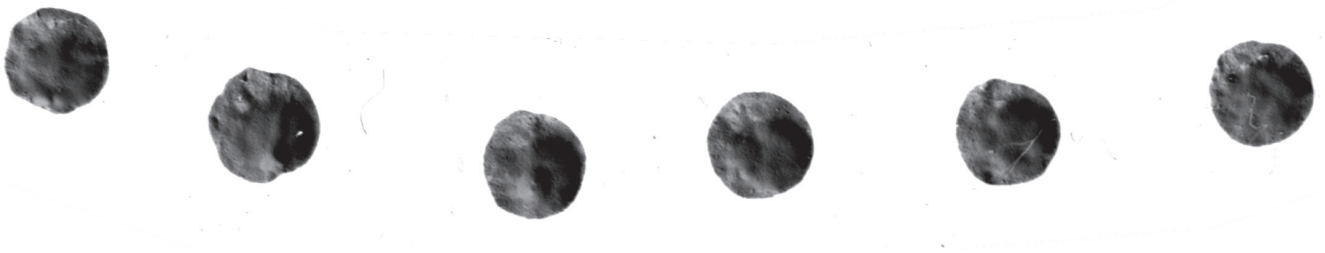


College of Law

DEPARTMENT OF PUBLIC, CONSTITUTIONAL AND INTERNATIONAL LAW



African Customary Law

ONLY STUDY GUIDE FOR LCP405M

UNIVERSITY OF SOUTH AFRICA, PRETORIA

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Preface

This module deals with an advanced study of African customary law. The themes covered are more or less the same as in the introductory module of African customary law (IND203X), but they are now dealt with in greater depth. Since we are building on your knowledge of the introductory module, we assume that you have this prior knowledge.

The tutorial material is divided into FIVE study units. Each study unit is further divided into several lectures. In some lectures we may require you to make your own notes, using the guidelines provided.

We distinguish between the following categories of reading matter:

- **Compulsory reading.** This forms an integral part of your tutorial matter on which you will be examined. Two books are prescribed:
 1. *Introduction to Legal Pluralism in South Africa* (2006) by JC Bekker, C Rautenbach and MNI Goola (2nd ed.)
 2. *Customary Law in South Africa* (2004) by TW Bennett.
- **Recommended reading.** These would be sources which you must consult to round out your knowledge of a topic. You will not, however be examined on this reading.
- **Additional reading.**

In the **literature cited**, additional sources are included as further background to guide your reading should you want to know more about a particular topic.

There are compulsory assignments set for this course. At the end of each lecture you will find questions for self evaluation and in some lectures, there are also specific study activities. You are advised to work through these questions as they will deepen your understanding of the particular theme being studied.

We trust that you will find this module stimulating and enriching. Enjoy your studies! You are welcome to consult us should you encounter problems with your tutorial material or your study programme. We will gladly assist you.

STUDY UNIT 1

AFRICAN CUSTOMARY LAW OF PERSONS

LECTURE 1

Legal status and the choice of law

Recommended reading

Bennett *Human rights and African customary law* (1995) 51–60, 80–112

Cowen “Can ‘dignity’ guide South Africa’s equality jurisprudence” (2001) 17(1) *SA Journal of Human Rights* 34–58.

Pieterse “It’s a ‘black thing’ upholding culture and customary law in a society founded on non-racialism” (2001) 17(3) *SA Journal of Human Rights* 364–403

Additional reading

Kaganas & Murray “The contest between culture and gender equality under South Africa’s interim constitution” (1994) 21(4) *Journal of Law and Society* 409–433

Van der Meide “Gender equality v right to culture” (1999) 116 *SALJ* 100–112 (Recognition of customary law with specific reference to unfair discrimination.)

STUDY OUTCOMES



After having studied this lecture you should be able to

- discuss the legal position of a person in terms of indigenous law
- explain the notion of shared rights and duties
- discuss factors influencing the choice of law with regard to a person’s status
- evaluate the impact of the constitutional recognition of customary law on the indigenous law of persons
- identify areas of conflict that may arise as a result of the constitutional recognition of customary law with specific reference to unfair discrimination.

1 LEGAL STATUS

Status refers to the legal position of a person as a member of a specific class. The legal position of a person is related to his or her powers, rights and duties. In terms of indigenous law, people belong to different classes or categories as a result of factors such as age, sex, rank within the family, legitimacy or illegitimacy of birth, adoption, disinheritance, mental capacity, order of birth within the family, marital status and kinship. In indigenous law a person’s status is influenced by several factors, with the result that no two people have the same status.

The juristic person as known to modern legal systems was foreign to original indigenous law. Persons were considered to be individual human beings. The individual always shared his or her rights, powers and duties with his or her agnatic group. A person's share in the rights and duties of the agnatic group was related to the factors referred to in the previous paragraph. There was, however, no question of absolute majority or minority. As the representative of the group, the head of the agnatic group (household) did indeed have powers and duties which clearly distinguished him from the other members of the group. This did not, however, detach him from the group. In order to understand the original indigenous law it is important for you to have a good understanding of the principle of shared rights and duties.

As a result of the influence of Western law, the emphasis in modern indigenous law falls strongly on the individual. The individual, rather than the agnatic group, is emphasised and members are placed in opposition to one other. The individual is, for example, the guardian, owner, creditor, debtor, offended party or defendant. This emphasis on the individual frequently occurs at the expense of the other members of the group. Under original indigenous law a marital union is thus a matter between the family groups of the man and the woman. In modern indigenous law the emphasis is on the man, the woman and the woman's father (or his successor) as individuals. In original indigenous law the family head controlled the family property on behalf of and for the benefit of the family. In modern indigenous law the tendency is to regard the family head as the owner and to disregard the rights of the other members of the family in respect of family property.

In modern indigenous law the status of a person is related to his or her powers to act and to appear in court as well as the power to acquire property and to dispose of it. A minor cannot, for example, enter into a binding agreement without the assistance of his or her guardian, while a major can enter into such an agreement without assistance. Status thus has an influence on a person's capacity to act, as well as on his or her capacity to appear in court and to acquire property.

2 CHOICE OF LAW

In indigenous law the legal capacity, as well as the capacity of a person to act or to appear in court, was determined according to the rules of either

- statute law, common law and case law, or
- indigenous law.

Bekker is of the opinion that there is only one legal system, namely the law of the land. It is submitted, however, that there is, in fact, only one system of law in operation in the Republic, and that it is necessary to guard against depriving a party to a suit of a right which is inherently or patently his under the law of the land, or against giving him a right which he clearly does not have.

This statement was made prior to the recognition of indigenous law in terms of the Constitution Act 108 of 1996, at a time when indigenous law was not recognised as a concurrent legal system of the Republic of South Africa. For example, in *Ex parte Minister of Native Affairs: In re Yako v Beyi* (1948) (1) SA 388 (A) it was decided that no basic or primary legal system was applicable.

There are, however, circumstances under which indigenous law may be enforced by the courts. Section 1 of the Law of Evidence Amendment Act 45 of 1988 empowered all courts of law to take judicial note of indigenous law in so far as such law can be ascertained readily and with sufficient certainty. Furthermore, indigenous law may not be opposed to the principles of public policy or natural justice, subject however to the proviso that *lobolo*, *bogadi* and similar customs may not be regarded as opposed to such principles.

This position has been drastically amended by the 1996 Constitution Act 108 of 1996. Section 211(3) provides that courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law. This provision amends section 1 of Act 45 of 1988 in that courts **MUST** now apply customary law and cannot merely take judicial notice of it. The court has to determine whether customary law is applicable and if it is found to be applicable the court has to apply it. Otherwise the court is not compelled to apply customary law. It is not clear whether the principles of public policy and natural justice still apply. The fact that indigenous law is subject to the Constitution makes these principles redundant. Moreover, the question arises whether these principles are not in conflict with the right to culture, which is recognised in terms of sections 30 and 31 of the Constitution.

We can assume that indigenous law has now been accepted and recognised as part of the general South African legal system. The parts of this system can be described as statutory law (legislation), common law, case law and indigenous law. Indigenous law, like common law, is subject to the Bill of Rights (Chapter 2 of the Constitution), and must be interpreted specifically in the light of the equality clause in section 9. Section 9(3) provides that the state may not unfairly discriminate, directly or indirectly, against any person on, among others, the grounds of age or gender. Section 9(4) provides for legislation to prevent and prohibit unfair discrimination. In this regard the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 was promulgated. Sections 1–3, 4(2), 5–6, 29 (excluding 29(2)), 32–33 and 34(1) came into operation on 1 September 2000.

By recognising indigenous law on the one hand and prohibiting unfair discrimination on the other, the Constitution gives rise to conflict between two opposing principles, namely the right of the individual to equal treatment and the right of a group to adhere to the culture of its choice (s 30). This right to culture appears to be limited somewhat by the provisions of Act 4 of 2000, which aim to eliminate social and economic inequalities, especially those that are systemic in nature and are generated, amongst others, by patriarchy.

There is no generally accepted definition of **patriarchy**. This concept refers to a type of social system that is dominated by the principle of paternal authority and “father-right”. This authority applies to the private (domestic) and public domains. “Father-right” may be viewed as the absolute authority of males in the domestic domain, extending to power over women and children, property and the right to take decisions on behalf of the household (domestic group). Patriarchy may also be viewed as the monopoly of males in the public sectors, in political and economic decisionmaking. A patriarchal cultural system is characterised by the emphasis on the social and juridical status of fathers (and not necessarily all men as a category vis-à-vis women), as well as succession and inheritance in the male line of descent.

Conflict between indigenous law and the Bill of Rights is unavoidable. The principle of patriarchy, implying cultural discrimination against women, is inherent in African culture and indigenous law. Moreover, in the Bill of Rights the emphasis is on the rights of an individual, whereas in indigenous law the emphasis is on the group, the community and the individual in the context of the community. The Bill of Rights emphasises rights, whereas indigenous law emphasises duties.

The question is how this potential conflict should be dealt with. The Constitution does not give a clear answer to this question. However, it is clear that the Constitution is the supreme law (s 2) and that indigenous law is subject to this law (s 211(3)). There are also other indications that the Bill of Rights has priority over indigenous law. See study guide IND203X for a more detailed discussion.

Please take note of the following:

- The position of a wife in a customary marriage. Discrimination against married women in terms of section 11(3) of the Black Administration Act 38 of 1927 has been terminated by the Recognition of Customary Marriages Act 120 of 1998. The latter Act came into operation on 15 November 2000.

