party that has been harmed should receive some form of restitution (compensation).

A feature of judgments by an African customary court is that each case is judged on its merits. The court is therefore not bound to previous judgments in comparable cases. The court comes to a decision after considering all the relevant information.

In criminal cases, judgment may mean punishing the accused. This punishment can take the form of a reprimand, a warning, corporal punishment, a fine, the attachment (seizure) of property, and in former times even banishment from the area.

In civil cases, judgment may mean rejecting or accepting the plaintiff's claim. If the plaintiff's claim is accepted, the defendant is usually asked to compensate for the plaintiff's damage.

In lecture 2 it was pointed out that in African customary law there is not always a clear difference between civil and criminal cases, nor is there a distinction between the civil and the criminal elements of a case. The Northern Ndebele, however, do use terminology (i.e. words) to distinguish between a fine and compensation. "Fine" refers to the punitive element (i.e. the element of punishment), whereas "compensation" refers to the civil element of a case. Judgment pertaining to a case with both a criminal and a civil element will therefore also comprise an element of punishment and an element of compensation.

Various factors are taken into account in determining the amount of compensation to be paid. If, for instance, the damage was done intentionally (i.e. in a purposeful and calculated manner), this is taken into account. In such a case the compensation is set for a higher amount than the damage that was actually done. The court may reject a plaintiff's claim if it is found to be unfounded or his attitude is found to be inflexible, and it may warn the plaintiff "not to waste the court's time with trivialities".

For certain offences, such as making an unmarried woman pregnant and adultery, there is, in most cases, a fixed amount of compensation. Although the court may amend (i.e. increase or decrease) this amount, it does not readily do so.

In cases where there is no fixed amount of compensation prescribed by tribal law, the court takes account of factors such as the status, the economic situation and the circumstances of the parties when the offence took place. An affluent person or a person of royal descent may therefore expect to pay a higher amount of compensation than other people. This is so because such people are expected to set an example to the community.

Sometimes the court orders additional goods or money, other than damages, to be delivered. This may be called "a court levy", or "court costs". It is called a "levy" because in former times no money was used. The Sotho-speaking groups refer to this "levy" as *mangangahlaa* (literally: "to tighten the jaw or to move the jaw a lot"). In this sense it refers to the amount of talking that the court councillors need to do in order to try to convince a difficult litigant of his guilt. In this context *mangangahlaa* may be regarded as compensation to the court for the time its members have spent on the case. Another explanation is that these are goods that are given in order to close the court proceedings.

In former times a goat, and even a head of cattle, if the case took a long time, was given. The animal was slaughtered for the members of the court, and then eaten in a meal shared by them and the litigants. In this way any trace of dissidence (disagreement) that still existed among the litigants was removed in a visible and a concrete manner. In this respect *mangangahlaa* also plays a role in the reconciliation of the parties.

Sometimes *mangangahlaa* is also ordered to compensate for malicious damage that has been caused. It is also ordered if, during negotiations, one of the parties unreasonably refused to come to an accord with another family group. In this respect *mangangahlaa* contains an element of punishment.

In criminal cases the fine that is imposed sometimes includes *mangangahlaa*. The *mangangahlaa* part is usually used for the food served to the members of the council and the accused.

Today the court levy takes the form of money, which by law (s 9, Act 68 of 1951) must be paid into the tribal fund. The court levy or court fees are usually due by the party against whom judgment is given.

6.2 The execution of the sentence or judgment

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

Should a person refuse or neglect to pay the fine or compensation owing within a reasonable period of time, the African customary court would order the confiscation of that person's property. In such a case force could be used to confiscate the property. Some groups had a special messenger, known as an *umsila* among the Xhosa, who performed this function. In such a case the fine and the compensation were usually increased summarily.

The increase may be regarded as a fine for contempt of court. This additional levy was called *thupa* ("stick" or "admonition" (warning)) by the Northern Sotho. It was used for maintenance of the messengers, and can therefore also be regarded as execution costs.

The judgment debtor, that is, the person against whom judgment was given for payment of a fine or damages, may also arrange with the court to pay the judgment goods in instalments.

In former times, sentences in the form of corporal punishment and banishment were enforced directly after the court session. Today a sentence by an African customary court may be enforced only if no notice of appeal was received within 30 days after registration of the judgment with the local magistrate's court.

If the property to be confiscated is situated outside the area of jurisdiction of an African customary court application must be made to the clerk of the magistrate's

court for execution of the sentence or judgment. Today the messengers of the African customary court are not allowed to use force in order to execute a sentence or judgment. Any interference with the messenger in the execution of his duty is considered a crime (Rule 8(4), GN R2082 of 1967). However, no more goods may be seized than is laid down in the judgment.

Section 20(5) of the Black Administration Act 38 of 1927 makes provision for another way in which to exact unpaid fines. If an African customary court cannot exact a fine, the court may arrest the guilty person, or have the person arrested, and make him or her appear in the local magistrate's court within 48 hours. If the magistrate is satisfied that the fine was imposed in a proper manner and finds that all, or part, of it is still outstanding, the magistrate may order that the fine be paid immediately. Failure to do so may lead to the guilty person being sentenced to imprisonment of a period not exceeding three months.

Self-evaluation

(1) Which factors are taken into account by an African customary court when giving judgment in a case? (10)

(2) Explain the legal significance of *mangangahlaa*. (10)

(3) Describe the execution of a sentence or judgment by an African customary court. (10)

Feedback

1. Refer to factors such as intentional damage, unfounded claims, the attitude of the parties concerned, their status and economic situation, as well as the circumstances in which the offence took place. Also briefly refer to the influence each factor may have on the sentence or judgment concerned.
2. Refer to the following possibilities: goods to close the court proceedings; compensation to the members of the court council; reconciliation; the element of punishment.
3. Describe the following principles:
   - Execution takes place as soon as possible after sentencing or judgment.
   - Any delivery of goods (in the form of animals or money) takes place at the court.
   - It is possible to seize goods, even by force.
   - Today execution of judgment requires prior registration at the local magistrate's court.

- Act 38 of 1927 makes provision for another way of exacting outstanding fines.

STUDY UNIT 5

AFRICAN CUSTOMARY CRIMINAL LAW

OVERVIEW

This study unit serves as an introduction to the study of customary criminal law. In customary law there are certain offences that may only be decided on by the courts. The parties in such cases are not free to choose whether they wish to settle the matter among themselves or whether they wish to institute an action in court. These offences are considered offences that are harmful to the community as a whole. They are acts that have certain consequences that are disapproved of by the community and that are therefore punished. Such offences could be said to fall under "customary criminal law".

In lecture 1 we shall discuss the first element of a crime, namely the act, and the requirements that must be met before an act may be called "a customary crime". We shall also discuss the fact that there may be more than one perpetrator (i.e. more than one person responsible for a crime). Finally, there is also the principle that the head of an agnatic group is liable for the actions of members of his group. ("Liability" means to be held responsible for the consequences of certain actions.)

In lecture 2 we shall discuss the other elements of a crime, namely unlawfulness, guilt and punishment.

In lecture 3 we briefly refer to the above elements of a crime and apply them to a few specific customary crimes. The crimes we have chosen are contempt of the ruler, assault and rape.

Outcomes

After having studied lectures 1–3, you should be able to

- discuss the nature and scope of African customary criminal law
- distinguish the elements of a crime in African customary law
- analyse specific crimes in accordance with the elements of African customary crimes
- apply the principles contained in the lectures to a set of facts
- evaluate certain sets of facts in accordance with these principles

Structure of study unit

LECTURE 1: The act as an element of a crime

LECTURE 2: Unlawfulness, guilt and punishment as elements of a crime

LECTURE 3: Contempt of the ruler, assault and rape

LECTURE ONE

The act as an element of a crime

Recommended reading

Myburgh AC *Indigenous criminal law in Bophuthatswana* (1980)

Myburgh AC & Prinsloo MW *Indigenous public law in KwaNdebele* (1985) ch 3

Prinsloo MW & Myburgh AC *Inheemse publiekreg in Lebowa* (1983) ch 5

Feedback

After having studied this lecture, you should be able to

- name the elements of a crime in African customary law
- distinguish between a crime and a delict
- discuss the relationship between an act and the consequences of an act
- explain the legal position and liability involved should there be more than one perpetrator
- apply the principles contained in this lecture to a set of facts

1.1 Introduction

For the following reasons it is important to have a knowledge of African customary criminal law:

- It provides the necessary background for understanding African customary law as a whole.
- It is applied in African customary courts.

Section 20 of the Black Administration Act 38 of 1927 recognised the fact that traditional chiefs and headmen have limited criminal jurisdiction. This jurisdiction is discussed in study unit 4, lecture 4. Before studying the rest of this lecture, you should read that discussion carefully so that you know what that jurisdiction entails.

African customary criminal law may be defined as the law pertaining to crimes. Criminal law determines what conduct should be punished, that is to say, what conduct constitutes a crime. A crime is a human act that is in conflict with the generally accepted interests of the community, that can be blamed on the perpetrator, and the consequence of which is that the perpetrator may be punished by the community.

The elements of a crime may be summarised as follows:

- There must be a human act. This could mean either that something is done actively (this is called an "act"), or that something that by law should be done actively, is not done (this is called an "omission"; "omission" therefore means "failure to act in instances where by law action is required").
- The act must be unlawful.
- It must be possible to blame the act on the perpetrator. This means that the relation between the act and the consequences of the act will be examined.
- The community must be of the opinion that such an act should be punished.

An act may be harmful to a private person and the community at the same time. In the case of assault, for example, it is the victim who sustains physical injuries, but the community is also harmed by the act because of the disturbance of human relationships. In such an event the assailant may be punished by the court and may also be instructed to give the victim something "to heal the wounds". From this it may be concluded that in African customary law a distinction is made between a crime and a delict. The above will become clearer to you once you have studied the differences between a crime and a delict, as set out below.

The differences between a crime and a delict are set out below:

- The parties that are harmed: In a crime the community is harmed, whereas in a delict the individuals or agnatic groups are harmed.
- The property that is affected: In a crime public property is affected, whereas in a delict the property of a particular agnatic group or individual is affected.
- The procedure that is involved: In a crime the matter must be tried in court in the first instance, whereas in a delict mediation between the parties is required before legal proceedings may be instituted.
- The punishment or compensation that is granted: In a crime the offender is punished, whereas in a delict damages (in the form of money) are payable to the party that was harmed.

In African customary law certain acts may constitute both a crime and a delict. In such cases there are no separate actions and the matter as a whole is settled in court: that is, in the same process punishment is meted out and compensation is granted to the aggrieved (harmed) party. This was particularly the case with stock theft. In most African communities the theft of property, excluding cattle, constitutes a delict only. It is therefore important to determine in each case how the act in question is viewed by the particular community.

In African customary law infringement of communal interests sometimes takes the form of defilement (pollution) of the community. Examples of polluting crimes are "offences of the blood" such as assault and homicide. It is also believed that infanticide and abortion generate a ritual heat that keeps away the rain.

Incest – and in some communities contempt of the ruler as well – is considered defiling. In such cases not only is punishment imposed, but a meal of lustration (purification) and conciliation is ordered as well. The cattle paid as a fine are generally slaughtered at the court. All those present, and particularly the members of the court council and the persons involved in the act of defilement, must join in the meal. In this way the offenders are visibly (in a concrete manner) reconciled with the community.

In customary criminal law prescription of a crime is unknown – *molato ga o bôle, go bola nama* ("a crime does not perish; only meat does"), as the Tswana-speaking people say. (In law, the term "prescription" means that the action lapses in the course of time. Therefore if a person waits too long before instituting an action, it is said that the action is "prescribed".)

Activity 1

A is accused in an African customary court of a crime he committed 10 years ago. His defence is that he may no longer be prosecuted since the crime was committed such a long time ago. What are your comments on this defence.

Feedback

In African customary law the principle of prescription of a crime (i.e. a crime lapses in the course of time), which is found in other legal systems, does not exist.

1.2 The act

According to African customary law, only conscious human acts can constitute a crime. Unconscious human acts, such as hurting somebody when turning over in one's sleep, can therefore not constitute a crime. Involuntary acts, even conscious involuntary acts, cannot constitute a crime. An example would be where absolute force is used to make somebody commit a crime, such as a knife being held to his throat. Also, the act must cause harm. Thus, according to African customary law, an attempt to commit a crime that does not cause harm is not punishable.