Although Act 120 of 1998 provides in section 7 for the status of equality between husband and wife, the position of wives in a polygynous marriage *vis-à-vis* one another is not clear. It is a question whether the unequal rank of wives in a polygynous marriage would constitute unfair discrimination. The ranking position of a wife in a polygynous marriage does have an effect on her children's right to succession to the status of the father, but does not necessarily entail unequal treatment of wives by their husband.

- The form of marriage and the status of family members. The legal system which governs the marriage also determines the status of the family members with regard to their mutual rights and duties. In the case of a civil marriage the status of children with regard to mutual rights and duties of parents and children is governed by the general law of South Africa. In the case of a customary marriage the status of the children, in regard to their relationship with their parents, is governed by indigenous law.

In *Ngcamu v Majazi* (1959 NAC 74 (N-E)) it was noted that a child cannot have two guardians, one according to indigenous law and one according to South African common law. It was further stated that a child's guardian is determined by the legal system which would usually be applicable to the child. Consequently it was decided that the guardian of a daughter from an indigenous marriage was her father in spite of common law being applied in the court action. The South African High Court has, however, in cases where common law was applied, consistently refused to recognise the father of a child from a formerly non-recognised customary union as the guardian of the child, see *Samente v Minister of Police* 1978 (4) SA 632 (E).

These decisions will probably no longer apply in the light of the recognition of customary marriages in terms of Act 120 of 1998.

- The legal system which governs the right or duty and status.
Should one of the abovementioned guidelines not be applicable to a situation, the status of the parties is determined by the legal system governing the particular right or duty. Section 1(3) of the Law of Evidence Amendment Act

45 of 1988 governs the position in cases where more than one indigenous legal system applies in an area. This section agrees with the old section 54A(2) of the Magistrates Courts' Act and therefore has the same effect. Also compare *Ex parte Minister of Native Affairs: In re Yako v Beyi* 1948(1) SA 388 (A). Should one of the parties be a non-Black, the status of all the parties is determined according to the general South African law and not in terms of indigenous law.

3 STUDY ACTIVITIES

In this section we sketched some problems which you have to solve using the literature and information given in this lecture and lectures in the other study units of this module.

- A widow in a customary marriage institutes a claim for damages against a man for the impregnation of her minor daughter. The defendant argues that the widow cannot institute the claim as she is not the girl's guardian. Consider the original and modern legal position.
- Who is the guardian of an African child from a civil marriage, the child's widowed mother or the brother of the child's deceased father?
- Nomsa and her illegitimate daughter, aged 12 years, live with Nomsa's brother. Nomsa later enters into a customary marriage with a person other than the daughter's natural father. When the daughter married, Nomsa's brother received the marriage goods (*lobolo*). Nomsa, however, claims that the marriage goods should be handed over to her. Is she entitled to the marriage goods of her illegitimate daughter? Also see *Khumalo v Zulu* 1976 NAC 201 (N-E) and consider whether this decision would be reconcilable with the provisions of the Constitution, Act 120 of 1998 and Act 4 of 2000. Also consider the decisions in *Mabena v Letsoalo* (1998 2 SA 1068 T) and *Thibela v Minister of Law and Order* and others (1995 3 SA 147 T).
- Who should assist a sixteen-year-old boy from a customary marriage should he wish to institute an action against the Minister of Safety and Security?
- May an unmarried woman, 20 years of age, born from a customary marriage institute an action in which she demands that the natural father of her illegitimate child hand the child over to her?

LECTURE 2

Factors influencing status

Recommended reading

Bennett *Human rights and African customary law* (1995) 80–112

Additional reading

Robinson "The minority status and subordinate status of African women under customary law" (1995) 11 *SA Journal of Human Rights* 457–476

Myburgh *Die inheemse staat* (1986) 8–15

Schapera *A handbook of Tswana law and custom* (1970) 251–252

STUDY OUTCOMES



After having studied this lecture you should be able to

- discuss the factors that may have an influence on membership of a family or household
- discuss the legal implications of the shift from group rights to individual rights on the family in terms of customary law
- discuss each of the factors that influence a person's legal status in terms of customary law

1 INTRODUCTION

In terms of indigenous law people belong to different classes on the grounds of factors such as age, sex, marital state, mental health and family rank. Thus, no two persons have the same status in indigenous law, since status is influenced by various factors which result in one person's status differing from that of another.

In study unit 1, lecture 2, we discussed the influence which the choice of law may have on a person's status. In this lecture we turn our attention to other factors which have had or are still having a particular influence in indigenous law. In the introductory module on African customary law (IND203X) we paid special attention to the influence of age and sex as factors influencing status. We go into the matter in more depth in this module and deal with other factors as well. These factors still play a role in indigenous courts and are therefore important. It may well be asked whether some of these factors do not also amount to unfair discrimination in terms of section 9 of the Constitution.

2 MEMBERSHIP OF A FAMILY AND HOUSEHOLD

We assume that you will remember from the introductory module on African Customary Law what is meant by the concepts family and household. If not, we recommend that you begin by studying lecture 1 of study unit 2, in which we give details of the composition of the family and household. In lecture 1 above we explained that in original indigenous law a person shared his or her rights and duties with other members of the family and household. His or her share was related to his or her status within the family or household.

Membership of the family and household is acquired by the following means:

- Birth.
- Marriage. When a woman married in terms of indigenous law, she acquired membership of her husband's group while she retained membership of the group of her birth and if her marriage were dissolved, she again became a full member of her birth group.
- Adoption – among some groups.

Membership of the group is terminated by

- death
- emancipation of a son
- dissolution of a marriage
- excommunication or disinherison

In original indigenous law, group rights and duties applied in respect of rights of personality and patrimonial rights. Each member held a particular position within the family and household on the grounds of his or her mental and physical maturity, sex, marital state, rank and age. The head of the household had the highest rank within the group. On behalf of and in the interests of the group, he entered into juristic acts and instituted legal actions. An individual member, including the head, could, however, not act alone, but required the cooperation of senior members of the group. The group formed a close unit and members supported one another in the exercise of their powers and the fulfilment of their duties. In the literature the impression is sometimes created that the male head had autocratic powers over the members of the group, and over women and children in particular. Such a point of view does not take group rights sufficiently into account. In some groups women had (and still have) strong say in decisions affecting the group as a whole. The family (as a whole) were the owners of family or house property. The head of the family exercised control over such property on behalf of the family. He was also liable for the family's debts and delicts.

In modern indigenous law the emphasis is on the individual members of the family and the household. The position of the head of these units has in a certain sense been made absolute, so that in many cases the courts regarded the head as the sole owner of the unit's property. He is, indeed, obliged to support and protect the other members of the family or household but they are no longer regarded as automatically sharing in the group's property.

3 MENTAL AND PHYSICAL MATURITY

The concepts minority and majority as they are known in general legal usage were foreign to original indigenous law. The status of a person was influenced by his or her mental and physical maturity and he or she gradually reached the full status of his or her sex. Bennett (*Sourcebook* 1991:18) expresses this as follows:

In traditional African society, after a boy has been initiated (and, among many groups, after he has been drafted into a military regiment), has married, borne children and, finally, set up an establishment of his own, he is considered worthy of being treated as the head of a family unit. This status corresponds closely with that of a major in common law in that the head of a family unit has full legal capacity.

An *infans* could not represent his or her group, but shared in the group's property and other rights. As a child's powers of discretion increased, his or her duties also increased. Thus, for example, a child could be expected to give evidence in an indigenous court. Similarly, a girl was expected to help with the household tasks from about her seventh year, and a boy of the same age was expected to help with the small stock. Once puberty had been reached a person was marriageable and he or she could participate in the choice of a spouse.

Age plays a more important role in modern law. Mental abilities may well be a factor where evidence has to be given in a magistrate's court or in respect of accountability for a legal act.

4 INITIATION

Among most indigenous peoples, initiation, amongst others, was regarded as one of the transitional rites leading from childhood to adulthood. In the case of the Northern Sotho, Tswana, Southern Sotho, Venda, Tsonga and Ndebele, children were initiated in groups during "tribal" ceremonies while among the Nguni people in particular, children were initiated individually or in small groups. Initiation implied increased powers and duties: an initiated person could marry and initiated men could participate in the proceedings of traditional courts and the tribal assembly.

In *Gebeleiseni v Sakumani* (1947 NAC 105 (C&O)) the assessors' view was that, among the Thembu, an uninitiated man could not enter into a valid marriage but he could do so among the Mpondo. Initiation was a requirement for entering into a marriage in most groups but, mainly because of missionary influence, this requirement largely fell away.

It is apparently still accepted that initiation has an influence on a person's mental maturity. For example, the former Ciskei High Court accepted that it was a mitigating circumstance that a 28-year-old Xhosa man accused of murder and assault was uncircumcised: "... he is not yet considered by society as an adult in that he had not yet been initiated" (*S v Gontsanaand Others*, unreported case No CC 6/83, as quoted and discussed by Midgley 1983 103–107). An initiated Xhosa man is expected to exercise self-control and to behave as an adult, while one who is uninitiated is considered merely a boy.

5 MINORITY AND MAJORITY

We have already indicated that the concepts of minority and majority were foreign to indigenous law although age was not without significance. Age plays a significant role in modern indigenous law. In terms of legislation and court decisions, persons are divided into two classes: minors and majors. These two main classes do not, however, replace the indigenous classes of family heads, married women, widows, divorcees and children. These must consequently still be taken into account.

At present, in terms of the Children's Act 38 of 2005, South African citizens, males and females, attain their majority at the age of 18 years, or upon entering into a marriage (civil or customary) before reaching the age of 18 years.

6 EMANCIPATION

In original indigenous law, it was permissible in some groups for a father to emancipate his unmarried son. In cooperation with the family council, the father requested or instructed the son to establish his own residence, property unit and household. Emancipation in this form did not amount to disinheritance and was not related to a specific age. Today, this factor has little legal significance in indigenous law.

7 GENDER

Male and female persons never had the same status in indigenous law. Males always enjoyed a higher status than females.

In original indigenous law a female was always under the guardianship of the agnatic group and could not succeed her father or any male person. She could not participate in the men's councils and among most groups could not become a tribal leader. Since she could not become head of the family or household, she could not represent the agnatic group in legal proceedings or actions. However, as a member of the group, she shared in the group's rights and duties. Her inferior status was based purely on sex and was not related to her mental abilities.