Acts performed by animals do not constitute a crime. Thus, a person who instigates a dog to attack somebody uses the dog as an instrument to commit a crime, but the act of the dog does not constitute a crime.

A criminal act may also involve an omission, such as failure to execute an order of the ruler. However, nobody has a duty to prevent a crime. In African customary law failure to prevent an assault or suicide, for instance, was not considered an omission punishable by the African customary authorities.

Activity 2

(1) During a battle a regiment of soldiers has to flee the enemy. With their pursuers hot on their trail, they hide in a patch of dense bush. The pursuers run past and would have continued on their way if one of the soldiers had not started coughing. The soldiers do manage to escape, however. The soldier who coughed is later brought before a tribal court. Does his act constitute a crime? (2)

(2) Y is attacked by X's vicious bull. Y's dog comes to his rescue and begins to turn on the bull. The dog is killed by the bull. May Y prosecute X on the grounds of a crime having been committed? 5)

(3) Would the following acts constitute a crime in African customary law:

3.1 A does not like B. He is thinking of possible ways of killing B. (1)

3.2 D walks in his sleep. One night, while sleepwalking, he knocks over a burning candle, which causes a hut to burn down. Two children who are asleep in the hut sustain serious burns. (1)

3.3 F tries to enter another person's house through the window with the intent of stealing G's possessions. Sitting on the windowsill, he hears somebody approaching. He jumps back and sneaks away. (1)

Feedback

(1) No, because coughing is an involuntary human act, just like breathing and blinking.

(2) No, the act of the bull cannot constitute a crime. Further, there is no indication that X instigated the bull or opened a gate so that the bull could attack Y.

(3) The act as a crime:

3.1 A person's mere thoughts are not considered acts.

3.2 D's act while asleep may be regarded as an unconscious human act. It therefore does not constitute a crime.

3.3 According to African customary law, F's attempt does not constitute a crime, because no harm has been done.

1.3 Cause and effect: the problem of causality

Sometimes it is difficult to determine whether a particular act caused the effect complained of. If A stabs B through the heart with a knife and B dies instantly from the wound there is little doubt that A's action was the cause of B's death. However, if a series of acts or various people are involved it is often difficult to determine which person's action caused the forbidden effect.

In African customary law there is no theory of causation, but research has shown that in each case people know from general experience that a certain act usually causes a particular effect. The criterion used is therefore the experience of

the community. Every act that constitutes an indispensable condition for a particular state of affairs is considered a cause. Although the aforegoing sentence may sound complicated, the following will serve as a good illustration: If A is hit over the head with a *knobkierie* by B and then dies after being chased in the hot sun for some time by C and D, A's death is considered to have been caused by B. From experience people know that a person does not die simply because he or she has been chased in the hot sun. However, a blow over the head with a *knobkierie* may well be the cause of a person's death. If A therefore had not first been hit over the head with the *kierie*, he would probably not have died after being chased in the hot sun. Death (a specific state of affairs) would not have occurred if it had not been for the blow by a *knobkierie* (a specific act). In this example the blow with a *knobkierie* constitutes an indispensable condition for that particular state of affairs, that is without it that person would probably not have died.

What is significant is that in cases of poisoning the poisoning itself is not summarily taken to be the cause of death, even where the dose concerned is a lethal one. This is because it is believed that there is always the possibility that the poison will not be effective. Also, most people will usually try to prevent such misfortune from befalling them. Therefore, poisoning will be taken as the cause of death only after other possible causes have been eliminated.

It is also accepted that a person's omission may bring about a particular effect. Thus a person who fails to prevent his vicious dog from attacking another person is, because of his failure to do so, the cause of the effect. In this case the person's failure to control the dog constitutes an omission.

Activity 3

(1) A gives B a drink containing a deadly poison. B partakes of the drink. Some hours later B is hit and stabbed by a number of persons carrying *kieries* and knives. B dies a few hours later. Who caused his death? (5)

(2) R has a very vicious bull and everybody in the vicinity knows this vicious bull. R blunted the bull's horns with a saw and put a ring through its nose. One day S accompanies R into the latter's cattle kraal. They are attacked by the bull. Before S can reach the gate of the kraal, he is knocked over by the bull and sustains serious injuries. Is R criminally liable because of his failure to warn S specifically against this vicious bull? (5)

Feedback

(1) African customary law recognises the possibility of B's surviving the poisoning. From general experience we know that B probably died from the blows and the stab wounds. Thus B's death was probably caused by the persons who hit and stabbed him.

(2) R took reasonable precautions by blunting the bull's horns with a saw. If S had been one of the locals, he would have known about the bull. It is therefore not R's specific duty to warn S against the bull.

1.4 More than one perpetrator and co-liability

African customary law also takes note of the fact that there may be more than one person involved in a crime. In African customary law a broad distinction is made between persons participating in a crime (i.e. co-perpetrators) and persons assisting another person who has committed a crime (i.e. persons with co-liability, viz accomplices).

If a person persuades, orders or bribes another person to commit a crime he is also considered to be participating in a crime. Such participation is also punishable. Whether the perpetrators (participants) are equally involved or not does not matter: a person keeping guard while his friend commits a crime, for instance, is also punishable as a perpetrator. Conscious collaboration in the commission of a crime is a requirement. This means that the person collaborating must be aware of the fact that he is committing a crime. If two persons join in driving out another person's cattle from the kraal at night and then slaughter the animals in the veld, they are both committing theft and may be regarded as co-perpetrators.

A person who intentionally helps others to commit a crime is also punishable. He must, however, be distinguished from a perpetrator. Any person who intentionally helps others to commit a crime is called an "accomplice". An accomplice is punishable because he intentionally does something to promote the commission of a crime. If a person for instance tells two villains where another person keeps his money in his house he will be guilty as an accomplice if shortly afterwards the money is stolen by the villains. The Tswana call such a person a "helper" (*mothusi*), and require that such a person may be given a heavier punishment than the perpetrators themselves.

A person who intentionally helps a criminal to evade liability by for instance hiding the criminal, commits an independent crime. In African customary law there is no specific term for this crime. It is always referred to by means of paraphrases such as "hiding a robber" and "hiding stolen goods". In the general law of the land a person who commits this type of crime is known as an "accessory after the fact".

In African customary law the head of an agnatic group is always liable for the conduct of members of his group. In most cases he played no part in this conduct and did not even render assistance. Yet he has co-liability. How is this type of liability defined?

In African customary law the agnatic group has certain rights and duties. Therefore, the group is also liable for the crimes of its members. The Northern Sotho use the following sayings to refer to this type of liability:

> *Tsa loma badisi nageng, di fetelsa bogolo gae.* ("If the herd-boys in the veld are bitten, it will affect their elders at home.")
>
> *Kgomo ka mo gobe e wetswa ke namane.* ("A cow is brought to ruin by her calf.")
>
> *Ngwana a utswa o obela ragwe.* ("A child that steals gets his father into trouble.")

Liability of the group has nothing to do with being participants and accessories after the fact. It has to do with the principle of group rights and duties. The group member himself incurs the liability and is punished. If there is a fine, it must be paid by the group, represented by its head. The Northern Sotho say the following in this regard: *Phiritona ga e molato, molato e obelwa ke diphišana* (literally: "The big wolf has no guilt; the guilt is brought on by the little wolves.").

Activity 4

(1) A, B and C plan to steal G's cattle. C befriends G's herdsmen and finds out what they do at night. He passes on all the information to A and B and also tells them about the herdsmen's secret way of locking the gate of the kraal at night. One night, A and B steal the cattle, while C accompanies the herdsmen to a neighbouring township. Is C an accomplice or a co-perpetrator? Discuss. (5)

Feedback

(1) C is a co-perpetrator rather than an accomplice, because he takes part in planning and executing the crime, although he himself is not present when the cattle are stolen.

Self-evaluation

(1) Give two reasons why it is important to have a knowledge of African customary criminal law. (2)

(2) Name the elements of a crime in African customary law. (2)

(3) Distinguish between a crime and a delict. (5)

(4) In African customary law there are certain crimes that can defile (pollute) the community? Discuss briefly. (5)

(5) Give two examples of conscious human acts that can constitute a crime. (2)

(6) Distinguish the following: a co-perpetrator, an accomplice, an accessory after the fact. (6)

(7) Briefly discuss the principle that the head of an agnatic group is liable for crimes committed by members of his group. (8)

Feedback

1. – 4 For a full discussion of the answers to these questions, see section 1.

5. Stabbing a person with a knife, strangling a person, causing a person to drown by holding his head under the water.

6. For a full explanation, see section 4.

7. The head's liability is based on the principle of group rights and duties. Mention proverbs and examples as well.

LECTURE TWO

Unlawfulness, guilt and punishment as elements of a crime

Recommended reading

Myburgh AC *Indigenous criminal law in Bophuthatswana* (1980)

Myburgh AC & Prinsloo MW *Indigenous public law in KwaNdebele* (1985) ch 3

Prinsloo MW & Myburgh AC *Inheemse publiekreg in Lebowa* (1983) ch 5

Outcomes

Having studied this lecture, you should be able to

- discuss the grounds of justification, excluding the unlawfulness of an act, according to African customary law
- discuss guilt as an element of a crime according to African customary law
- discuss the forms of punishment and the factors that determine punishment in African customary law
- apply the principles contained in this lecture

2.1 Introduction

In lecture 1 we discussed the requirements for an act to be punishable, that is to constitute a crime in African customary law. We saw that it must

- be a human act
- be a conscious human act
- have a certain harmful consequence

This harmful consequence links up with a further element of a crime, namely unlawfulness. The act must therefore also be unlawful, that is, in conflict with what the community considers to be right.

Apart from unlawfulness, we shall also discuss guilt and punishment as elements of a crime so that at the end of this lecture we shall have discussed all the elements of a crime.

2.2 Unlawfulness

If an act had a certain forbidden consequence it does not necessarily mean that the person who performed the act committed a crime, that is that his act was unlawful. There may be factors excluding the unlawfulness of a certain act. For example, in African customary law it is generally considered to be forbidden to kill another person but a person who kills another person in self-defence will not be guilty of murder. In customary law an act is therefore considered a crime (i.e. unlawful) only if it is in conflict with (i.e. harmful to) the interests of the community.

In African customary law there are certain circumstances under which what looks like an unlawful act is still considered lawful. These conditions are generally referred to as "grounds of justification". A ground of justification excludes the unlawfulness of an act. For instance, if A attacks B with a knife and B defends himself by hitting A over the head with a *kierie*, B's conduct is justified as being an act in private defence or self-defence.

There are many grounds of justification. The following grounds are known in African customary law:

- defence
- necessity
- self-help
- executing orders
- impossibility
- consent
- institutional action
- discipline

In African customary law it is accepted that a person may forcibly defend himself or his property, or other persons or their property, against an unlawful attack without being criminally liable. The Tswana refer to self-defence as *boiphemelo*, and to the defence of others as *phemelo ya babangwe*. However, only as much force as is necessary to ward off the assault, abduction, robbery or other peril may be used. Such conduct is justified against an attack that has already begun or that is threatening to begin. The person being attacked need not flee to avoid the attack. In some instances (e.g. a child attacking an adult) to flee may be considered humiliating. If a person's life is in danger, the attacker may even be killed if there is no other way of avoiding the attack. The above may all be called examples of defence.

An act out of necessity, such as protecting oneself or another person, or one's own or another person's property, from danger, excludes unlawfulness. The Tswana call this *tlhokofalo*. One for instance acts out of necessity when breaking into another person's home to extinguish a fire and to save his property. It is also accepted that

killing a sorcerer is not punishable: this could be called "an act out of necessity" since a sorcerer is considered an unknown but constant threat to the community.

A thief, rapist, abductor or adulterer caught in the act may be assaulted, and sometimes he may even be killed. In these cases exclusion of unlawfulness is based on self-help in order to obtain satisfaction. Vengeance, however, does not exclude unlawfulness, so assault after the offence is not allowed.

Executing an official order issued by a traditional ruler or his authorised agent by for instance seizing the property of a judgment debtor does not constitute an unlawful act.

Impossibility of executing an order excludes unlawfulness. Thus a person who has to attend a headman's court session is not guilty of contempt of tribal authority if at that instance he is summoned to the ruler. He is, however, not free to choose what he wishes to do: the ruler takes precedence over other duties.