In original indigenous law, only a male person could become head of the family and the household. Where a male person was not the head of his group, he assisted the head on the protection of the group's rights and the performance of its duties. He had certain duties towards the group to which he belonged. Adult males could also participate in the activities of the tribal councils and become tribal leaders.

In modern indigenous law the concept of majority has removed most of the restrictions on females. Females cannot, however, become family heads and represent their family in legal actions. In many urban areas many females are the *de facto* heads of their families (see study unit 2).

8 MARITAL STATUS

In original indigenous law, marriage meant a change in status for the man as well as the woman. In all cases it was accompanied by increased powers.

In original indigenous law a married woman could exercise her part in the guardianship of her children, for example by applying discipline. She could expect her marital group to maintain and protect her and her children even after her husband's death. She had an important share in the property of her house and her husband had to consult her in the disposal of house property. She shared in the rights of personality of the group and had a real share in obtaining satisfaction if her daughter were to be seduced. She had to bear children for her marital group even after her husband's death in the event of her still being of child-bearing age. Furthermore, she had to undertake the household duties and cultivate food for her house.

A man's status was raised by a marital union because he became the head of the family and represented his family in legal proceedings and actions. He exercised authority over his wife and children, through moderate discipline if necessary. Furthermore, he had to care for his wife and children by providing the necessary means of support such as arable land.

At present the position is regulated by statute, namely the Recognition of Customary Marriages Act 120 of 1998, and the Marriage Act 25 of 1961. However, the provisions of section 22 of the Black Administration Act still apply to civil marriages entered into by blacks before 2 December 1988 (see study unit 2).

It is necessary to deal briefly with the status of a wife whose customary marriage has been dissolved by divorce or the death of her husband, that is, where the marital tie has been broken. In original indigenous law the death of a spouse (husband or wife) did not dissolve the customary marriage. Strictly speaking there were no "widows"; the wife's status in an indigenous marriage was not affected by her husband's death. This principle, however, was not recognised by the courts and the wife was deemed to be a major if on the death of her husband she was 18 years or older. However, she was still subject to the control of her husband's successor in "house matters". Apparently this position has not been amended by Act 120 of 1998, since this Act recognises the dissolution of a customary marriage by a competent court on the grounds of irretrievable breakdown of the marital relationship as the only way in which a customary marriage can be terminated.

In the case of a civil marriage, a woman's position depends on whether the marriage is in or out of community of property.

9 RANK

In terms of indigenous law rank is determined by descent and birth. The first-born son has the highest rank among the sons of a monogamist. His sons are ranked according to their order of birth. All the sons of a man have a higher rank than any of the sons of his younger brothers.

Among the South African indigenous peoples, descent is reckoned along the male line or patrilineally, but the sons of a polygynist are ranked according to the marital rank of their respective mothers. The eldest son of the main wife is the

genealogical senior regardless of the ages of his half-brothers. In many cases the half-brothers are older than the eldest son of the main wife but they have a lower rank. All the sons of a wife of higher rank have a higher rank than the sons of a wife of lower rank. In the next generation the sons of brothers have a specific rank according to the principles mentioned above. The rules according to which the wives of a polygynist are ranked differ among the various peoples.

Rank has a particular significance in the determination of the order of succession. The eldest son in each house is the successor in that house and the eldest son of the main wife is the successor to the household. The successor succeeds to the control of the group's property and its members. In original indigenous law he did not become the owner of the property since all the members of the group shared in the property.

In original indigenous law the various families, lineages, clans and other kinship groups within a tribe were also ranked. The ruler was the person with the highest rank while the ruling family was the family with the highest rank. According to this ranking order, no two members of the tribe held the same rank within the tribe. Among some tribes rank was strengthened by institutions: participation in the initiation school and in the feast of the first fruits was allowed on the basis of rank. Rank therefore played a part in public life. Rank may also be expressed in ceremonial forms of respect. Rank also found expression in ceremonial forms of respect, and even today it plays an important role during funerals. In many cases a relative can only be buried once the most senior male and female member of the family, or their substitutes, are present.

In modern indigenous law the rank of males is still relevant with regard to succession to status. It is not clear what effect section 8 of Act 4 of 2000 will have on the indigenous principles regarding rank.

10 MENTAL STATE

According to indigenous law insane persons are in the same position as *infantes*. They cannot participate in legal proceedings but they share in the patrimonial rights of the family or agnatic group and are cared for from the group's property. In legal proceedings they are represented by the head of their agnatic group. They cannot succeed to status positions either.

11 TRIBAL MEMBERSHIP

Tribal membership also had an influence on a person's powers, rights and duties in original indigenous law. For instance, the position of foreigners differed from that of members of the tribe (Myburgh *Die inheemse staat* (1986) 8–15).

Members of the tribe had various rights and prerogatives. Each family was entitled to residential and arable land and to the use of the commonage. Members of the tribe were entitled to protection by the tribal chief, the courts and other organs of authority when their rights were threatened or prejudiced. According to their position in the tribe, they could participate in the proceedings of the legislative, executive and judicial bodies of the tribe. Their duties included the following: recognition of and obedience to the ruler, compliance with tribal customs, the

payment of tribute and provision of labour when required. Men had to perform military duty when necessary.

While foreigners were protected by the tribal chief and other organs of authority against transgressions, they had no claim to residential and arable land or to the use of the commonage. Temporary visitors had to honour the authority of the tribal chief and comply with the tribal laws which applied to them. They were not obliged to pay tribute or to provide labour to the traditional authority.

Tribal affiliation is still relevant in actions between members of different tribes where the court has to decide which tribal system to apply to the actions in terms of s 1(3) of the Evidence Amendment Act 45 of 1988.

12 FREEDOM

The literature provides details regarding the restricted rights and powers of persons who have been deprived of their freedom. For example, according to Whitfield (*South African native law* (1948) 75) in earlier Shona law (Zimbabwe), slaves could not marry free persons nor could they succeed their masters. Among some Tswana of Botswana, their freedom of movement and freedom to enter into contracts was limited and they could also not institute legal action against their masters (Schapera *A handbook of Tswana law and custom* (1970) 251–252). At present all persons are free and are not subject to any of the limitations mentioned above.

SELF-EVALUATION

1. Discuss the legal significance of family and household membership. (5)
2. Discuss the legal significance of initiation, physical maturity and mental state on a person's legal position. (8)
3. Evaluate the following statements and justify your answers fully.
 - 3.1 The concept of majority has removed all customary restrictions on the status of women. (5)
 - 3.2 Rank has currently no influence on the status of a person. (5)
 - 3.3 Tribal membership has no relevance to present-day customary law. (5)
 - 3.4 The position of a "widow" in a customary marriage has been amended by Act 120 of 1998. (5)

LECTURE 3

Classes of rights

Recommended Reading

Van den Heever *'n Sistematiek van die inheemse deliktereg van die swartman*
(1984) 97–124

STUDY OBJECTIVES



After having studied this lecture you should be able to

- explain the notion of rights in indigenous law
- distinguish various classes of rights
- discuss relief and remedies for infringements of rights in indigenous law

1 INTRODUCTION

Myburgh (1985, 109) defines private law as the law of rights. “Private law is the law of rights; these, as well as duties, are shared within agnatic groups, which means that there is no room for the notion of dependents and support (maintenance) within the family or of inheritance; patrimonial rights are of three kinds, namely real rights, obligatory rights, and guardianship; sharing of the latter excludes the distinction between majority and minority; rights in immaterial (industrial) property are unknown, but rights of personality are well established as rights that are not constituents of estates.”

“An important legal concept is that of rights. A right is distinct from a competency, which is derived from the law, and a power, which may be derived from the law or from a right.”

“Among the indigenous peoples rights are vested in agnatic groups. A right produces a legal relationship between those in whom it vests and all others since the latter are in duty bound to respect it.”

What criticism can you make against this view? From your knowledge of the law in general you know that rights are restricted to private law. However, private law as a division of the law is not generally classified with reference to rights. We usually distinguish between the law of persons, family law and the law of marriage, the law of things, the law of obligations and the law of succession as divisions of private law. While the law of persons relates to the status of persons and thus to their legal capacity to be bearers of rights it is usually not directly concerned with rights. Likewise, neither family law nor the law of marriage nor the law of succession have a direct relation to rights. Rather, the relation is indirect since

family law and the law of marriage relate to the family's estate while the law of succession relates to succession to that estate.

You also know that a right presumes a legal tie between a legal subject and a legal object on the one hand, and on the other hand, between the legal subject in question and other legal subjects in respect of the legal object concerned. We will illustrate this idea by means of a diagram and an example.

Legal Object

Legal Subjects

Other Legal Subjects

An owner (as legal subject) has a particular claim to a material object such as a beast, for example. At the same time, non-owners of that particular object (legal subjects other than the owner) must respect the owner's rights in the object. Thus, they stand in a particular legal relationship to the owner in respect of the object concerned. Generally speaking they may not, for example, use or destroy the object without the owner's permission. To deliberately destroy the object without permission would be to infringe the owner's right to that object. In certain circumstances the owner could also demand compensation for the damage done.

In this study unit we first give attention to general matters related to rights as these are expressed in indigenous law. In lecture 4 we confine our attention to rights of personality as a particular class of rights.

2 THE LEGAL SUBJECT

The legal subject refers to the person or persons in whom a particular right is vested. The legal subject is sometimes described as the bearer or vestee of rights.

In original indigenous law the members of the agnatic group were the vestees of rights. We presume that you are familiar with the principle of shared rights within the agnatic group.

Among the indigenous peoples the articulate factors in private law are groups. The fact that they are the joint bearers and sharers of the various rights excludes the notion of delict within the group, and an action for satisfaction against a fellow-member is inconceivable. This is confirmed by the fact that the group has only one representative, viz, its head, who acts on behalf of every member and so cannot represent members with conflicting claims.

Since the group share their rights they also share their duties; a delictual obligation incurred by a member is therefore the obligation of the whole group.

The emphasis falls strongly on the individual in modern indigenous law. The individual is thus the vestee although the interests of the agnatic group are still recognised, particularly in matters relating to indigenous marriage and the law of succession. Consider the claim of the wife's group to her marriage goods and the recognition of the indigenous rules of succession. In principle, all individuals now have legal capacity although not all individuals can exercise their legal capacity independently. The age of majority plays an important role in this regard.

3 CLASSIFICATION OF RIGHTS

Myburgh distinguishes two main classes of rights, viz rights of personality and patrimonial rights.

Among the indigenous peoples rights are of four kinds: real (in things), obligatory (to performance), of guardianship or authority (over persons), and of personality (safeguarding, personal integrity). Only the first three are patrimonial rights falling within the complex of rights and duties designated by the term "estate". The available data for the indigenous peoples furnish no evidence of immaterial (also termed industrial) property rights such as copyright.

In lecture 2 below we give attention to the rights of personality. In this lecture, therefore, we confine our attention to patrimonial rights in general. Patrimonial rights refer to those rights and duties which fall within a person's estate. In indigenous law patrimonial rights comprise real rights (over material things), obligatory rights (to performance) and rights of authority or guardianship (over persons).

3.1 REAL RIGHTS

In general we distinguish between various real rights. The most comprehensive real right in a thing is ownership. Things can be classified in various ways such as movable and immovable things, or divisible or indivisible things. Other real rights which may be distinguished and which are also sometimes called limited real rights are servitude, mineral rights, pledge and mortgage, and usufruct. These real rights imply a restriction on the real right of another person in a thing.

According to Myburgh ownership was the only real right known to original indigenous law. Other real rights are known in modern indigenous law, well-known examples of which are quitrent tenure and leasehold.

3.2 OBLIGATORY RIGHTS

An obligatory right can arise from contract, quasi-contract and delict. The legal object of an obligatory right is performance. Performance refers to human behaviour which may be either a commission or an omission. This classification is in general also valid for indigenous law.

3.3 RIGHTS OF AUTHORITY OR GUARDIANSHIP

In original indigenous law the right over persons was a right which fell within the estate of the agnatic group. The individual member acquired for and on behalf of the group while the group as a whole was liable for the actions of its members. The woman's child-bearing potential also fell within the group's estate. Cases of seduction and adultery thus constitute infringements of the group's rights of authority.

In the administration of justice in modern indigenous law, there is a tendency to no longer regard guardianship as a right. There are, however, still traces of the original conception to be found. For instance, the husband and his group lay claim to all the children of a woman for whom marriage goods were delivered. This claim comes to the fore particularly in cases where the indigenous marriage has been dissolved by divorce and the children of the marriage have been placed under the care and control of the wife. Similarly, it is recognised that the husband has an action for damages in cases of adultery on the grounds of unlawful infringement of the group's rights of authority over the woman and, in particular, over her child-bearing potential.

4 RELIEF

In the case of infringement of rights there is talk of relief of the injured party's infringed rights. In principle, when patrimonial rights are infringed the term used is damages and when rights of personality are infringed we speak of satisfaction. This subject is discussed in more detail in lecture 4 below.

5 REMEDIES

In original indigenous law there were two remedies available to obtain relief, namely self-help and court action. Self-help could take several forms such as thrashing, attachment of property and even homicide in certain circumstances. In modern indigenous law the courts do not recognise self-help as a means of obtaining relief. Despite this, instances of self-help do still occur such as the killing of an adulterer caught in the act. Another example is the case where a person's crops have been damaged by another's cattle and the injured party drives the cattle into the cattle owner's own crops.

SELF-EVALUATION

1. Discuss the various classes of rights in indigenous law. (10)
2. Explain the notion of guardianship as a patrimonial right in indigenous law. (7)
3. Evaluate the following statements and justify your answers fully:
 - 3.1 Private law can be described as the law of rights. (7)
 - 3.2 According to indigenous law rights are vested in the head of the agnatic group. (5)
 - 3.3 According to indigenous law infringement of the right to honour may result in patrimonial loss. (5)

LECTURE 4

Indigenous law of personality

Additional Reading

Van den Heever *'n Sistematiek vir die inheemse deliktereg van die swartman*
(1984) 443–53

STUDY OBJECTIVES



After having studied this lecture you should be able to

- discuss the indigenous law of personality
- discuss the objects of indigenous rights of personality
- explain the notion of pollution associated with violation of personality rights
- discuss forms of relief for infringement of rights of personality in indigenous law

1 INTRODUCTION

Very little has been written about the law of personality among the indigenous peoples of Southern Africa. The law of personality is not clearly distinguished in modern indigenous law and in some cases it is even denied.

2 RIGHTS OF PERSONALITY

The law of personality relates to the protection of the personality. This involves protection of the personality. This involves rights of personality.

“The law of personality concerns rights of personality, which do not fall within estates and are apparently shared within comprehensive agnatic groups.” Myburgh (115–116)

“Satisfaction for violation of these rights is often obtained by lawful self-help and what is seized or awarded is often consumed to show that the purpose is not to obtain patrimonial restitution; where this is not so, the acquisition falls within the estate of the agnatic group and is accepted by them as a consolation.”

“The identifiable objects to which rights of personality pertain are the body and the honour, violation of the latter being associated with pollution and bringing to mind the notion of certain crimes as deeds defiling the community and in particular of incest as a deed constituting a polluting moral threat to the community or a pollution of public morals.”

2.1 SUBJECTS

Originally rights, including rights of personality, were vested in the group. The group concerned may be a family-group (household) or an individual family (house). Infringement of rights of personality involves the whole family group. The advantage for a house that may result from satisfaction can be regarded as an advantage for all, since constituent families borrow from each other, help each other in many instances, and share enjoyment.

The share of each member of the group in the content of the rights of personality, namely in the powers deriving from them, depends on his or her status. A husband and not the head of the family group for example, takes the initiative in an action for adultery with his wife. The share of daughters and young children in powers deriving from rights of personality is limited to general participation.

2.2 OBJECTS

A characteristic of rights of personality among South African African-speaking peoples is that infringement thereof is often considered to be polluting. Furthermore, satisfaction is often obtained through self-help, if need be with violence and that which serves as satisfaction is frequently destroyed. The objects of the rights of personality are the body and honour.

2.2.1 THE BODY

The body may be injured physically through assault and killing. Violation of the body also includes causation of anxiety, sorrow, fright, consternation and trouble.

2.2.2 HONOUR

According to Myburgh honour or dignity may be injured by various forms of insult which usually also involve pollution. Thus the killing of a group member also injures honour because of the pollution brought about by death. Insult also includes cursing (for example that a woman will bear her father-in-law's children), swearing, and the neglect of avoidance taboos (*hlonipha*) in connection with affines, witchcraft accusations, and verbal allegations (for example, that someone is a sorcerer or adulterer). Honour includes good name or reputation in addition to privacy in the sense of peace in the home.

2.3 RELIEF

Relief for the infringement of rights of personality takes the form of satisfaction. Infringement of rights of personality may also involve patrimonial loss for which satisfaction and damages may be recovered.

Satisfaction may take the form of things or value, for example, a goat or a beast which is usually slaughtered. Other known forms of satisfaction are retribution (*talio*, repayment in kind), a hiding, and also offering an apology.

2.4 REMEDIES

The recognised forms of relief are self-help and court action. Self-help may take the form of feud action, a hiding and even killing, and seizure (attachment) of property.

SELF-EVALUATION

1. Discuss the indigenous law of personality. (25)
2. Discuss the right to honour and the body as objects of the right to personality in indigenous law. (20)
3. Discuss indigenous forms of relief for infringement of rights of personality. (10)
4. Evaluate the following statements and justify your answers in full:
 - 4.1 Violation of an indigenous right of personality may involve pollution. (5)
 - 4.2 Infringement of rights of personality requires damages as the only form of relief in indigenous law. (5)
 - 4.3 Violation of an indigenous right of personality may result in self-help to effect relief. (5)

STUDY UNIT 2

FAMILY LAW AND MARRIAGE LAW IN AFRICAN
CUSTOMARY LAW

LECTURE 1

The family and the legal position of the household

Recommended reading

Bekker *Seymour's customary law in Southern Africa* (1989) 71-80, 126-140, 242-246, 282-286, 379-384

OR

Olivier *Die Privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes* (1989) 121-137, 148-154, 454-462, 557-567

Bennett *A sourcebook of African customary law for Southern Africa* (1991) 224-242

Additional reading

Van Vuuren *The strengths and problems of black families in informal settlements* (1997) HSRC Pretoria

STUDY OUTCOMES



Having studied this lecture you should be able to

- distinguish between the nuclear, compound and extended family structures
- discuss the legal significance of the ranking of wives
- explain the control of property of the compound family
- discuss the legal significance of allocations of property and placement of people within the household
- identify areas of possible unfair discrimination in terms of the Constitution, 1996, and Act 4 of 2000.
- Explain the legal position of the family head
- Discuss the legal position of the family head of the household

1 INTRODUCTION

One of the consequences of a marriage is the creation of a new family. In indigenous law two types of marital union are distinguished, namely the customary union or indigenous marriage and the civil marriage. A civil marriage is monogamous whereas in principle a customary marriage can be of a polygynous nature, with the consequence that the accompanying family structures differ. We use the term civil marriage throughout, and this term is taken to include church or Christian

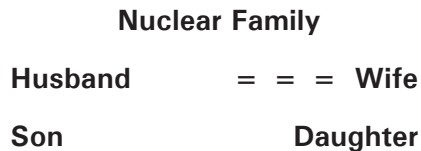
marriages.

In this lecture we look at the various family structures that result from marriage. We also pay attention to the rank of women and the implications of the property rights which are associated with the family structures. You are expected to identify areas of possible unfair discrimination in terms of the Constitution, 1996, and Act 4 of 2000.

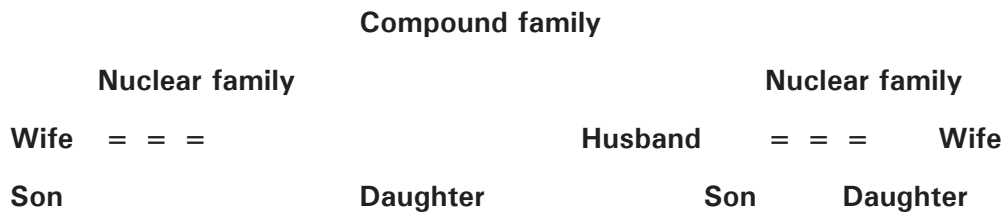
We also consider the legal position of the members of the household in respect of each other. We pay particular attention to the position of the head of the household and to the position of the members in general. We also discuss the members' claim to maintenance from the household.