If an agnatic group has consented to a certain act and this act causes a person injury or harm, unlawfulness is excluded. Therefore, a medicine specialist who gives medicine with the consent of the head of the patient's agnatic group is not liable for harm resulting from that act.

Institutional action (i.e. action according to a recognised cultural institution) excludes unlawfulness. Injuries sustained by young men in recognised stick and *kierie* fights do not constitute assault. The same applies to injuries sustained in the circumcision process during recognised initiation ceremonies.

Under African customary law adults have wide disciplinary powers: for instance, any adult who catches a child committing an offence has the power to chastise (i.e. discipline or punish, especially by reprimanding or even beating) the child, no matter what their relationship and no matter what wrongs were done by the child. An initiation master also has the official power to chastise initiates during initiation ceremonies.

Activity 1

Evaluate the following statements by indicating whether you agree with them or not, and give reasons for your answers.

(1) A threatens to bewitch B. B assaults A and pleads self-defence. (5)

(2) C, a headman, orders D to steal X's corn at night. D is caught and justifies his conduct by saying that C ordered him to do so. (5)

(3) Some boys challenge one another to a stick-fight, as is their general custom. During the fight, G injures F by hitting F hard through the face with his stick. F accuses G of assault. G's defence is that F agreed to the fight. (5)

Feedback

The following could be used as guidelines in your answers:

(1) According to African customary law a threat to bewitch someone can be regarded as acting out of necessity. It cannot be regarded as defence. B therefore cannot plead self-defence.

(2) As a headman C has the authority to issue certain orders to his subjects. These orders must, however, be valid, that is within his legal capacity, in order to be official. Obviously, ordering D to steal X's corn is not a valid order. D therefore cannot justify his conduct by pleading that he was executing an official order.

(3) According to African customary law a stick-fight is a recognised cultural institution based on general custom. Therefore, injuries sustained during such a fight would not be unlawful. In accordance with the principle of shared rights and duties the boys may, however, not consent to harming the rights of their agnatic groups. F may therefore not hold G liable for assault because the boys were participating in a recognised cultural institution. G's defence that F consented to the fight is also not appropriate, since F, as an individual, may not consent to harming the rights of his agnatic group.

2.3 Guilt

African customary law requires that the act must be intentional or at least negligent in order to be unlawful. The Tswana use the word maikaelelo for "intent", and *botlhaswa* for "negligence". The Northern Sotho refer to *boomo*, which may be translated as "intentional". This means that the act must be accompanied by guilt. If the unlawful act is merely an accident (Northern Sotho: *ka kotsi*), criminal liability is excluded. (To give an example: A approaches B, who is chopping wood. While B is chopping wood, A is struck in the eye by a chip of wood. A loses his eye. Here B is not liable for assaulting A, because B was injured by accident.)

We can distinguish two forms of guilt (or culpability, as it is also called), namely intent and negligence. Intent is the form of guilt that is required for most African customary law crimes. A person acts with intent if he consciously does something that he knows is wrong: the act is intentional, that is the person is acting from malice. Examples here are contempt of court, assault, murder and rape. One can speak of negligence when official discipline is not adhered to, and in cases of culpable homicide (i.e. the unlawful and negligent killing of a human being). Negligence means not to act like an ordinary man or woman (Northern Sotho: *bjalo ka monna goba mosadi*). In African customary law no strict distinction is made between intent and negligence. Rather, what is looked at is the relation between cause and effect, that is: Did the act cause that particular effect? In other cases the question that is asked is: Did the perpetrator plan the act?

Also, according to African customary law a small child and an insane person are not criminally liable for their unlawful conduct. It is said that a child's "brain is

still too weak", and that an insane person "is not a whole person and his actions are like an injury caused by a tree trunk". This means that they do not have the mental ability to judge their actions. From this it is evident that in customary law consideration is also given to whether a person can be held liable for his actions or not, that is, whether he is criminally liable.

There is no fixed age at which children may be held criminally liable. In former times it would be a consideration whether a particular boy was just herding goats, or whether he was already herding cattle. From this it appears that there are various degrees of liability. Also, in former times a person who had not yet undergone the initiation ceremonies was not considered a mature person. Such a person was therefore also not considered fully criminally liable, whatever his age.

According to customary law an intoxicated or other drugged condition does not exclude criminal liability. It is also not a mitigating factor if the accused himself is responsible for his condition. If a person in an intoxicated or drugged condition is made to commit a crime, however, his intoxicated or drugged state as well as the fact that he was made to commit the crime are considered mitigating factors.

A supernatural cause such as sorcery does not exclude criminal liability. However, according to African customary law, a belief in sorcery, together with the fear that the sorcery performed by the victim may endanger a person or his relations or even the community may be regarded as a mitigating factor.

2.4 Punishment

Originally, the following forms of punishment were known in African customary law:

- the death penalty
- banishment
- confiscation of property
- removal of the offender to an appointed area within the communal territory
- fines, mostly in the form of stock
- corporal punishment
- compulsory labour
- a warning after having been found guilty

The punishment may be increased by combining any of the above-mentioned forms of punishment. The death penalty or banishment from the communal territory were often accompanied by confiscation of the offender's property. Imprisonment was unknown as a form of punishment, although an offender's freedom could be restricted to a particular area.

The determination of punishment was influenced by various factors. Mitigating circumstances were the following: the insignificance of the offence, youth, provocation and diminished liability. Aggravating circumstances were, for example,

the seriousness of the crime, the use of force in the perpetration of the crime, perpetration of the crime within the victim's dwelling or within his premises, and repeated perpetration of crimes. Further, intentional unlawful acts were punished more severely than negligent acts.

Nowadays an African customary court may still impose punishment in accordance with African customary law, but with the following limitations: no punishment resulting in death, mutilation or bodily harm, including corporal punishment may be imposed. The maximum fine that may be imposed has also been limited.

An African customary court may not sentence any person to imprisonment. In former times a common method of executing a judgment was to detain a convicted person until the imposed fine had been paid by his relatives. Today this is not allowed since it boils down to imprisonment until the fine has been paid.

Self-evaluation

(1) Complete the following statements:

1.1 In order to constitute a crime a voluntary human act must also be ..... (1)

1.2 Circumstances under which what looks like an unlawful act is still considered lawful, are called ..... (1)

(2) Give four grounds of justification which, according to African customary law, exclude the unlawfulness of an act. (2)

(3) Distinguish briefly between "defence" and "necessity". (5)

(4) Which forms of guilt (culpability) can be distinguished in African customary law? (2)

(5) What is the test for negligence? (2)

(6) Which factors influence a person's criminal liability? 4)

(7) What influence does a person's alcohol or drug abuse have on his criminal liability? (3)

(8) Which forms of punishment were originally known in African customary law? (3)

(9) Which factors were regarded as mitigating circumstances and which as aggravating circumstances in the determination of punishment in African customary law?

(10) Which punishments may no longer be imposed by African customary courts? (2)

(11) Discuss grounds of justification which, according to African customary law, exclude the unlawfulness of an act. (25)

(12) Discuss guilt (culpability) as an element of a crime according to African customary law. (10)

(13) Discuss forms of punishment and the determination of punishment in African customary criminal law. (10)

Feedback

1. 1.1 unlawful
   1.2 grounds of justification

2. Any four grounds of justification from the list given under point 2.
3. "Defence" has to do with defence against an attack by another person that has already begun or that is threatening to begin. "Necessity" has to do with any condition that poses a threat to a person or property.
4. Intent and negligence.
5. Not to act like an ordinary man or woman.
6. Age and mental condition (youth and insanity may cause a person not to be criminally liable).
7. Generally speaking, alcohol and drug abuse do not affect a person's criminal liability.
8. The forms of punishment are mentioned in the first paragraph of section 2.4.
9. These factors are mentioned in the third paragraph of section 2.4.
10. The death penalty, corporal punishment, imprisonment and banishment.
11. List and distinguish the various grounds of justification discussed in section 2.2. Mention, specifically, the fact that there is a relation between grounds of justification and the element of unlawfulness.
12. Remember to discuss criminal liability as well as intent and negligence.
13. For a full discussion of punishment and the determination of punishment, see section 2.4.

LECTURE THREE

Contempt of the ruler, assault and rape

Recommended reading

Myburgh AC *Indigenous criminal law in Bophuthatswana* (1980) chs 18, 23, 24

Prinsloo MW & Myburgh AC *Inheemse publiekreg in Lebowa* (1983) ch 5

Myburgh AC & Prinsloo MW *Indigenous public law in KwaNdebele* (1985) ch 3

Outcomes

Having studied this lecture, you should be able to

- discuss contempt of the ruler as a crime in African customary law
- discuss assault as a crime in African customary law
- discuss rape as a crime in African customary law
- apply the principles contained in this study unit to a set of facts

3.1 Introduction

You know what the elements of a crime in African customary law are. We shall now apply these elements to certain specific crimes. You should apply these elements to each crime. Here is the list of elements again:

- the act
- unlawfulness, and particularly the grounds of justification that can exclude unlawfulness in each case
- the requirement of guilt (culpability)
- the punishment

In African customary law there are many more crimes than the few that we have selected for our studies. Unlike South African law in general, African customary law does not recognise an attempt to commit a crime as an independent crime. In this lecture we shall deal with examples of crimes against the traditional authority and against the human body.

The seriousness of the crime "contempt of the ruler" serves as an indication of the position and authority of the ruler in traditional law. This also explains certain

sentiments and views regarding traditional leaders in modern times. The position of traditional leaders will be discussed in detail in study unit 6, lecture 4.

The views on assault in African customary law serve to indicate the position held by a subject in customary law. The possible defiling (polluting) effect assault may have on the community also emphasises the value that was attached to harmonious relationships among people within the community.

A study of rape in particular shows how group rights and a woman's body and honour were protected. It is also clear that in African customary law the individual's consent cannot exclude the unlawfulness of an act.

While studying these crimes you should always keep in mind the unspecialised nature of African customary law. Page back to study unit 1 and make sure that you know what is meant by "the unspecialised nature of African customary law". Pay particular attention to the group orientation and unity of African customary law of procedure.

3.2 Contempt of the ruler

In Tswana and Northern Sotho contempt of the ruler is known as go *nyatsa kgosi*. The Southern Ndebele refer to it as *ukunyaza ikosi*. Contempt of the ruler is a serious crime. Any act of a subject that intentionally rejects, disregards, opposes or disputes the authority of the ruler constitutes a crime. Rejection of the authority of the traditional leader, the national assembly or the representative of the ruler, such as a headman or a messenger, is also regarded as contempt of the ruler.

The following are examples of acts that were punished in African customary courts as contempt of the ruler:

- explicitly rejecting the ruler's authority
- unlawfully calling and holding a tribal meeting
- usurping a headmanship
- conspiring to usurp the ruler's position
- encouraging and canvassing subjects to divide the traditional authority and establish an independent traditional authority
- encouraging subjects to leave the tribal area and to join another ruler
- rejecting the authority of a headman
- adultery with the "tribal wife"

Contempt of the ruler requires intent as a form of guilt (culpability). A stranger visiting the ruler's area does not have an allegiance with the ruler and cannot commit this crime.

In former days, this crime was punished in one of the following ways:

- banishment, because of the maxim *go nyatsa kgosi ke go tloga* (literally: "contempt of the ruler means to leave")
- the death penalty for serious forms of contempt, together with confiscation of property
- a fine
- corporal punishment

Because the death penalty and corporal punishment as forms of punishment have been abolished by the Constitutional Court, these forms of punishment can no longer be imposed. Nowadays traditional leaders do not have the authority to banish subjects either, and the only valid form of punishment is a fine.

Activity 1

Would the following acts constitute contempt of the ruler? Give reasons for your answers.

(1) A is visiting a friend in a traditional tribal area. He would like to start a business there. Without the help of anybody else he arranges a public meeting. (2)

(2) Z, a headman, determines, without consulting the members of his council or the ruler that people may use of the first fruits of the lands before the ruler announces that this may be done. When it is pointed out to him that the ruler has not performed the customary ceremony in this regard Z says in public that he does not believe in the ceremonies and that he cannot wait for the ruler. (2)

(3) F leaves the area of ruler X with his wife and children to work in the city. After 15 years he and his wife return to the area. Without making sure what the current local arrangements are he cuts thatching-grass in an area where it is forbidden to cut grass. It was decided to forbid the cutting of grass in that area at a tribal meeting four years before F's return. (2)

Feedback

(1) No, from the above-mentioned facts we know that A is not a subject of that particular ruler. Only subjects can be guilty of contempt of the ruler.