2 THE STRUCTURE OF THE FAMILY

Civil marriage is generally associated with the monogamous or nuclear family. The nuclear family, or elementary family as it is sometimes called, consists of a husband, his wife and their children. The structure of this family can be represented diagrammatically as follows:



The customary marriage is generally associated with the polygynous or compound family. The compound family is sometimes also called a household. You should keep in mind, however, that a household can include other forms of family structures, such as the extended family. The compound family is not composed of a number of complete nuclear families; each nuclear family in the compound family is incomplete in the sense that the husband is a spouse in more than one nuclear family. The structure of this family can be represented diagrammatically as follows:



Besides the compound family, the extended family could include other complete and incomplete nuclear families. For example, a married son or daughter may live with his or her parents. This type of family can be illustrated diagrammatically as follows:

Extended family

Nuclear family

Husband = = = Wife

Nuclear family

Wife = = =

Son

Son Daughter

Daughter

It should be clear to you from these diagrams, and the explanation of the different types of family structure, that the nuclear family is the basis of the various types. At the same time, it is also the comprehensive structure in civil marriages which develops into an incomplete nuclear family (also known as the single parent family) in the case of divorce or the death of one spouse. In the case of the compound and extended family types, the nuclear family is the initial stage which may develop over time into a typical compound or extended family. On the dissolution of marriage, the structure of these family types changes according to the particular circumstances of each case.

The African peoples of South Africa have particular cultural characteristics which have an influence on family life and the structure of the family. One characteristic is the principle of patrilineal descent reckoning, according to which descent is reckoned along the male line. This focus on the male line ideally results in the following:

- The husband is regarded as the head of the nuclear and compound family.
- The children of the marriage bear the husband's family name.
- Residence is **patrilocal**, that is with the husband's people or, literally, with the father's people, which implies that sons reside with their fathers after their marriage. In the modern urban context patrilocal residence is no longer of much importance.
- Familial authority is exercised mainly by men, a system known as patriarchy. However, among some communities the main wife, the senior sister of the husband and the eldest daughter of a wife have a lot of say in family decision-making.

We have already referred to the **polygynous** nature of the customary marriage. This means that each married man may potentially have more than one wife and that each marriage with a woman establishes a separate house as a distinct legal unit within the compound family. Although residence after marriage is patrilocal, in some cases a son may set up a separate home as soon as he enters into his first marriage.

If a man marries more than one wife, each wife has a particular rank within the household. You will recall that in study unit 1 we explained that no two persons have the same status and that rank is one factor which may influence a person's status. Refer to the abovementioned lecture again if you are uncertain or wish to refresh your memory.

In original indigenous law the compound family type was considered the ideal. The culture of the indigenous peoples made provision for this family type *inter alia* in the distinction between house property and general property and in the distinction between house succession and general succession. In a recent investigation to

determine, among other things, whether urban Blacks still observed polygyny it was found that it is no longer generally observed and that polygyny is presently the exception. One of the most important reasons for the decline in polygyny is the socioeconomic factors which prevail in the urban environment. It is known, however, that there are many marital relationships, especially in the form of *lobolo* unions, with women subsequent to a civil marriage. Can we conclude from this that the nuclear family is now the general family type?

In original indigenous law the head of the family was always a male person. In urban areas today the phenomenon of women as heads of family units is increasing. In most cases these female family heads are unmarried women. These may include widows, divorcees and unmarried (never married) women. Some of these family units extend over three or even four generations. There are even cases of family units comprising four generations without a single marriage having been concluded. A typical case is where an unmarried mother lives with her children, and where, in time, her unmarried daughters with their children also become part of the unit. These cases are not a type of compound family but are rather a particular form of the extended family type. The extension of the family occurs mainly in the female line and to this degree one can speak of a matrifocal tendency. This means a family structure which is strongly focused on the mother as opposed to the original patrilineal focus. This tendency has not, however, developed to the stage where we can speak of a matrilineal focus, as is apparent from the strong emphasis which is still placed on succession in the male line.

The legal position of the female head of this extended family type is by no means clear. Although as an individual she is a major on the grounds of age (18 and older), her powers in respect of the family unit are not very clearly defined. For example, can she represent the family unit in court? What is the nature and extent of her control over daughters who are majors but are members of the family unit? The position of the female family head is analogous to that of the family head in original indigenous law but she presumably does not have the same status as the erstwhile family head. Furthermore, it is uncertain whether indigenous law or common law should be applied in cases in which this family type is involved as a unit. The legal position of the various mothers within the unit vis-à-vis one another is also uncertain. Is there a ranking order analogous to that which applied in original indigenous law? What we can say, however, is that this type of urban family displays a measure of correspondence with the original extended family structure in indigenous law.

3 THE RANKING OF WOMEN IN A COMPOUND FAMILY

The composition of the compound family has specific consequences for the various families within the unit. For example:

- Each married woman in the compound family has a particular rank which influences her status and her sons' rights of succession and which regulates her family's relation with the other families within the household.
- Each family has specific powers, rights and duties vis-à-vis the other families.

In the so-called **simple system of ranking of wives**, there is a main wife and subordinate wives. The relative rank of wives is usually determined by the order of marriage: the wife first married is the main wife while the wives married second and third rank second and third. Each successive wife is subordinate to the main

wife and to other wives with a higher rank. The houses of the various wives do not create separate property units. All property is controlled by the family head as common property (Bekker 126).

There are a number of variations in the so-called **complex system of ranking**. Among the Cape Nguni groups the household is usually divided into two sections (the *indlunkulu* and right hand sections). The wife first married becomes the main wife in the *indlunkulu* section while the wife married second becomes the main wife in the right hand section. Subsequent wives are affiliated in order of marriage in alternative sequence to the *indlunkulu* and right hand section. Thus the third and fifth married wives are affiliated to the *indlunkulu* section while the fourth and sixth married wives are affiliated to the right hand section (Bekker 127). There are, however, exceptions to this general pattern (Bekker 128) which should be taken into account, but which we will not consider further.

The ranking of wives has been codified in the former Transkei in terms of section 38 of the Transkei Marriage Act 21 of 1978. This section has since been repealed by section 13 of the Recognition of Customary Marriages Act 120 of 1998.

The ranking of wives among the Zulu has also been codified in terms of sections 68–72 of the respective Codes of Zulu Law. This codification changed the original position in terms of which a family head had the freedom to determine the rank of his respective wives subject to the proviso that he could not lower the rank of a wife once it had been determined. In terms of the Codes the rank of wives is determined by the order of their marriages unless the husband makes a public declaration altering this order during the wedding ceremonies (Bekker 129–32).

Among the Swazi the order of marriage is not relevant to the ranking of wives. Instead the relationship of the wife's family to her husband's family or the way she was married is taken into account. Moreover, the wives are only ranked by the family council after the death of their husband (cf Bekker 129; Vorster "Traditional leadership in South Africa, marriages and succession" 1999 *Obiter* 85–86).

The Sotho-Tswana-speaking people do not divide the household into sections like the Nguni-speaking people. Among ordinary people (that is those who do not belong to the ruling family) the order of marriage usually determines the rank of the wives. However, since these people also have a system of preferential marriages, the ranking of wives in terms of marriage order is subject to a preferential marriage. Thus, should a man marry one of his mother's brother's daughters or among the Pedi one of his father's younger brother's daughters, she would become the main wife irrespective of her order of marriage (Bekker 132–134). The position among the Venda is very similar to the Sotho-Tswana pattern (Bekker 134).

The main purpose of the ranking of wives in a polygamous marriage system is to order relationships between the husband, his various wives and their families. The ranking system also structures the principles of succession to status positions and guides the distribution of property among wives and their children.

4 CONTROL AND ALLOCATION OF PROPERTY OF THE COMPOUND FAMILY

Marriage is one basis on which an independent family estate is established. Where there is only one house, only one family estate under the control of the family head is created. Where there is more than one wife and therefore more than one house, each house is an independent unit with its own property. There is, however, also the possibility of a general estate. Among most people the property of the compound family can be divided into:

- the general estate, also known as family property, and
- house property.

You SHOULD recall from the introductory module (IND203X) what the distinction is between the general estate and house property in African customary law. This distinction is important.

The head of the compound family may, in consultation with the senior members of the family, make certain allocations of property as well as placements of people within the household.

4.1 THE ALLOCATION OF PROPERTY

In addition to the general duty of the family head to provide for the material wellbeing of each constituent house of the household, he also has the power, in consultation with senior members of the household, to use the property of one house to assist another house in times of need. The general principles guiding such allocations include the idea that one house may not be enriched at the expense of another. Therefore, any allotment of property from one house to another gives rise to a debt relationship between the houses concerned. This debt must be repaid at some time in the future (Bekker 138–139).

4.2 PLACEMENT OF CHILDREN BETWEEN HOUSES

It may occasionally be necessary to place children of one house in another house. Where a son is placed in another house the purpose is usually to provide a successor for a house without sons. The son must not be the first born of his original house and the placement is from a senior house to a junior house. This placement does not necessarily imply the physical transfer of the son to the other house but it does require a public announcement within the family group stating the new status of the son.

In the case of the placement of a daughter, the purpose may be either to provide a daughter for the house without a daughter to allow that house to benefit from her marriage goods or to make provision for the marriage goods of a son of that house. The marriage goods received for the daughter on her marriage would then be used to allow a son of that house to marry a wife.

5 LEGAL POSITION OF THE HEAD OF THE HOUSEHOLD

We distinguish between the head of a nuclear family, a compound family and an extended family.

5.1 THE NUCLEAR FAMILY

The nuclear or elementary family consists of a man, his wife and their children and may result from a customary or a civil marriage. The husband is regarded as the head of the family and has control over the family members and the assets of the family. The nature of his control depends on the nature of the marriage. In the case of a customary marriage, the husband has the power to act and to appear in court on behalf of the family members and to protect their assets. In original indigenous law, however, he was obliged to consult his wife and later also the older sons, especially the future successor. In modern indigenous law the position has been changed by the provisions of Act 120 of 1998 in terms of which both husband and wife are majors while the husband and wife have equal status. The powers of the spouses with regard to the family estate depend on the matrimonial property dispensation of the marriage.

In the case of a civil marriage both the husband and the wife are majors. The husband's and wife's powers regarding the family members and the family assets are associated with the matrimonial property dispensation of the marriage. In this respect, the marriage may be in or out of community of property.

5.2 THE COMPOUND FAMILY

The compound family consists of a man, his wives and their children, with the husband being regarded as the head of the family. This family type may later be extended to include married children and their families.

Traditionally, the husband, as the head of the family, upheld the "house rules" and exercised authority within the household. He had control over his wives' houses and his children. Furthermore, he had control over all the members of the household as well as matters which concerned the household as a whole. He represented the household in all external matters with the assistance of the adult male members of the household. He was responsible to the outside world for the behaviour of the members. He was therefore empowered to discipline the members in order to enforce obedience and to maintain order. He had to make provision for the maintenance and protection of the members. He was also responsible for the delicts of the members of his household.