(2) Yes. Z's conduct amounts to a public rejection of the ruler's authority.

(3) No. It is true that F was negligent by not finding out about the latest arrangements. However, contempt of the ruler requires intention to do so, and there is no indication that F had the intention to disregard the ruler.

3.3 Assault

In Northern Sotho "assault" is described as *go itia, go betha* ("to hit somebody") and *go gobatsa* ("to hurt somebody"). The Tswana terms for "assault" can also be translated with the word "attack". It therefore appears that according to African customary law "assault" has to do with unlawfully and intentionally hurting another person's body. Assault is particularly associated with blood and with bodily injury. An attack causing an open wound or permanent bodily injury is regarded as assault. It is believed that human blood belongs to the ruler. To injure someone until the blood flows also has a public, defiling (polluting) effect on the community. This defilement is then compensated for by means of a reconciliatory meal at which the assailant and the victim as well as the members of the court council are present. The assailant must provide the animal that is slaughtered as a sacrifice at the meal. An attack where there is no blood or bodily injury, however serious the attack may be, is not considered an assault.

An assault can also be indirect, such as when somebody instigates a dog to bite a person. Then, as well, there should at least be an injury for it to be regarded as an assault.

Intention and unlawfulness are requirements for assault. Bodily injury caused by negligence does not constitute assault. If, therefore, someone is chopping wood next to his house while children are playing nearby and a child is struck by a chip of wood and is injured, it is not regarded as assault. The person did not plan to injure the child. The person will, however, be liable because he did not warn the children. He was therefore negligent.

Defence, executing an official order or discipline, participation in recognised *kierie* or stick fights or initiation ceremonies are considered grounds of justification in cases of assault. In cases of assault there must be a complainant.

The victim and the assailant may also settle the matter between themselves before proceedings are instituted at an African customary court. This is done particularly when the injuries are of a less serious nature. It therefore appears that assault also contains a delictual element. If there is a settlement in such a case it means that there is no punishment under African customary law. This does not mean, however, that the less serious assault does not constitute a crime, but the interests of the community are satisfied because the relations between those concerned are restored. The harmony that then exists in the community can be regarded as public satisfaction.

Punishment in cases of assault is decided on by the court and generally used to take the form of a fine or corporal punishment, or a combination of the two. Provocation (i.e. words or behaviour that incite a person to attack another person) by the victim is considered a mitigating circumstance. Serious injury and the use of a dangerous weapon are aggravating circumstances.

The court often gives part of the judgment goods to a complainant "to heal the wound", that is, as satisfaction. Formerly the court could order a form of retalia-

tion (i.e. revenge), which meant that the injured person could injure the assailant in a similar way. The intention was probably both punishment and satisfaction. Nowadays the assailant is ordered by the African customary courts to pay the victim the medical costs that were directly caused by the assault. Thus today there is also an element of compensation in cases of assault.

Activity 2

Would the following acts constitute assault in African customary law? Give reasons for your answers.

(1) A and B have an argument which turns into a fight. A hits B in the face with his fist, causing B's face to swell up to such an extent that he cannot see. There is no blood, however. (2)

(2) While R and S are chatting near R's house, R's vicious dog approaches without their seeing him. Suddenly the dog growls loudly from behind S's back and S gets such a fright that he faints. (2)

Feedback

(1) No, although B has reasonably serious injuries, there is no sign of a permanent injury or of blood.

(2) No. From the set of facts it appears that S sustained no bodily injury. According to African customary law a person's feelings and soul cannot be hurt by assault. Thus, if a person's feelings and honour are hurt, it does not constitute assault.

3.4 Rape

According to African customary law rape occurs when a man uses violence to force a woman to have sex with him without being married to him. Sex with a girl who is not sexually mature (i.e. old enough) is punishable as rape, even if there is no violence. The Tswana call this *go senya*, which means "to destroy or to waste". Only a man can commit rape – not a woman.

The use of violence is a requirement for rape. The woman therefore has to offer resistance, unless she is threatened. The terms used for "rape" emphasise the element of violence. The Northern Sotho refer to rape as *kato*, meaning "to hold tight". The Tswana use *petelelo* (derived from *betelele*), meaning "to constrain" or "to overpower", or gatelelo (derived from *gatelela*), meaning "to trample" or "to push down".

If, under the law of the Northern Sotho, it is proven that the woman was thrown on the ground or that she was constrained and that her clothes were torn, while she was screaming or was offering resistance in any other way, these are sufficient

grounds for the attacker to be found guilty of rape. However, the woman must have reported the matter to the head of her family immediately.

Some groups do require penetration for rape to have taken place. This is the practice among the Tswana of North-West and the Ndebele of Mpumalanga. If there is no penetration, the offence is sometimes regarded as assault, and not as rape.

The mere fact that the woman had not consented to sexual intercourse did not mean that a rape had been committed. There had to be violence as well. Here we must remember that according to African customary law the individual can never consent to harming the rights of the group. Therefore, if the woman consents to intercourse it cannot be used as a defence in a case of rape.

Rape is a serious crime and is regarded as unlawful and intentional harm to the woman's body and honour. At the same time it also harms the honour of the agnatic group.

In former times, rape could be punished with the death penalty, particularly if the victim was the wife of the traditional ruler. Other recognised forms of punishment were fines or corporal punishment, or both.

A person who caught a rapist in the act with his wife, daughter or sister could give him a severe thrashing without himself incurring punishment. There are also known cases where the rapist was killed and the killer was not punished. The Northern Sotho have the following saying in this regard: *mpsa e bolaelwa mafekong* ("a dog is killed where he copulates"). The killing and the assault (the thrashing, in this case) were regarded as lawful means of self-help that excluded the unlawfulness of the killing and the assault. The killing and the assault also serve as lawful means of protecting guardianship. The infringement of the agnatic group's guardianship over a member of the group, namely the rape, is compensated for by killing or assaulting the rapist. The killing and the thrashing must therefore also be seen as forms of satisfaction.

Nowadays rape may not be tried by an African customary court as a crime, but only as a delict. Since, according to African customary procedure, criminal and delictual liability resulting from a single act must be tried at the same court trial, the above distinction is not understood by the people concerned.

Activity 3

Would the following acts constitute rape in customary law? Give reasons for your answers.

(1) A, a male person, suggests to D, a female person, that they go to a certain room to have sexual intercourse. It looks as though D agrees to do so, because she accompanies A to the room. However, when they get there, she refuses to have sexual intercourse with A. A then uses violence to force her to have sex with him. D reports the incident to her agnatic group. (5)

(2) M, a 24-year-old unmarried man, persuades N, an 8-year-old girl, to have sex with him. N agrees and they have sexual intercourse. (5)

Feedback

(1) The fact that D appeared to consent does not constitute a defence in a case of rape. The fact that there was violence, however, serves as an indication that D was raped.

(2) N's consent does not constitute a valid defence in this case. N is not sexually mature so that in this case violence is not a requirement for rape. M's act therefore constitutes rape.

Self-evaluation

(1) Discuss contempt of the ruler as a crime in African customary law. (25)

(2) Which punishments could formerly be imposed for contempt of the ruler? What is the present position? (5)

(3) Discuss the elements of a crime in African customary law with reference to assault. (25)

(4) According to African customary law assault also contains elements of a delict. Evaluate this statement. (5)

(5) Discuss rape as a crime in African customary law. (25)

Feedback

1. Discuss this crime and refer specifically to the different elements of a crime. Discuss the forms that the act of contempt can take, which grounds of justification can exclude the unlawfulness of the act and which punishments may be imposed on a person found guilty of this crime.
2. Banishment, the death penalty, confiscation of property, a fine and corporal punishment. Nowadays only a fine may be imposed.
3. Discuss the elements of a crime one by one, each time using assault as an example. Also see the guidelines for the answer to question 1 above.
4. The statement is correct. There is an element of delict because of the possibility that the assailant and the victim may settle the matter between them, without intervention by the court. The fact that the court gives part of the judgment goods to a complainant "to heal the wound" also shows that there is compensation.
5. Discuss the different elements of a crime with regard to rape according to the general guidelines given for the answer to question 1 above.

STUDY UNIT 6

TRADITIONAL LEADERSHIP

OVERVIEW

Traditional leadership is one of the oldest institutions of government in Africa, predating colonialism and Apartheid. With the advent of colonial rule, the institution underwent considerable transformation, marked by extensive repression in the implementation of colonial policies such as indirect rule. In spite of all the repression the institution emerged resilient when most African states became independent.

The advent of freedom in South Africa also saw a majority of South Africans, especially in the rural areas, continuing to owe their allegiance to the institution of traditional leadership. This allegiance is in accordance with their commitment to democratic governance as provided in the Constitution.

The Constitution provides in chapter 12 for the recognition of the status and the role of the institution of traditional leadership in South Africa.

Study unit outcomes

After completing this study unit students must be able to demonstrate an understanding of how traditional leaders are recognised in South Africa as well as identify the categories and functions of traditional leadership found in South Africa. Students must also be able to show how succession to traditional leadership is determined and describe the role of traditional leadership in the governance system of South Africa.

Structure of the study unit

Study unit 6: Traditional leadership

Lecture 1: Legal recognition of traditional leaders

Lecture 2: Traditional authority in South Africa

Lecture 3: Succession to traditional leadership

Lecture 4: Traditional leadership and governance

LECTURE ONE

Legal recognition of traditional leaders

Compulsory reading

Bekker JC, Rautenbach C & Goolam N (eds) *Introduction to legal pluralism in South Africa* (2010) LexisNexis Butterworths 113

The Traditional leadership and Governance Framework Act 41 of 2003

Recommended reading

Bennett TW *Human rights and African customary law* (1995) 70–79

Vorster LP "Tradisionele leierskap in Suid-Afrika" (1996) 19 (2&3) *SA Journal of Ethnology* 76–82

Outcomes

After having studied this lecture, you should be able to

- define traditional leadership
- identify the constitutional position of traditional leaders
- establish the legal basis for recognition of traditional leaders in the Constitution and in legislation

1. MAIN PRINCIPLES

1.1 Introduction

The constitution makes provision not only for traditional authorities, but also for the recognition, institution, status and role of traditional leadership (s 211(1) and (2)).

The following are the most important questions regarding traditional leadership:

- What do we understand by "traditional" leadership?
- What are the constitutional implications of the recognition of traditional leadership?
- What are the legislative impacts for recognition of traditional leadership?

1.2 Traditional leadership

The term "traditional" is derived from the word "tradition". The term "tradition" is generally used to refer to the transfer of culture from one generation to the next, and includes the repeated transfer of ideas, cultures, material objects and behaviour among people that is necessary in order for them to survive within a group.

The term "tradition" is also used in a popular sense, and then the meaning is less neutral than when it is used in the sense of cultural transmission. One meaning refers to tradition as that which has stood for many years and continues unchanged. For example, behaviour that has remained for many years and has been transferred from generation to generation can be described as "traditional". Think of traditional foods, dress and weapons. An example of traditional behaviour is the wearing of a robe by judges, magistrates and advocates during court proceedings.

Tradition can also have a subjective meaning, for example with reference to the traditional inviolability (sacredness) of marriage, or the traditional value of freedom of speech. It can also have a negative meaning when it refers to the conservatism or backwardness of people. Think of references to traditional (backward) societies, traditional (inadequate) medicine and traditional (backward) law.

With reference to the specification of time, the term "tradition" emphasises the timelessness and immutability on the one hand, for example traditional hunters and gatherers, and it can refer to a usage which arose only quite recently on the other.

The term "tradition" and its derivations therefore have conflicting and ambiguous connotations. The fact that people use this term with different meanings indicates that its meaning is not self-evident, and that the meaning to be attached to the term "traditional leadership" is not self-evident either.

There is no indication in the Constitution as to which meaning should be attached to traditional leadership. Section 211(2) refers to a traditional authority "that observes a system of indigenous law". Constitutional Principle XIII also refers to "traditional leadership, corresponding to customary law". From this we can infer that the understanding of traditional leadership refers to a cultural institution (indigenous leadership) which has been handed down from generation to generation. In the Southern African context we can assume that the principle of heredity and succession by men (only male members of the patrilineage although the patrilineage includes female members) are also included.