In modern indigenous law the powers of the head of the family have been affected by the concept of majority. In terms of the Children's Act 38 of 2005 all citizens become majors at the age of 18 years. Thus, where formerly the head of the compound family was the only person who could act, it now becomes possible for other members of the family to attain the status of majors at law as well. This has implications for the head's control over members of the family. The family head's control over majors, such as married sons and unmarried persons over the age of 18 years, is confined to matters concerning the household as a whole.

All the members of the household are subject to the authority of the head in regard to household matters. He is still responsible for maintaining order within the household. His liability for the delicts of members is also affected by the majority of some of the members. At present the head is liable for the delicts of all members who are minors. With regard to members who have attained majority, to be liable he must be joined in the action or accept liability for their delicts. In the event of his not being joined in the action, or of his not accepting liability, he cannot be held liable.

5.3 THE EXTENDED FAMILY

The composition of the extended family may vary. It may be based on a nuclear family or a compound family to which further nuclear or compound families are added. The head of the founding family is usually also the head of this family type. In the rural areas the position of the head is more or less the same as in the compound family.

In urban areas we find several variations in the composition of this family type. We pay particular attention to the legal position of the female heads of this family type. Where there is a male head, his position is probably more or less the same as that of the head of the compound family.

The legal position of female family heads has not yet been thoroughly researched. We therefore know little about their powers regarding the members of the household and whether or not they would be able to enforce these powers in court. We can, however, draw some inferences from available anthropological and other sources regarding the legal position of the female head. The female head may be a widow, a divorced woman or a woman who has never married. If she is 21 years of age or older she has all the powers of a major. In terms of common law she would be the guardian of her own minor children. Her control over other majors within the household is probably based on kinship and on a mutual residential agreement. Legally the head would have no control over the minor dependants of the other majors of the household. Although her position is ostensibly similar to the position of the male head of a compound family in indigenous law, it is doubtful whether she has the same powers. She would probably not be able to represent the members in court and in legal acts outside the household. In *Mabena v Letsoalo* (1998 2 SA 1068 (T)) the court accepted that a mother can negotiate and receive *lobolo* in respect of her daughter's marriage. Lacking further information we must be content with these remarks.

6 THE LEGAL POSITION OF THE MEMBERS OF THE HOUSEHOLD

In **original indigenous law** the notion of complete or exclusive guardianship of one person over another was unknown, as was the notion of complete minority and majority. The household as an agnatic group had guardianship over its members and every member shared in the guardianship over himself or herself and over the other members of the group. Each member also shared in the rights and duties of the group. In this way each member earned an income for and on behalf of the group but, as a member, had a claim to maintenance by the group.

In **modern indigenous law** the position has been changed by the notion of majority. The emphasis has shifted from the agnatic group to the individual who has attained majority. Majors do not, as a matter of course, earn for and on behalf of the household. The head of the household is, however, entitled to a reasonable share of these members' earnings. Minors earn for and on behalf of those exercising guardianship over them. All members are, however, entitled to maintenance out of the assets of the household and to legal protection.

In the case of a **civil marriage**, common law pertains. There is a mutual duty on the spouses to maintain each other and to support their children.

What redress is there in indigenous law for a person who has contributed all his earnings to the household? Can he or she claim the return of such earnings or can he or she demand that a contribution be made to his or her marriage?

In terms of modern indigenous law a son or a younger brother of the family head who has contributed to the earnings of the household on the understanding that he would receive all or part of his *lobolo* could recover a reasonable contribution, by means of a court action in a magistrate's court, in the event of the recipient's refusing to honour the agreement. The claim is in all probability based on an agreement for the provision of *lobolo* which, as a result of the contributions, has become a contract.

The position among the Zulu may be summarised as follows:

- Where a son has done no more than his duty by contributing his earnings and has had the benefit of residence, he cannot claim *lobolo* or repayment (*Ntini v George* 1921 NHC 45).
- Where the son has, however, done more than his duty, it is reasonable that he should receive something, for one may imply an agreement in such circumstances, but not if his father has supplied his *lobolo* (*Biyela v Biyela* 1935 NAC (N&T) 1).
- Where a son contributes money for a specific purpose, such as the purchase of cattle, the head is liable if he fails to buy the cattle (*Ndopi v Sita* 1917 NHC 77).
- An agreement to provide *lobolo* is binding, but such an agreement between father and son is improbable (*Magidigidi v Sanqula* 1912 NHC 33); a father's promise to supply *lobolo* for a son's wife as payment for earnings may be withdrawn before the marriage (*Mtobhoyi v Nkolongwane* 1914 NHC 193); in terms of indigenous law, such a promise is not enforceable and it is unlikely that such a promise would have been made.
- When considering a claim, the magistrate's court will take the following into consideration:
 - the age of the son when he contributed
 - the amount contributed
 - whether the earnings paid were the consequence of a promise, expressed or implied, that *lobolo* would be supplied
 - whether the earnings were paid for any specific purpose
- The conclusion is therefore that at present the whole question is one of equity or fairness.

7 THE LEGAL POSITION OF THE "WIDOW"

It is necessary to deal separately with the legal position of the "widow" since she occupies a particular place within the household.

In original indigenous law the husband's death did not dissolve the customary marriage. His death did not terminate the guardianship over his "widow". She remained a member of her house and shared in its rights, duties and powers and remained under the guardianship of her deceased husband's group.

The principle that the husband's death does not dissolve a customary marriage has apparently been recognised in modern indigenous law. Act 120 of 1998 makes no explicit provision for the termination of a customary marriage on the death of one of the spouses. This means that the position in indigenous law continues to apply. However, in terms of section 7 of the Act the husband and wife have equal status and are majors. This means that a "widow" is a major and is therefore no longer under guardianship and has full powers in respect of her personal property. However, in respect of the affairs of her house and of house property she remains under the control of her deceased husband's successor. She has a claim to be maintained from the property of her house as long as the marital union with her husband's group continues. She is also regarded as the guardian of her minor children, including any children born after her husband's death.

SELF-EVALUATION

1. Briefly discuss the legal significance of the nuclear, compound and extended families. (5)
2. Discuss the various ranking systems of wives with reference to the underlying principles and legal significance. (10)
3. To what extent does the ranking of wives allow for the distribution of property and placement of family members within the household? (8)
4. Discuss the legal position of the household. (5)
5. Discuss the legal position of the head of the family. (10)
6. Discuss the legal position of the members of the household. (8)
7. Discuss the legal position of the "widow" within the household. (5)

LECTURE 2

Relationships of authority within the family

Recommended reading

Bekker *Seymour's customary law in Southern Africa* (1989) 242–246

OR

Olivier *Die Privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes* (1989) 557–561

STUDY OUTCOMES



After studying this lecture you should be able to

- explain the concept of guardianship in indigenous law
- discuss guardianship over members of the household
- evaluate the factors that may have an influence on guardianship

1 INTRODUCTION

As you are aware, a family unit is created by marriage. Traditionally the indigenous marriage came into being through the transfer of guardianship over the wife. Her birth group transferred marital guardianship over her to her husband's group. Within such a family there were definite, accepted and prescribed relationships between and rights and duties of the family members. The members thus respected, cared for and protected each other. This, in turn, resulted in definite relationships of authority which may commonly be described as guardianship. Some of these relationships continued even after the death of one of the spouses.

At present the position is that customary and civil marriage free the spouses from guardianship, should they have been minors upon entering into the marriage. Both the husband and the wife become majors upon entering into a customary and civil marriage.

In general law parental authority is usually divided into guardianship on the one hand and custody and control on the other. Guardianship refers to the capacity to enter into juristic acts on behalf of a minor and to assist him or her in legal actions. **Control and custody** refers to the physical control over a minor, and the duty to provide the minor with accommodation, to look after him or her and to assist him or her in daily activities. During the existence of a marital relationship, the father and mother have joint guardianship and joint control and custody over

the children born of the marriage. However, this distinction was not made in original indigenous law.

In this lecture we focus on the nature and content of guardianship in terms of indigenous law. What is guardianship, how is it acquired and how is it terminated? How does it affect the respective members of the family?

2 GUARDIANSHIP

2.1 NATURE OF GUARDIANSHIP

In original indigenous law guardianship was a right. The agnatic group was the bearer of the right of guardianship. Each group member shared in his or her own guardianship and in guardianship over the other members of the group. The individual member's share in the group's guardianship was related to his or her status within the agnatic group.

Since the head of the agnatic group had the highest status within the group, he also had the most powers in regard to guardianship. However, he had to exercise his powers in cooperation with the other members of the group. There was therefore no question of absolute or exclusive guardianship of one person over another.

In modern indigenous law the legal position of members of the agnatic group has been changed drastically by the concept of majority. According to this, the members of the agnatic group are divided into two classes, namely minors and majors. Majors, in principle, are freed from guardianship, while minors, on the other hand, are under the guardianship of a major. In modern indigenous law guardianship can no longer be regarded as a right.

2.2 CONTENT OF GUARDIANSHIP

A person cannot be regarded as the object of a right, but certain features of a person are susceptible to legal objectivity. In original indigenous law the object of guardianship was the bodily freedom of the individual, and the labour and reproductive powers of a person. Guardianship, therefore, formed part of the estate of the agnatic group.

Under original indigenous law the head of the agnatic group had control and authority over the members of the group, which he exercised in cooperation with the senior members of the group. He entered into juristic acts on behalf of and in the interests of members, took legal action on their behalf and took care of and protected them. Members' labour and reproductive powers accrued to the group. Members also owed obedience to the head and to other members.

The notion of guardianship as a shared right implied that the group could not be divided against itself. Because of this, one member could not take legal action against another, since, as members of the group, they had to be represented by their head. The latter could hardly represent one member as claimant and another as defendant in the same action.

In modern indigenous law the emphasis is largely on the authority of one individual over another, and more specifically, a major over a minor. One result of attaining majority is that the individual is freed from guardianship.

2.3 ACQUISITION AND TERMINATION OF GUARDIANSHIP

Guardianship is acquired through birth and transfer. In original indigenous law a person was subject to the guardianship of the agnatic group through birth. The general rule was that the child was subject to the guardianship of the group that had guardianship over its mother. The group membership of the biological father was therefore not decisive.