The Traditional Leadership and Governance Framework Act 41 of 2003 refers to "traditional leadership" as the "customary institutions or structures as recognised, utilised or practised by traditional communities". Precisely what the customary institutions, structures or procedures are, is a matter that is left to the different traditional communities to determine.

However, it is not clear which version of African customary law is implied. We can assume that it refers to law as applied "in accordance to any applicable legislation and customs, whereby is included any amendment or repeal of that legislation or

customs" (s 211(2)). It is therefore clear that customary law should be understood as adapted by legislation and the administration of justice. The traditional leadership under discussion is now regulated by the Traditional Leadership and Governance Framework Act 41 of 2003, as well as the Traditional Leadership and Governance Framework Amendment Act 38 of 2009.

However, there is no doubt that in the new dispensation traditional leaders will also be able to give a distinctive content to this institution. In order to explain the dynamics of tradition in this sense, we can use the image of a deciduous tree. The tree represents the institution of "traditional hereditary leadership". During every growth season new leaves are formed which look like those of the previous season, but they are not the same leaves. Similarly, every new chief is a part of the line of ancestors and he governs like them. He can nevertheless bring about regeneration without applying pressure to the traditional element of his office.

1.3 Implications for Constitutional recognition

The Constitution of the Republic of South Africa, 1996, makes provision for the continuation of traditional authorities in section 211(2), and by implication for traditional leaders. This section states the following:

> A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.

According to section 211(1), "the institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution".

The inclusion of traditional leadership in a democratic constitutional dispensation, which is also included in the new Constitution which came into effect in 1997, leads to certain inconsistencies. The differences in degree between traditional and modern governments, and the meaning of these differences, greatly depends on the various functions of the government and the levels of government at which the functions are exercised.

In so far as the legislative function is concerned, a democracy implies, among other things, regular elections. This system of chosen leaders is in contrast to the traditional system of hereditary leadership. Hereditary leadership is based on the principle of male primogeniture, with due regard to the status of the main wife or tribal wife. (Problems in this regard and the way in which the traditional principle is manipulated and abused when striving towards political power are discussed below in lecture 4.) Even though these rules of succession are frequently manipulated and abused, it is clear that elections should not be a measuring-rod for succession to traditional office. Hereditary leadership further implies that the official holds office for life, in contrast to the fixed terms of office of elected leaders in a democratic system. We must also accept that the draftsmen of the constitution made a conscious decision that traditional leadership would be an exception to the democratic principle of free elections.

The principle of elections has little effect on legislative powers at local government level, as legislation has never been an important characteristic of African customary law. Traditional leaders have always had unwritten and unlimited powers to make new "law" for the community. The emphasis has fallen on the maintenance of existing law rather than on changes with a view to future developments. In this regard, consider what we said about the characteristics of African customary law in study unit 1, lecture 2.

This inconsistency is brought sharply to the fore when we look at the new powers that were given to the traditional leaders at the provincial and national levels. Provision was made for a House of Traditional Leaders at the provincial level and a Council for Traditional Leaders at the national level. These bodies must advise the provincial and national legislatures respectively, and must make suggestions about matters concerning the traditional authorities and African customary law, as well as the traditions and customs of the traditional communities (s 212(2)).

At provincial level, traditional leaders are elected or appointed by traditional authorities to provincial houses, and at the national level they are elected to the national council. This process is also inconsistent with democratic principles, but is in accordance with the exception made in regard to the traditional style of government. These new bodies have limited powers. They can make laws which are then considered by the provincial and national legislature, but cannot legislate independently. In addition, they can insist on being consulted about matters of African customary law, but they can do little more than delay the legislative process if they do not agree with specific legislation.

Another inconsistency with the Constitution is the clash between the equality clause (s 9(3)) and the African customary system of male succession. With a few exceptions, women are not clothed with any public political function in terms of African customary law. The Lobedu of Modjadji do however have a woman as the chief, while the Venda and Swazi clothe the chief's mother or sister with important functions. According to the Swazi, the king's mother is the mirror image of the king. In other groups, women today can act as regents while the rightful successor is still too young, or cannot succeed for any other reason.

According to the principle of equality there can be no argument that the traditional principle that a chief's daughter cannot succeed if she is the first-born is discriminatory. According to the principle of primogeniture the first-born must succeed, regardless of whether they are male or female. The discriminatory element in the succession system is therefore the principle of patrilineal succession. This means that only males in the patrilineage can succeed. If a woman is allowed to succeed, it would mean that her children cannot succeed, as they are not members of the patrilineage. The question which arises in such circumstances is: Who should succeed her? In a patrilineal system of descent reckoning, a daughter belongs to the patrilineage of her father, but her children belong to the patrilineage of her husband.

Another problem is that a female head cannot perform the political rites in honour of the ancestors, as according to belief these rituals can be performed only by male members of the male line of descent. With Modjadji we have the situation that a woman can be succeeded only by her daughter, and that she is not allowed to marry formally, so that her children will indeed belong to her line of descent. In this case, we are dealing with reverse discrimination (only women), and with the further problem that she is not allowed to marry formally.

Gender discrimination is not limited to succession to political offices. It also affects the succession system of ordinary people, if the prohibition against gender discrimination is to be applied uniformly. If women were to be allowed to succeed according to the African customary system of succession, they would have to fulfil the functions of a successor. This means, among other things, that they would have to support and maintain the members of the household and perform rituals during sickness and death. This would bring about fundamental changes in the status of women, and indeed in the "traditional" way of communal life.

It is however not yet clear in this regard whether the chapter on fundamental rights should be applied only horizontally. Even if horizontal application is assumed, strong arguments can be advanced against the application of the equality clause in the case of traditional political succession.

First, we must determine what is meant by "unreasonable discrimination" as found in section 9(3). Does it mean "unreasonable" in an abstract sense, or "unreasonable" in a particular sense? Can a specific position be seen as being unreasonable if it is generally accepted and is underwritten by a cultural tradition?

Secondly, the provisions of section 36 may be applicable. Section 36(2) states, among other things, that an indigenous legal rule does not limit the fundamental rights in the Constitution, "except as determined in subsection (1) or any other determination of the Constitution". Sections 211 and 212 of the Constitution make provision for the continued existence of traditional authorities. If the principle of patrilineal (or agnatic) succession is abolished, it will mean that this authority is no longer traditional.

Thirdly, it can be argued that the political background that resulted in the chapter on traditional authorities (ch 12) in the Constitution cannot be ignored if a decision is made on the application and interpretation of this chapter. The traditional leaders were specifically persuaded to support the Constitution and the new political dispensation on condition that the traditional form of government would be protected. It would be highly unjust if the Constitution were later interpreted in a manner that ignores this understanding.

Self-evaluation

(1) Discuss the constitutional inconsistencies which have been brought about by the recognition of traditional leadership. (20)

(2) Discuss the implications which could follow should the principle of patrilineal succession be abolished. (10)

Feedback

1. In your answer refer to the following inconsistencies:
   - democratic constitutional dispensation
   - the principle of gender equality, including the argument against the application of this principle

2. This concerns the arguments against the application of the equality clause in the Constitution to traditional political succession. You should be able to name the three most important arguments which can be raised against its abolition.

LECTURE TWO

Traditional authority in South Africa

Compulsory reading

Bekker JC, Rautenbach C & Goolam N (eds) I*ntroduction to legal pluralism in South Africa (2010)* LexisNexis Butterworths

Recommended reading

Bennet TW *Human rights and African customary law* (1995) 66–70

Khunou SF *Traditional leadership and independent Bantustans of South Africa: Some milestones of transformative constitutionalism beyond Apartheid* (2009) PER 19

Outcomes

Having studied this lecture, you should be able to

- formulate an overview of the recognition of traditional communities in South Africa
- list the different categories of traditional leaders in South Africa
- indicate the different institutions of traditional governance and their functions

2. MAIN PRINCIPLES

2.1 Introduction

The basis for traditional rule is a traditional state or, on a smaller scale, the traditional community.

In this lecture we deal with the characteristics of the traditional state and community in Southern Africa as it was before it was subjected to large-scale influence from Western institutions of authority. According to the typology (study and interpretation of types) of Fortes and Evans-Pritchard (African political systems) we can describe the traditional state as a system with centralised authority, administrative organisation and jural organs.

The various Bantu-speaking groups of Southern Africa show great similarity with regard to state structure. There are, however, important differences that we shall not go into in this review.

2.2 Characteristics of the traditional state

The traditional state must be seen as people in a cultural context who comprise an autonomous (i.e. independent) jural community. A jural community is a political unit with an own juristic life. The most important criteria determining whether a community or part thereof is a jural community are the following:

- An own territory. The boundaries of the comprehensive jural community are clearly demarcated with reference to topographical (topography = accurate description of natural and artificial features of an area) phenomena such as rivers, mountains and valleys: there is, therefore, a clear boundary between the territories of neighbouring states. Within the comprehensive jural community the boundaries of the constituent but subordinate jural communities are not clearly defined. The organ of authority within each jural community has control over its own territory. The control of subordinate jural communities over their territories is subject to the higher authority of the comprehensive jural community.
- An own household. The term "household" here denotes the interaction between the members of the jural community, including their everyday contacts. Membership of the household may be acquired or lost in various ways.
- An own public law authority. Every jural community has organs of authority that exercise authority within the community and also represent the community against other outside jural communities. The head of the jural community is its most important organ of authority.

The establishment and structure of the jural community are largely influenced by the following three groups of factors:

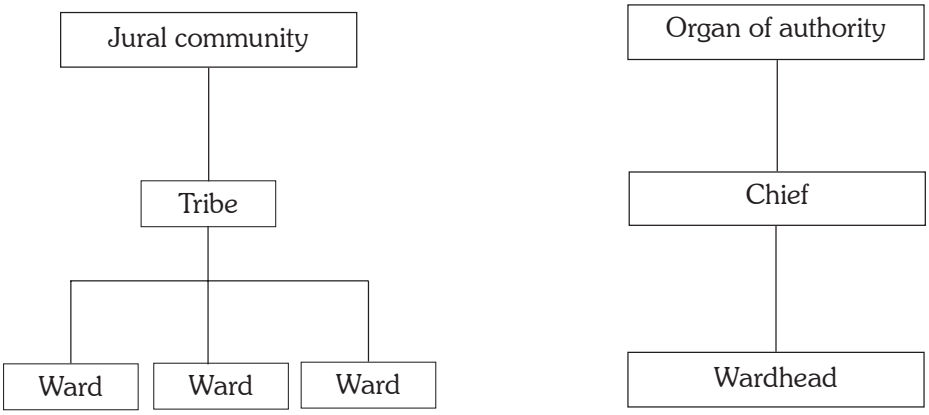
- genealogical factors
- religious factors
- territorial factors

Among the Bantu-speaking groups of Southern Africa jural communities were usually territorial units in the sense that every jural community had its own territory. However, most jural communities developed out of an original founding group which formed the core of the jural community and in which the ruling family was established. The genealogical or kinship principle thus also played a role, even though nonrelated persons and strangers joined the core group over time. Because of the belief of the Bantu-speaking groups in ancestor spirits, religious factors also played a role in sanctioning the authority of organs of government of jural communities. The ruling family were seen as the descendants of the original rulers.

Among the Bantu-speaking groups of Southern Africa the state comprised a hierarchy of constituent jural communities. In hierarchical order, from the most comprehensive to the smallest, the following jural communities can be distinguished: the empire, the federation of tribes, the tribe, the district or section, the town and town wards, and the ward. The commonest and simplest traditional structure of the state was the tribe, which comprised a number of wards. The comprehensive jural community could be enlarged by the addition of tribes or tribal segments through conquest or voluntary subjugation. In this manner empires were founded, such as those of King Shaka and King Moshesh.

The organ of authority of the comprehensive jural community exercised control over the territory and its occupants. The authority of the constituent but subordinate jural communities was limited to that particular area and to the occupants of each.

Owing to the hierarchical structure of the constituent jural communities the organ of authority of the smallest or lowest jural community was subordinate to the authority of the next higher jural community. The following is a diagrammatic illustration of the structure of the jural communities most commonly found among these peoples and the corresponding organs of authority:



Every ward generally comprised a number of family groups. Every family group included a number of related households, which in turn were composed of related families. These components of a ward were, however, kinship units and did not form jural communities.

The legislative, executive and jural functions of government were not exercised by different organs of authority. The head of the comprehensive jural community exercised all these functions, while the lower organs of authority had no legislative functions. Lower organs of authority had only executive and jural functions. Please note that this feature is indicative of an unspecialised legal system.

The historical background to traditional leadership shows that the colonial government recognised traditional authorities commonly referred to as tribal authorities. Recognition was accorded to such tribal authorities through individual proclamations in the different homelands, with traditional leaders of these tribal authorities

being formally appointed by the colonial government. The passage of the Black Authorities Act 68 of 1951 consolidated the position in the whole of the then colonial South Africa regarding the recognition of these tribal authorities. This is one of the colonial statutes which has been repealed under the new Constitutional dispensation.

2.3 Statutory framework for traditional leadership and institutions

The above explanation of a traditional state defines the historical position. As we mentioned before, the colonial government began to make changes in terms of regulating the institution of traditional leadership. After the adoption of the new Constitution traditional leadership continued to be regulated by legislation and one of the results of the provisions of such legislation was more definition and regulation of some of the traditional institutions of government.

One law which has resulted from the Constitutional recognition of traditional leadership is the Traditional Leadership and Governance Framework Act 41 of 2003. The Act is a framework Act which determines traditional leadership issues and also provides for the different provinces to determine their own province-specific policies and statutory frameworks on their traditional leadership issues.

> Please refer to and read Act 41 of 2003 and make your own notes on the aims of the Act.

2.3.1 Recognition of traditional communities

The conceptualisation of a traditional community has recently been defined in accordance with democratic principles in South Africa. The Traditional Leadership and Governance Framework Act 41 of 2003 defines a traditional community as "a traditional community" recognised as such in terms of section 2.

> Section 2 of this Act provides for the recognition of a traditional community. Please refer to and read this section to establish the conditions or requirements for the recognition of a traditional community.

After reading this provision, you will note that a traditional community must transform and adopt customary law and customs relevant to the application of this Act so as to comply with the relevant principles contained in the Bill of Rights in the Constitution.

2.3.2 Withdrawal of recognition of traditional communities

Please refer to section 7 of Act 41 of 2003, making your own notes to establish the conditions under which the withdrawal of recognition of a traditional community may be considered. Also note who has the power to withdraw such recognition of a traditional community.

2.4 Recognition of traditional leaders

As pointed out previously, the recognition of traditional leaders dates back to pre colonial times. In the new Constitutional dispensation, the recognition of traditional leaders is regulated both constitutionally and legislatively.

Schedule 4, Part A of the Constitution, 1996, provides for matters concerning Indigenous law, including the recognition of traditional leaders, to be entrusted to the different provinces.

Categories of traditional leaders

Reference is made in the Constitution to the institution, status and role of traditional leadership (s 211(1)). However, the meaning of "traditional leaders" is not defined. It will sometimes appear from the general use of the term "traditional leaders" that "traditional leaders" refers to the leader corps known as chiefs. Sometimes ward heads (the indunas or councillors) are included, especially in the context of the Provincial Houses of Traditional Leaders.

However, if we look at the members of an organisation such as Contralesa (Congress of Traditional Leaders of South Africa), we see that women play a prominent role in this organisation. Women are also accepted as members of some Provincial Houses of Traditional Leaders. At this stage it is not clear whom these people regard as traditional leaders. According to the Constitution and according to the composition of the Provincial Houses of Traditional Leaders it seems that kings, chiefs, ward heads and other councillors are regarded as traditional leaders.

This Constitutional provision has been further given effect by the legislation specifically providing *inter alia* for the recognition of traditional leadership. The different categories of traditional leaders, their appointment and removal will be discussed in lecture 3.

2.4.1 Functions and roles of traditional leaders

Chapter 5 of Act 41 of 2003 (national legislation) generally provides (in section 19) for the functions of traditional leaders, as indicated below:

> 19. A traditional leader performs the functions provided for in terms of customary law and customs of the traditional community concerned, and in applicable legislation.

Read section 20 of Act 41 of 2003 for the different functional areas in respect of which national government or a provincial government may provide a role and functions for traditional leaders.

2.5 Traditional councils

In the exercise of his functions a traditional leader was traditionally assisted by various councils who acted as his advisers. These various councils were understood to have been divided into four types, namely, the private council, the general/ representative council, the court council and the people's assembly.

2.5.1 Recognition of traditional councils

The recognition and functions of traditional councils are now regulated by legislation. Once a traditional community has been legally recognised in accordance with section 2 referred to above, that traditional community must establish a traditional council in line with the principles set out in provincial legislation.

For the requirements and procedure for establishing a traditional council in a traditional community, please refer to section 3 of Act 41 of 2003 and make your own notes.

2.5.2 Functions of traditional councils

As was previously mentioned, the main function of a traditional council was to advise the traditional leader. In terms of legislation, once traditional councils have been established in communities they have more structured functions to fulfil.

The functions of traditional councils are listed under section 4 of Act 41. Please make your own notes on these functions.

2.6 Houses of traditional leaders

Two categories of houses of traditional leaders in the Republic of South Africa are legally recognised. These are:

(a) A national house of traditional leaders and provincial houses of traditional leaders as provided for in section 212(2)(a) of the Constitution, in Act 41 of 2003 and recently in terms of the National House of Traditional Leaders Act 22, 2009.

(b) Local houses of traditional leaders established in accordance with the principles set out in section 17 of Act 41 of 2003.

2.6.1 The National House of Traditional Leaders

Refer to Act 22 of 2009 and make your own notes on the following regarding the National House of Traditional leaders:

1. The establishment of the house, see section 2.
2. The composition of the house, see section 3.
3. Election, qualification and vacation of seats for members of the house, see sections 4, 5 and 6.
4. The powers and duties of the house.

2.6.2 The Local Houses of Traditional Leaders

These are recognised in terms of section 17 of Act 41 of 2003. The section provides that the number of members of a local house of traditional leaders may not be more than 10, or such other higher number not exceeding 20 as may be determined by the minister where there are more than 35 traditional councils within the area of jurisdiction of a district municipality or metropolitan municipality.

Members of a local house of traditional leaders are elected by an electoral college consisting of all kings or queens or their representatives, and senior traditional leaders residing within the district municipality.

2.6.3 Referral of Bills to the National House of Traditional Leaders

Any parliamentary Bill pertaining to customary law or customs of traditional communities must, before it is passed by Parliament, be referred to the National House of Traditional Leaders for comments. The National House of Traditional Leaders must, within 30 days from the date of such referral, make any comments it wishes to make. See section 18 of Act 41 of 2003 and section 11(2) of the National House of Traditional Leaders Act 22 of 2009.

Self-evaluation

(1) Discuss the general characteristics of a traditional state. (10)

(2) Discuss the terms for both the recognition and withdrawal of a traditional community. (10)

(3) List the different categories and functions of traditional leaders. (10)

(4) Explain the procedure for establishing a traditional council in a traditional community. (8)

(5) Discuss the establishment, composition, powers and duties of the National House of Traditional Leaders in South Africa. (20)

Feedback

1. Refer to section 2.2 of this lecture again in which the nature and characteristics of a traditional state are discussed.
2. Refer to section 2 and 7 of Act 41 of 2003 for the recognition and withdrawal of a traditional community.
3. There are a number of these roles and functions listed in Act 41 of 2003. Read them and if you can list at least ten of them you will get full marks for this question.
4. Refer to section 3 of Act 41 of 2003 for the procedure for establishing a traditional council.
5. Sections 2 and 3 of the National House of Traditional Leaders Act discusses the establishment, composition, powers and duties of the house of traditional leaders in South Africa. Please refer to these sections.

LECTURE THREE

Succession to traditional leadership

Compulsory reading

Nwamitwa and others v Shilubana and others (CCT3/07) [2008] ZCC 9; 2008(9) BCLR 914 (CC); 2009 (2) SA 66 (CC)

Recommended reading

Bekker JC, "Establishment of Kingdoms and the identification of Kings and Queens in terms of Traditional Leadership and Governance Framework Act 41 of 2003" (2008) PER 15

Outcomes

After having studied this lecture, you should be able to

- discuss the statutory provisions on succession to traditional leadership
- explain the African customary law principles of succession to traditional leadership
- evaluate the causes of succession disputes

3. KEY PRINCIPLES

3.1 Introduction

In lecture 1, we indicated that the central tribal authority was originally strengthened through the genealogical limitation on succession. In lecture 2 we referred briefly to factors which play a role in succession. In lecture 3 we indicated that at present a traditional leader does not hold his position on genealogical grounds alone, but that his position is subject to recognition by a higher authority.

From the rules regarding succession it would appear that the law regarding succession to traditional leadership is quite clear. One would expect relatively few problems in this regard. However, the opposite seems to be true. At present there are a number of disputes regarding traditional leadership. As a result of disputes in this regard, it is necessary to go into this phenomenon in more depth.

3.2 Indigenous principles of succession to traditional leadership

In lecture 1 we indicated that in principle the ruler is a male, except for the Lobedu, where at present the ruler is invariably a female. Among some groups females may act temporarily as traditional leaders. We may summarise the law of succession to traditional leadership as follows:

- It is a hereditary system and the position of the traditional leader follows the patrilineage (male line). Succession in the female line is the exception in Southern Africa, and is seen only in parts of Malawi and Mozambique and among the Wambo of Namibia.
- The successor is the eldest son of the ruler by the tribal or main wife. The tribal or main wife is often married specifically for this purpose and the tribe contributes towards her marriage goods. For example the ruler cannot decide that he wishes to divorce her or that she will not bear the successor. She is the tribal wife and her position is indisputable. Among the Northern Sotho she is known as *setima mello* (extinguisher of fires), *lebone* (lamp), *mohumagadi* (wealthy woman) and *mmasetshaba* (tribal mother). Among most groups such a woman should meet specific requirements. Among the Northern Sotho no woman other than the tribal wife can bear the successor. Substitution is possible, however.
- The other wives of the ruler occupy a particular position of rank, and this ranking order has significance, especially in situations where an acting traditional leader or regent has to be appointed.
- The sons of a ruler by his various wives retain the rank of their mothers. Among some groups this ranking order is confirmed during the rites of circumcision.
- The rules according to which younger full and half brothers of a successor may succeed vary greatly among different groups. Among the Northern Sotho such sons cannot succeed, but can only act as regents.
- General recognition of substitution of the ruler by the institution of the *levirate* and substitution of the tribal wife by the *sororate* institution (institution whereby the man has certain rights with regard to the sisters of his wife, if it appears that his wife is infertile, or the right to marry her sister after her death) or complementation of the wife (custom in terms of which a specific defect is supplemented without replacing the person who has the defect). Once the defect has been complemented, the person standing in to make the defect good is under no obligation towards the husband's group. The rules in this connection differ markedly among the various groups, however. In any dispute arising from this the principles of the community concerned should be duly taken into account.
  - Substitution of the husband occurs where the husband dies before he can marry or before he can marry the tribal wife, in which case children are raised on his behalf with a wife married after his death,

usually to a relative, such as his younger brother. This is the *ukuvusa* custom. Substitution also occurs where the ruler dies without a son by the tribal wife. Provided the wife is still fertile a son is raised on behalf of the deceased with his wife in terms of the *ukungena* custom and this son becomes the lawful successor.

– Substitution of the tribal wife occurs in those cases where she dies without a son, in which case she is substituted for by a relative. This is the well-known institution of the *sororate*. Substitution may also occur when the wife is childless or where she has borne no son during her fertile years. In such a case her inability to bear a son is supplemented for by a relative, "supporting wife". Once this "wife" bears a son as a successor, she does not have to stay with the husband's people. She can then even marry another man. Among some people the childless wife or wife without a son is not supported in this way but a daughter-in-law *(ngwetsi)* is married for her as a tribal wife for the generation of her fictitious son. Children were then raised with the daughter-in-law in terms of the institution of the *levirate*.