In indigenous law guardianship over a person can be transferred from one group to another. This may result in the following:

- adoption among certain groups
- entering into marriage where the marital guardianship over the wife is transferred to her husband's group
- dissolution of marriage, through divorce, where the wife again falls under the guardianship of her birth group; in modern indigenous law the dissolution of a customary marriage no longer results in the transfer of guardianship over the wife since she is a major and is thus freed from guardianship;
- transfer of guardianship over an illegitimate child from his mother's group to that of his natural father, provided the necessary requirements have been met (this form of transfer has to be distinguished from adoption);
- the repudiation by the husband of a child born adulterously to his wife, in which case the child falls under the guardianship of the mother's birth group.

In indigenous law guardianship over a person is terminated by transfer and disinheritance. Transfer takes place on transfer of marital guardianship, adoption or transfer of guardianship over an illegitimate child through the delivery of *isondlo*. In modern indigenous law there is no longer a transfer of marital guardianship in the case of a customary marriage. Disinheritance does not bring about a transfer of guardianship but has the effect of terminating it; it results in the disinherited person having no claim to the rights and duties of the agnatic group of which he was a member. The disinherited person's membership of the group is terminated and consequently also his rights within the group. Traditionally women could not be disinherited, since they could not **succeed** to status positions.

3 GUARDIANSHIP OVER FAMILY MEMBERS

3.1 INTRODUCTION

We have already pointed out that in the original indigenous law guardianship was a group right and that the notion of absolute minority or majority was unknown. This position has been changed drastically by the concept of majority in modern indigenous law. Persons become majors at the age of 18 years or upon entering into a marriage (civil or customary).

In modern indigenous law a major is freed from guardianship. In principle, such a person has full powers to act and has *locus standi in iudicio*. However, as long as a major remains a member of the household, he or she is subject to the authority of the head of the household in all matters concerning the household as a whole.

3.2 THE MARRIED WOMAN

A wife in a civil and customary marriage is a major. Her powers are further influenced by the matrimonial property dispensation of her marriage (in community of property or out of community of property with or without the accrual system, or other contract).

3.3 THE WIDOW

In original indigenous law the death of the husband did not terminate the indigenous marriage. The "widow" remained a member of her deceased husband's group, who also had guardianship over her. Her house continued to exist and she shared in all the rights and duties of her house as she had during her husband's lifetime. However, if she dissolved the union with her husband's group, she would be in the same position as a divorced woman. She would then revert to being under the guardianship of her birth group.

In modern indigenous law the principle that the husband's death does not dissolve a customary marriage is apparently recognised. At the same time recognition is also given to the principle that the widow is a major. She is thus freed from guardianship and fully competent to act and she has guardianship over her minor children.

Her powers concerning house property are not clear. Traditionally, such property was controlled by the house successor and the widow had a claim to maintenance from the house property as long as she remained with her husband's group. If she left the group without the approval of her husband's successor, she forfeited her claim to maintenance. Her action could result in the dissolution of her union with her husband's group and in her birth group's being held liable for the return of the *lobolo*. She would, however, still be the owner of earnings acquired by her after her husband's death.

The recognition of customary marriages provides for the following matrimonial property dispensations:

- the house and general property regime in respect of customary marriages entered into before the commencement of Act 120 of 1998 (15 November 2000), unless this property dispensation was subsequently changed in terms of section 10 of the Act:
- in community of property
- out of community of property with or without the accrual system
- a property regime governed by a contract in the case of a polygynous customary marriage

A widow from a civil marriage is a major regardless her age. She is also the guardian of her minor children. Her husband's successor, according to indigenous law, has no claim to the children but does, however, retain his claim to the *lobolo*

for her daughters when they marry.

3.4 MINOR CHILDREN

3.4.1 CHOICE OF LAW

In original indigenous law, children were generally under the guardianship of their mother's guardian. This guardianship over the wife, her children, and also over other family members, was exercised by the head of the group, who was always a male person.

The notion of majority has, however, changed this position. An unmarried woman who is a major is therefore the guardian of her children. The family head is, however, not responsible for a debt incurred by a minor under a common law contract. Moreover, in KwaZulu-Natal, the family head is only liable for those contracts of minors which have been entered into with his assistance or consent, whether explicit or tacit. However, if the contract is to the benefit of the minor or his household, the family head is liable, whether he consented or not.

3.4.2 LEGITIMACY AND ILLEGITIMACY OF CHILDREN

In indigenous law illegitimate children do not carry the same stigma as among Western peoples. Such children are treated as legitimate children and they have a claim to maintenance from the group of which they are members. The question of legitimacy or illegitimacy is only important with regard to succession. It can therefore be said that in indigenous law there is no difference between legitimate and illegitimate children, except in matters of succession.

Indigenous law recognises the presumption that all children born from or conceived during a valid marriage are the husband's children and therefore legitimate. A person who claims that such a child is illegitimate, must prove this. This presumption is valid even if the child is born after the death of the husband or the dissolution of the marriage, provided the child was conceived before the death or dissolution (*Ndondo v Ndondo*, 1944 NAC & O) 80).

The presumption of legitimacy can be rebutted in the following ways:

- By proving that because of absence or illness it was impossible for the man to have had intercourse with his wife at the time of conception.
- By proving that, while he could have had intercourse with his wife, he did in fact not have intercourse with her. In such a case definite proof is required and if there is the slightest doubt, the child is regarded as legitimate.
- Where both father and mother are deceased, the court may consider several factors, such as whether the child was brought up by the father and whether he received *lobolo* for a daughter. Any conduct or declaration on the part of the husband is relevant and his testimony regarding matters of succession carries greater weight than that of the wife, however important her testimony may be.

3.4.3 CHILDREN OF A MARRIED WOMAN

The legal position of the children of a married woman in a civil marriage is governed by the general law of South Africa. We are consequently not going to expand on this.

In indigenous law there is a rebuttable presumption that the children of a married woman are legitimate. In original indigenous law the children of a married woman fell under the guardianship of the husband's agnatic group in consequence of the agnatic group's guardianship over their mother. In modern indigenous law the children fall under the joint guardianship of the husband and mother.

The following court decisions reflect the position regarding adulterous children before the official recognition of customary marriages in South Africa:

- Children born or conceived by a wife and another man at a time when she was living with her husband fall under her husband's guardianship (*Loliwe v Mnyuko*, 1945 (NAC & O) 15). This also applies where children are born out of her adultery while she was not living with her husband. Here it is a requirement that the customary marriage should not have been dissolved. Should her husband dissolve the union without claiming such a child, the child falls under the guardianship of the mother's natural guardian. The husband cannot claim guardianship at a later stage (*Sontshatsha v Gqibeni* 4 NAC 46). Should the woman take steps to dissolve the union, the man may, at a later stage, claim guardianship over such a child. If the man rejects the child, however, the child would fall under the guardianship of the mother's natural guardian (*Tonono v Qobo* 3 NAC 120).
- The natural father of a child born out of adultery has no claim to such a child, except perhaps in cases where adoption is recognised. The natural father's subsequent valid customary marriage with the child's mother does not result in guardianship of the child being transferred to him (*Kobi v Putamani* 1954 NAC (5) 210). Such a child is under the guardianship of the mother's previous husband or, should he have rejected the child, under the guardianship of the mother's natural guardian.
- Children born of a woman after the dissolution of her customary marriage are regarded as children of an unmarried mother (except where such children were conceived before the dissolution). They therefore fall under the guardianship of their mother's natural guardian (*Skevi v Xelitole* 5 NAC 23). Where *lobolo* is returned to the husband after the dissolution of the marriage without any deduction having been made for the children, the husband loses his claim to the children. The children revert to the guardianship of the mother's natural guardian (*Mpika v Mpanda*, 1945 NAC & O) 66). In the former Transvaal, however, the courts decided that the abovementioned position is against public policy and could be seen as constituting trade in children (*Mathebe v Katima*, 1944 NAC (T & N) 69). In our opinion this decision correctly reflects the position in indigenous law.
- In KwaZulu-Natal children born from a customary marriage belong to the house of their mother. They are therefore under the guardianship of the man who is their mother's guardian. This also applies to children who are conceived by the woman by another man before the customary marriage (*Mdhlipi v Mbopo*, 1917 NHC 66). The natural father of an illegitimate child by a married woman cannot claim the child by delivering the *imvimba* beast to the woman's husband (*Megadeni v Mfuleni*, 1921 NAC 53). It is also doubtful whether the husband could transfer the child to the natural father in such a

manner, because this would be regarded as a sale and therefore be seen as *contra bonos mores*.

These above situations should be reconsidered in the light of the recognition of customary marriages and the joint guardianship of father and mother over children.

3.4.4 CHILDREN OF A WIDOW

The legal position of the children of a widow from a civil marriage is governed by the general law. We will, therefore, not discuss this position.

In indigenous law the children of a widow fall into two groups:

- children from an *ngena* (levirate) union, who are considered to be the children of the deceased
- children born from intercourse with a man other than the *ngena* husband

In original indigenous law the husband's death did not dissolve the customary marriage. The widow thus continued to bear children for her house by means of the levirate custom. Levirate children consequently fell under the guardianship of the husband's agnatic group. Modern indigenous law apparently recognises the principle that the husband's death does not dissolve the customary marriage. Before the recognition of customary marriages a widow's children from a levirate union thus fell under the guardianship of the deceased husband's successor. The widow's children by a man other than the levirate partner also fell under the successor's guardianship. The successor could, however, reject such children, in which case they fell under the guardianship of the widow's natural guardian. The position of a widow's children was thus largely the same as that of the children of a married woman.

In Kwazulu-Natal the position has been amended by the Codes of Zulu Law. Section 27(4) stipulates that a widow is the lawful guardian of all her minor children. Section 16(3) stipulates that a child borne by a widow becomes a member of the widow's house. According to section 22 such a child is under the control of the family head.

3.4.5 CHILDREN OF AN UNMARRIED MOTHER

The general principle in indigenous law was that the mother's guardian was also the guardian of her children born out of wedlock. In this section, the term "unmarried mother" refers to an unmarried woman who is a divorced woman and a woman who has not yet been married, but not to a widow.

In original indigenous law women were always under guardianship. Children of an unmarried mother were under the guardianship of the agnatic group which had guardianship over their mother. This was the case irrespective of whether the woman was a major or not.

Guardianship over the child of an unmarried woman could be transferred to another person in three ways:

- Among all the peoples, the natural father could obtain guardianship over the child by marrying the mother. Even a man other than the natural father could obtain guardianship over the child by marrying the mother (*Thibela v Minister of Law and Order and Others* 1995(3) SA 147 T).
- Some peoples recognise adoption as a means of obtaining guardianship over an illegitimate child.
- Among some peoples, especially the Southern Nguni, the natural father could obtain guardianship over the child by paying for the seduction and also by paying *isondlo*. Among some groups the woman's father could refuse *isondlo* and retain guardianship of the child; among other groups he was *obliged* to accept the *isondlo* and to transfer guardianship over the child.