3.2.1 Reform of the principles of succession: The case of Shilubana v Nwamitwa (CCT3/07) [2008] ZACC 9; 2008 (9) BCLR 914 (CC); 2009 (2) SA 66 (CC)

Challenges to some of the above-mentioned customary principles of succession to traditional leadership have recently been interpreted in courts. The principle of patriarchy, which advocates for males only to be considered for succession to positions of traditional leadership was challenged in the case of *Shilubana v Nwamitwa* 2009 2 SA 66 (CC). The case concerned the constitutional validity of the principle of male primogeniture that governed succession to chieftainship. The senior traditional leader (hosi Fofoza Nwamitwa) of the Valoyi traditional community died in 1968 without a male heir. As a result of the application of the principle of male primogeniture governing the customary laws of succession, his daughter, Lwandhlamuni Phillia Nwamitwa, was not considered for the position even though she was not only her father's eldest child, but his only child. Hosi Fofoza's was instead succeeded by his younger brother, Richard Nwamitwa.

In the course of 1996 and 1997, the Royal family of the Valoyi community passed resolutions, which were later approved by the royal council and the tribal council, to the effect that Ms Shilubana would succeed Hosi Richard, since in the new Constitutional era, women are equal to men. Her succession was approved by the provincial government. However, following the death of Hosi Richard in 2001, Mr Nwamitwa interdicted Ms Shilubana's installation and challenged her succession, claiming that the tribal authorities had acted unlawfully and that he, as Hosi Richard's eldest son, was entitled to succeed his father. Mr Nwamitwa subsequently sought a declaratory order in the Pretoria High Court to the effect that he is the rightful successor to Hosi Richard. Both the High Court and the Supreme Court of Appeal ruled in his favour, reasoning that even if traditions and customary law of the Valoyi currently permit women to succeed as Hosi, Mr

Nwamitwa, as the eldest child of Hosi Richard, was entitled to succeed him. Ms Shilubana appealed to the Constitutional Court against the judgment and order of the Supreme Court of Appeal.

Ms Shilubana claimed that the Royal family had acted well within their powers in amending customary law when they restored the traditional leadership to the house from which it had been removed on the basis of gender discrimination. Mr Nwamitwa argued on the other hand that according to Valoyi customary law the eldest son of the previous traditional leader was the successor in title; and the appointment of Ms Shilubana as traditional leader was grossly irregular and void as the traditional institutions had acted *ultra vires* in identifying someone else instead of the heir.

The Constitutional court held that both the traditions and the present practice of the community had to be considered and that the spirit, purport and objects of the Bill of Rights have to be promoted. The Court reasoned that the community had a right to develop its own laws and customs, and this right had to be respected where it is consistent with the continuing effective operation of the law and that the actions by the traditional authority reflected a valid change to customary law which resulted in Ms Shilubana's succession to traditional leadership. Consequently, Mr Nwamitwa did not have a right to the traditional leadership under the customary law of the Valoyi traditional community.

The case raised a number of constitutional issues which, according to legal scholars, have not been satisfactorily settled. However, recognising and interpreting the right to equality for everyone as provided for under section 9, the courts seem to have done away with the principle of primogeniture that has been recognised under customary law as underlying the principles of succession to traditional leadership. Women can also be considered for succession in accordance with gender equality.

3.3 Legislative measures governing succession to traditional leadership

Originally each tribe, and more particularly the ruling family, decided on succession. The question of succession arose when a ruler died and a successor to him had to be appointed. We must keep in mind that originally a ruler could not relinquish his office or be relieved of it since he held his office on the grounds of his genealogical position within the ruling family. The Northern Sotho express this principle in the following maxim: *kgosi ke kgosi ka madi a bogosi* (*a kgosi is kgosi* through the blood of chieftainship).

The following situations may arise on the death of the ruler:

- There is a suitable successor and succession can take place without delay.
- No successor has yet been born or the successor according to the rules of succession is either not suitable or not competent to succeed. In such

a case a person has to be appointed to act as a regent until such time as a lawful successor is in a position to succeed.

Over time the original power of the ruling family and the tribe to decide on a successor has been subjected to the recognition of the successor by the state authority.

According to Schedule 4, Part A of the Constitution, 1996, matters which concern "indigenous" law are entrusted to the different provinces. At present the provinces are vested with the power to recognise and appoint traditional leaders. In addition to this the provincial legislature is not bound by the local law of succession of a particular tribe. In practice, however, tribes are usually permitted to nominate a person according to tribal law for institution and recognition as chief (see also *Chief Pilane v Chief Linchwe and Another* 1995(4) SA 686 (BPD) 686–697).

In *Mosome v Makapan NO and Another* (BAD 1982 (2)(44)), it was stated at 47 that "there is no suggestion in this of any limitation upon the presidential power to designate chiefs by any obligatory adherence to tribal law". From this it is clear that although modern law occasionally provides for the observation of the African law of succession, the authorities are not bound by it. This situation will most probably also be followed in the present constitutional dispensation in the provinces.

In terms of section 9(2)(a) & (b) of the Traditional Leadership and Governance Framework Act 41 of 2003, the President must, subject to subsection (3), recognise a person so identified in terms of paragraph (a)(1) as a King or a Queen. This is done by way of –

(a) a notice in the *Government Gazette* recognising the person identified as King or Queen, and

(b) the issuing of a certificate of recognition to the identified person

Senior traditional leaders, headmen and headwomen are recognised in accordance with section 11 of the Act by the Premier of each province by –

(a) placing a notice in the *Provincial Gazette* recognising the person so identified

(b) issuing a certificate of recognition to the identified person

(c) informing the relevant House of Traditional Leaders of the recognition of the senior traditional leader, headman or headwoman

The Act provides that should there be any evidence or an allegation that the identification of a person as a traditional leader was not done in accordance with African customary law, customs or processes, the President or the Premier of that particular province, as the case may be –

- may refer the matter to the National House of Traditional Leaders (in the case of a King or a Queen)
- may refuse to issue a certificate of recognition

- must refer the matter back to the royal family for reconsideration and resolution where the certificate of recognition has been refused

Note that the Act (under section 12(1)) also provides for the removal from office of senior traditional leaders, headmen and headwomen on the following grounds:

(a) conviction of an offence carrying a sentence of imprisonment of more than 12 months without the option of a fine

(b) physical incapacity or mental infirmity which, based on acceptable medical evidence, makes it impossible for that senior traditional leader, headman or headwoman to function as such

(c) wrongful appointment or recognition, or

(d) a transgression of a customary rule or principle that warrants removal

Where the successor to the position of King, Queen, senior traditional leader, headman or headwoman identified in terms of section 9 or 11 is still regarded as a minor in terms of applicable customary law or customs,

(a) the royal family concerned must within a reasonable time

  (i) identify a regent to assume leadership on behalf of the minor,

  (ii) through the relevant authority structure, inform the Premier of the province concerned of the particulars of the person identified as regent and the reasons for the identification of that person, and

(b) the Premier concerned must with due regard to applicable customary law or customs and subject to subsections (2) and (3) recognise the regent identified by the royal family in accordance with provincial legislation.

A royal family may, in accordance with provincial legislation, under certain circumstances (see sect 14(1) a–c) identify a suitable person to act as a King, Queen, senior traditional leader, headman or headwoman, as the case may be.

Note that deputy traditional leaders are also recognised in terms of section 15 of the Act to act on behalf of traditional leaders in their absence. Their appointment and removal is regulated by provincial legislation. When such appointments are made the traditional leader is required to inform the President of the appointments.

3.4 Problems in connection with succession

In this section, we briefly discuss some of the causes of succession disputes. We emphasise that these are not the only possible causes. We merely wish to indicate the potential complexity of these disputes.

There are examples of tribal fission as a result of succession disputes in the history of most communities. In days gone by tribal fission resulting from succession disputes was a common way in which new tribes came into being. In many cases tribal fission was the only way to solve a succession problem as an internal tribal

dispute seldom solved such a problem. It appears that there was no mechanism within the ruling family to solve serious differences in respect of succession.

At present it is no longer possible for tribes to divide in order to solve a succession dispute, merely because unallocated land is no longer available. In modern times parties within the ruling family even call upon the High Court to solve their disputes. However, a decision by a court seldom succeeds in solving a problem of succession, with the result that internal disputes regarding traditional leadership became a chronic problem that could last generations.

The following are some of the causes of succession disputes:

- The traditional leader tries to divorce the tribal wife without the cooperation of the ruling family (see Wiid 10 for an example). Remember that we have stated that the tribal wife is not actually the wife of the traditional leader. He cannot, therefore, divorce her at will. In modern times the problem may intensify where a civil marriage is involved. There are examples of cases of a traditional leader being married to his tribal wife in a civil marriage and later on marrying further wives according to customary law. In many of these cases the position of the tribal wife was disputed and it is for this reason that the argument has been advanced that the tribal wife should not be married by means of a civil marriage.
- In modern times it sometimes happens that the traditional leader marries a wife in a civil marriage without the cooperation of the ruling family or against their wishes. This wife is then the only wife and is sometimes even regarded as tribal wife, although in terms of customary law she is not.
- The appointment of the tribal wife or another wife of the traditional leader as a regent. The appointment of a wife to act temporarily as traditional leader is now a fairly common occurrence. Some of the problems in this connection result from situations
  - where the tribal wife associates with "unacceptable males"
  - where she refuses to cooperate with the ruling family
  - where a wife who is not the tribal wife tries to usurp the traditional leadership for her son
  - where the tribal wife is opposed by the deceased chief's brothers and half brothers
- The ranking of the traditional leader's wives often gives rise to disputes. In many cases the tribal wife's position is disputed by descendants of a wife who was married before the tribal wife was married.
- A temporary lack of a tribal wife also eventually leads to serious problems, since the wife who temporarily took over the functions of the tribal wife often claims the status of tribal wife afterwards.

- The biological paternity of the successor is often disputed despite the fact that it is generally accepted that a married woman cannot give birth to an illegitimate child, for the child is child of the cattle (marriage goods): *ngwana ke wa dikgomo* (Northern Sotho).
- Witchcraft also often leads to accusations against the tribal wife in order to exclude the rightful successor.
- Substitution, in particular of the wife, but sometimes also of the husband, occasionally leads to the rightful successor's claim being questioned at a later stage. In such cases the man or woman who acted as the substitute claims the privileges of the man or woman for whom they were substituted.

3.5 Court's interpretation of succession disputes

The incidence of succession disputes in respect of traditional leaders indicates that the office of traditional leadership in rural areas is still of significance. As the traditional leader reigns with the assistance of the ruling family and not as an individual and this family has to appoint a successor, any serious dissent within the family has implications for efficient administration and the administration of justice at the tribal level. In most cases any succession dispute results in a split in the ruling family which is reflected at the tribal level. In the interests of efficient administration it is therefore necessary that any succession dispute be solved as soon as possible and this requires cognisance and application of the local law of succession.

3.6 Resolution of succession disputes and Commission on Traditional Leadership Disputes and Claims

Whenever a dispute concerning customary law or customs arises within a traditional community, or between traditional communities or other customary institutions on matters arising out of the implementation of Act 4 of 2003, members of such a community and traditional leaders within the traditional community or customary institution concerned must seek to resolve the dispute internally and in accordance with customs.

If the dispute cannot be resolved internally, it must be referred to the relevant provincial house of traditional leaders, which house must seek to resolve the dispute in accordance with internal rules and procedures. If the provincial house of traditional leaders is unable to resolve the dispute, the dispute must be referred to the Premier of the province concerned, who must resolve the dispute after having consulted –

(i) the parties to the dispute, and

(ii) the provincial house of traditional leaders concerned.

Traditional Leadership Disputes and Claims. This Commission may decide on any traditional leadership dispute and claims arising in any province. Section

25(2)(i)(ii) authorises the commission to investigate several traditional leadership issues, including those that relate to disputes concerning succession to traditional leadership.

Section 25(3)(a) requires the commission to consider and apply customary law and the customs of the relevant traditional community at the time the events occurred when considering a dispute or a claim. In particular, when the claim considered by the commission is in respect of a kingship, or senior traditional leadership or headmanship, the commission is required to be guided, among other things, by the customary norms relevant to either the establishment of a kingship or senior traditional leadership or headmanship.

Self-evaluation

(1) Discuss the African customary principles of succession to traditional leadership. Indicate to what extent the principles are recognised in modern African customary law. (25)

(2) Indicate to what extent substitution can influence succession to traditional leadership. (10)

(3) What are the main causes of disputes regarding succession to traditional leadership? (15)

(4) What influence can succession disputes have on the tribal authority? (5)

(5) Discuss the resolution of succession disputes in terms of Act 41 of 2003. (8)

Feedback

1. Discuss every principle which was dealt with in section 3. Consider the statutory measures on succession and indicate how the African customary principles are adapted or replaced.
2. Differentiate between substitution of the man (*levirate*) and substitution of the woman (*sororate*). Indicate in what circumstances substitution is necessary. Indicate what influence this has on public succession.
3. The causes are dealt with quite fully in section 4.
4. The influence of succession disputes on tribal administration is quite far-reaching. It can actually bring administration to a standstill, and divide the traditional authorities into opposing parties so that nothing of importance is done for the community. Succession disputes must therefore be solved by the application of the local law of succession.
5. The resolution of succession disputes as provided for in terms of Act 41 of 2003 is dealt with in section 4.6.

LECTURE FOUR

Traditional leadership and governance

Recommended reading

Outcomes

After having studied this lecture, you should be able to

- define the traditional administrative law
- define the traditional administrative act
- critically discuss the validity requirements which must be fulfilled in order for an administrative act to be legally valid
- evaluate the control over a traditional leader's administrative actions

4. MAIN PRINCIPLES

4.1 Introduction

Administrative law is generally connected to

- the powers, functions and actions of the state's executive organs
- the relationship between these organs and the subjects

In study unit 1 we showed that in African customary law the functions of government (legislative, executive, and judicial) are not divided. All the traditional organs of government are also executive organs of government. The chief, the traditional representative council, the statutory traditional authority, ward heads and other officials of the tribal administration are also executive organs.

In this lecture we give attention to the traditional administrative act. We focus on the requirements which must be fulfilled for the act to be legally valid and on the control which is exercised over an administrative act.

4.2 Validity requirements

4.2.1 General

A traditional administrative act refers to an action of an administrative organ, such as the chief, the ward head, the traditional authority or an official land designator.

Such acts result in rules for subjects and authoritative bodies, with the consequence that acts in conflict with these rules constitute a crime. In colloquial language these acts are known as a decision, an order, a determination or an instruction of an administrative organ. In legal terms we speak of administrative determinations.

An administrative determination is an act whereby legal relations are created, amended or abrogated. It can also be an action whereby the creation, amendment, or abrogation of legal relations are refused. Examples of traditional determinations are

- the allocation or refusal of residential and agricultural land
- the permission or refusal of immigration or emigration
- the permission or refusal to gather natural products from communal land

Determinations can, on the basis of their effect, be divided into general and particular determinations. An example of this is the traditional leader's decision or determination to reserve a particular area as grazing land for a specified time. This decision is valid for all subjects. A particular determination creates, amends or terminates particular legal relations, for example the allocation of a residential site to a particular family or the removal of a particular family from one place to another.

The difference between a general and a particular determination is important, because the rules of creation, revocation and interpretation of a general determination do not apply to particular determinations. A particular determination is directed at a particular subject and is conveyed to the person concerned by personal notification. A general determination must be publicly made known to the whole chiefdom. Generally a general determination is made known during meetings of the ward or the general assembly. Further the annulment of a general determination affects the whole functioning of the determination, and not only the particular subject who opposes it. When some subjects successfully dispute the effect of a general determination on the grounds that the determination did not fulfil the legal requirements, and is thus invalid, the whole of the determination falls away, thus in relation to all the subjects and not only towards those subjects who opposed it.

A person who neglects a prohibition or a command that is instituted in an administrative determination commits a crime. A crime can, however, be committed only if the administrative act is legally valid. Although some maintain that the chief's word is law, the chief, or any other traditional functionary, cannot act arbitrarily. In order to see if a traditional administrative act is legally valid, it can be tested against the requirements of customary law in relation to the author, as well as the form, purpose and consequences of the act.

4.2.2 The author

According to African customary law the ruler (king or queen, senior traditional leader, headman, headwoman) is the organ of authority who acts as the author of the determination from which all the duties of the subjects or the particular subjects flow. The ruler holds his position by virtue of his genealogical position. At present his genealogical position is constitutionally subordinated by statutory recognition and appointment. The ruler can exercise his powers as soon as he is inaugurated.

The traditional ruler can institute or revoke valid general determinations only as long as this administrative power is exercised in accordance with valid legal rules. The ruler has no power to create new acts or laws. The competent organ that could make new laws used to be the general assembly, and now it is the traditional authority.

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

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

4.2.3 The form of the act

The formal requirements of an administrative determination are related to

- the announcement thereof
- its content
- the correct procedures

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

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

The content of the determination must be clear and understandable. The action that is required from the subjects must be clearly stated and it must be connected

to the exercise of an administrative function. For example, an order for removal must clearly indicate who must be removed, when they must be removed, where they are to be removed to and why they must be removed.

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

4.2.4 The purpose of the act

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

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

4.2.5 Consequences of the act

The consequences and effect of the administrative act must be reasonable. The requirements for reasonableness include the following:

- The consequences and effect of the act must be possible.
- The rights and freedom of subjects must not be exceedingly burdened by the exercise of discretion.
- There must be no discrimination between individuals or groups, except where the law permits this.

The ruler's order that subjects must work for free in the interest of the community was seen as being reasonable and was confirmed by the former Supreme Court in *S v Moshesh* (1962 (2) SA 264 (E)). However, with such an order, the ruler may not make an unreasonable distinction between age regiments (those who underwent the initiation rites are incorporated into an age regiment for military and administrative purposes) and wards or individual people. For example, he may not always instruct the people of a particular ward to perform public labour only.

According to African customary law no compensation is payable with regard to orders for removal. However, suitable land must be allotted elsewhere to the people

required to move. They must also be allowed to remove all building material. In the event of cultivated land, they must allow for a reasonable amount of time to elapse in order to gather the harvest of the land.

4.3 Statutory regulation of traditional leadership and governance

Traditional leadership and governance matters are also regulated in terms of statute, notably, the Traditional Leadership and Governance Framework Act 41 of 2003. One of the aims of this Act is to define the place and role of traditional leadership within the new system of democratic governance in South Africa. The Act then acknowledges that traditional leadership has a role and place to play in the whole system of democratic governance in the country.

In this regard, as pointed out previously, the Act provides for the formal recognition of traditional communities. See Lecture 2.2.1 for the requirements of recognition of a traditional community. The Act also provides for traditional councils and their functions. While providing for the general functions of traditional councils, section 4(1) of Act 41 provides for the role of traditional councils in facilitating, contributing, participating and promoting development in one form or another.

Most of the functions outlined in the Act are actually aimed at supporting municipalities and other government organs. To give further effect to this aim, a partnership between municipalities and traditional councils must be encouraged by both the national and the provincial governments. Thus, in terms of section 5(3) of the Local Government Municipal Systems Act 32 of 2000, traditional councils can enter into service delivery agreements with municipalities to promote development.

4.4 Control over the traditional leader's administrative actions

4.4.1 Introduction

The general form of control over the actions of the traditional leader is through advice by the different councils.

The basis of this control is expressed in the Northern-Sotho legal maxim: *kgosi ke kgosi ka batho* (*a kgosi is kgosi* thanks to people). This means that the ruler must act in accordance with the will of the people. Previously it was the private council and the representative council that advised the ruler over administrative acts. At present the traditional authority is empowered to perform this function (s 4, Act 68 of 1951). Further, any adult male tribal member can discuss the actions of the traditional leader during a meeting of the tribal assembly. The process of consultation is a form of control which precedes the administrative action.

The requirements of administrative determinations are incomplete unless the law also provides for methods to enforce these requirements. African customary law

provides for legal remedies when a subject is wronged by an administrative action of the ruler, ward head or another organ of authority. Here we pay attention only to control over the ruler. We distinguish between mediation, judicial control according to African customary law, internal review according to common law and judicial control according to common law.

4.4.2 Mediation

Mediation embraces the out-of-court resolution of disputes with the intervention of a third party (study unit 2). In customary law the following principle applies: any objection to an administrative action by the ruler must go before the private council for mediation. This council exercises the most control over the actions of the ruler, and ensures that it is actually the ruling family that rules with the ruler as mouthpiece only.

An aggrieved subject relates his complaint to a member of the private council, who consults the ruler in secret. If he finds that the ruler acted incorrectly, he can reprimand him and require him to offer his pardon to the subject. One or more pieces of cattle can be delivered by way of reconciliation. The council can also act on its own against the wrongful action of the ruler. If the private council and the ruler cannot reach a compromise, in the past the matter was referred to the representative council. If this council did not succeed in reconciling the ruler and the subject, the matter was referred to the people's assembly, where it was dealt with publicly. At present the traditional authority also fulfils this function.

Examples of circumstances where a complaint was lodged against the ruler's action included the following: the administration of corporal punishment to women; incorrect composition of the representative council; mismanagement of tribal funds; refusal to award residential land to a subject.

4.4.3 Judicial control according to African customary law

African customary law does not allow a court action by a subject to oppose an administrative action of the ruler in the tribal court. The reason for this is that the ruler would then have to act as judge and accused in the same case. An aggrieved subject can, however, use indirect means to oppose an administrative determination by the ruler by raising the invalidity of the act as a defence in a criminal suit. For example, in one case people were accused of failing to carry out the ruler's instruction to deliver cattle. After it had been proved that they had not received notification of such an order, the case against them was dropped.

4.4.4 Internal review according to common law

Today, the traditional ruler functions within a hierarchy of organs of authority. This means that his actions can also be reviewed by a higher authority within the same hierarchy of power. The local magistrate, the provincial minister entrusted

with traditional authorities, and the State President can review the administrative actions of the traditional ruler.

Internal review can be done at the request of an aggrieved subject or of the higher organ's own accord. The higher authority can consider the validity of the act as well as the desirability and effectiveness of the act. The particular organ can confirm, disprove, amend or replace the action. The reviewing authority can also take new facts into account and apply new considerations. However, the decision must fulfil the validity requirements of administrative determinations.

If a subject is not satisfied with the decision of the reviewing authority, he can oppose it in a court of law as the decision does not have the power of a court decision. However, the traditional ruler cannot oppose the decision in a court of law, because he and the magistrate belong to the same hierarchy of power and are not independent parties in such a case. The ruler can appeal to a higher official in the hierarchy if he is not satisfied with the decision of the reviewing authority.

4.4.5 Judicial control according to common law

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

The subject can

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

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

The institution of an action does not defer the force of the ruler's administrative act. If the subject wants a deferment, he must specially apply for a temporary interdict.

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

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

4.4.6 Judicial review according to legislation

In terms of section 6(1) of the Promotion of Administrative Justice Act 30 of 2000, any person may institute proceedings in a court or tribunal for the judicial review of an administrative action. Administrative action refers only to action taken by an organ of state when exercising a power in terms of the Constitution or Provincial Constitution or exercising a public power or performing a public function in terms of any legislation, or by a natural or juristic person other than an organ of state in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect.

It has already been shown above that traditional leaders, headman and traditional authorities do make decisions of an administrative nature likely to have the said effects. Thus the provisions of the said Act also apply to the administrative decisions of traditional leaders but not to their judicial functions. (See s1 of the Act.)

Self-evaluation

(1) Distinguish between a general and a particular administrative determination. Why is this distinction important? (8)

(2) Discuss the following validity requirements for a valid traditional administrative determination: author, form, purpose and consequences. (15)

(3) Discuss the control over the traditional leader's administrative actions. (25)

Feedback

1. A general determination involves the creation, amendment, substitution or termination of legal relations between an organ of authority and its subjects. Give one or two examples.

   A particular determination entails the creation, amendment, etc. of particular legal relations between the organ of authority concerned and specific subjects. Give one or two examples.

   The distinction is important as the rules for general determinations are not the same as for particular determinations. Indicate the rules.

2. Disregard of a determination is a crime. The crime, however, can be committed only if the determination is valid. The test for validity concerns the author of the determination, the form, the purpose and the consequences thereof.

Discuss each of these requirements. Explain what each of these requirements consists of and give an example. Also indicate what the consequences are if the requirements are not fulfilled.

3. Validity requirements have meaning only if the law provides for their enforcement. The following legal remedies are used in African customary law to control the administrative actions of organs of authority: consultation with councils, mediation, judicial control according to customary law, internal review and judicial control according to common law. Discuss each of these legal remedies and indicate where one is a prerequisite for another.

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