Isondlo, among the Zulu, signifies the bringing up or maintaining of a child. Whenever a family has brought up or maintained a child of another, that family is entitled to claim *isondlo* from the child's guardian or the child's natural father in the case of an illegitimate child with an unmarried woman. The amount claimable for *isondlo* was one beast, irrespective of the duration of *isondlo*, and irrespective of the actual cost of maintaining the child, and also irrespective the sex of the child. A claim for *isondlo* is not usually made by way of legal action.

In the case of an illegitimate child with an unmarried woman, acceptance of the beast for *isondlo* and the customary seduction fee have the effect of transferring guardianship over the child to the group of the natural father of the child. Generally speaking, in terms of indigenous law, the natural father of an illegitimate child is not liable for maintenance. (See lecture 4 below for further details.)

The legal position is somewhat uncertain at present. According to legislation, unmarried women over 18 are majors and are competent to be the guardians of their minor children. This position is explicitly recognised by section 27(2) of the Codes of Zulu Law. The question is whether payment for *isondlo* and the seduction fee will have the effect of transferring guardianship over the child to the person paying the fees and whether that person will have a claim to *lobolo* for a girl child. The natural father of an illegitimate child is liable for maintenance in terms of common law.

3.4.6 ADOPTED CHILDREN

On adoption, guardianship of an adopted child is transferred to the adoptive group. Adoption is not a common phenomenon in indigenous law. It occurs mostly in the case of very young children, both male and female.

It was held that adoption as a means of providing a successor is unknown in Zulu law (*Helela v Maxinana*, 1921 NHC 52). The practice among other groups of securing the custody of an illegitimate child in exchange for compensation is contrary to public policy (*Ngata v Msaba*, 1905 NHC 50).

Regarding the Southern Nguni, the court decided in *Sibozo v Notshokovu* 1 NAC 198 that it was not unusual for "a Native having no male issue" to adopt an heir – that is an illegitimate son of his. In such a case the Native sends for his illegitimate son and thereafter treats him as a son.

Adoption is also recognised among the Bhaca (*Cakile v Tulula*, 1 NAC 201), the Thembu (*Mponya v Mlungu*, 5 NAC 166), and the Mpondo (*Siteto v Mretshi*, 5 NAC 162).

It has been held that the adoption must be formal. It must be done publicly, otherwise it is not valid (*Kamani v Sigongo* 1940 NAC & O) 167). It is submitted that where a stranger is adopted as an heir there must be some public declaration in respect of the adoption.

It seems that if adoption of an illegitimate child as a successor is to be valid, the head must:

- be the father of the child
- have paid for the seduction
- take the child to his homestead, after paying *isondlo* if necessary
- bring him up as a son
- have no other legitimate male issue, otherwise the adopted son would rank as a younger son

It is not certain whether adoption in terms of indigenous law will still be allowed in terms of the Constitution and legislation regarding adoption.

SELF-EVALUATION

1. Discuss the indigenous concept of guardianship. (10)
2. Discuss guardianship over various classes of members of the household.(25)
3. Discuss guardianship over various classes of children in terms of indigenous law. (15)
4. Evaluate the following statements:
 - 4.1 Guardianship is a group right vested in the family head. (5)
 - 4.2 Guardianship in indigenous law is similar to the common law concept of minority. (5)
 - 4.3 Changes in customary marriage laws have had no effect on the indigenous notion of guardianship. (5)

LECTURE 3

The household and maintenance

Recommended reading

Bekker *Seymour's customary law in Southern Africa* (1989) 74–75, 227–234, 238, 242–246

OR

Olivier *Die Privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes* (1989) 397–417, 557–567

Bennett *A sourcebook of African customary law for Southern Africa* (1991) 277–289

Additional reading

Dlamini "Maintenance of minor children: the role of the courts in updating customary law to meet socio-economic changes" 1984 *SALJ* 346–362

STUDY OUTCOMES



After studying this lecture, you should be able to

- discuss the concept of maintenance in terms of indigenous law
- evaluate the institution of *isondlo*
- discuss the effect of common law on maintenance for a wife in a customary marriage and her children

1 INTRODUCTION

In the preceding lectures we focused on various aspects of the household: its composition, the legal position of its members, and guardianship over its members. In this lecture we pay particular attention to the question whether maintenance in the Western sense was known in original indigenous law. We also consider the current common law position regarding maintenance to the extent that it influences indigenous law.

2 THE POSITION IN CUSTOMARY LAW

According to original indigenous law all members of the agnatic group or household shared in the rights and duties of the household. Thus every member was not only entitled to reasonable care and maintenance, but was also obliged to contribute

to the material wellbeing of the household. Since all rights and duties vested in the family head, there was little regulation of the family head's responsibilities towards individual members of the group. This is clearly indicated by the absence of established procedures for the protection of the rights of children which are necessary when such rights have to be enforced. However, maintenance as such did not create any problems in the traditional African community. The wide net of kinship resulting from the extended family ensured that there was always somebody to care for the children. Great emphasis was placed on the importance of family relationships, with the result that maintenance within the agnatic group never gave rise to litigation in court. Thus the concept of maintenance in the western sense was unknown in indigenous law.

In indigenous law children born outside of marriage posed no problem either with regard to maintenance. Rather, the law was concerned with the parental rights vested in the child and the child's rights to succession. The law provided that pre-marital children were under the guardianship of the mother's agnatic group, but adulterous children were under the guardianship of the mother's husband. These children were treated like any other child within the family. When a pre-marital child had been weaned, its natural father could, among certain groups, acquire parental rights over such child. The father was, however, only entitled to guardianship if he had paid damages for seduction and one beast, which traditionally had to be a female animal, as *isondlo*. The delivery of the latter animal symbolises the transfer of guardianship or parental rights to the natural father and is in no way related to maintenance.

Isondlo is an indigenous institution in terms of which a man can, under certain circumstances, acquire guardianship over his pre-marital child. *Isondlo* also refers to the custom in terms of which an animal is given by parents of a legitimate or illegitimate child to any person who has cared for their child. This institution is known as *isondlo* among the Nguni and as *dikotlo* among the Tswana. The Zulu people are not familiar with *isondlo* in this sense.

Isondlo is limited to one animal, irrespective of the length of time that the child was in the care of the other person. In this respect, *isondlo* differs from the common law maintenance payment which is usually based on a fixed monthly sum, which is determined on the basis of a number of factors.

The available literature gives rise to considerable confusion and uncertainty regarding this well-known institution among the indigenous peoples of South Africa. Apparently this uncertainty can be ascribed to the fact that many authors confuse this institution with adoption or maintenance as in the common law meaning of the word. Some authors regard this institution as a contract with rights and duties that can be enforced on the grounds of the custom of delivering one beast as a token of appreciation to the people who cared for and reared the child. Others are of the opinion that the duties may arise from a specific agreement, in which case it is contractual, or from the circumstances of each case, for example those amounting to *negotiorum gestio*, in which case it is *quasi* contractual.

Bennett (Sourcebook 1991 278) states that "*isondlo* is a tangible token of the transfer of parental rights to the donor. *Isondlo* bears no relationship to the common-law conception of maintenance because the right to payment does not vest in the child". In many respects, this statement of Bennett's is correct, except that parental rights are not transferred in all instances. In some cases a child is placed with family members while his parents maintain guardianship

over the child. However, Bennett's statement is true under circumstances where the natural father attains parental rights over his pre-marital child after having delivered a beast for *isondlo*.

According to Olivier *et al* (Privaatreg 1989 557), it is customary that a person caring for the child of another is entitled to payment by the child's natural guardian for maintaining the child. Usually only one beast can be claimed, although, according to them, more than one can be claimed under special circumstances. These writers mention that this beast should not be seen as a payment but rather as an expression of appreciation. Although Olivier *et al* refer to maintenance, and to one beast which can be claimed, they do not explain the nature of "maintenance" or the "claim" to which they refer. Besides, an "expression of appreciation" cannot be enforced by a court of law.

Strydom (1985:504) writes that among the Southern Sotho of Qwaqwa although a *seotla* agreement is entered into informally, it is regarded as a contract to which prescribed legal principles apply and any departure from the terms should be mentioned explicitly at the time when the contract is entered into. He also states that it was customary for the person who cared for the child of another to receive one beast as compensation when the child's return was requested by his natural parents. The beast was payable irrespective of the period of time the child was cared for and irrespective of the actual costs incurred in rearing the child (Strydom 1985 504). However, the beast is not claimable if a wife deserts her husband without sufficient reason and, together with her children, moves in with another person (Strydom 1985 506). From all of this it is not clear what the writer's opinion is of this custom, although he refers to entering into a contract, thus suggesting that we are dealing with a contract. Moreover, he does not distinguish clearly between *seotla* and common law maintenance.

In respect of the Batswana of the North West Province, Van Niekerk (1990:99) writes that each agnatic group has to support its members. This is known as *kotlo*, which, translated freely, means "to care for or to bring up". According to her the liability to support the members arises from the agnatic group's guardianship over the individual members, who share in the rights and duties of the group. However, when one agnatic group supported a child from another group, it was entitled to claim maintenance, usually one heifer, regardless of the period of maintenance. She continues: "Claims for maintenance between members of different agnatic groups are based either on contract or *quasi*-contract. Contractual liability for maintenance arises where the maintenance has been agreed upon and performance or part performance has taken place. *Quasi*-contractual liability arises where there is performance or part performance only and no express agreement" (Van Niekerk 1990:99). She does, however, mention that among the Bahurutse no claim can be instituted for the upbringing of a child.

In regard to the Bangwaketse of Botswana, Campbell (1970:221) mentions that a woman who has raised a daughter is entitled to one of the cattle which are delivered as *bogadi* as compensation for the rearing of the child.

According to Schapera (Handbook 1970 166–167) a claim for maintenance is known among the various groups in Botswana. He mentions that children usually go to stay with their mother's family when she dies. Should their father's group not provide them regularly with the necessities of life, they are *quasi*-contractually liable when they wish to have the child returned. It is not clear, however, whether Schapera is referring to maintenance in the ordinary sense of the word or only to

the *kotlo* custom. The confusion arises because the term *kotlo* is sometimes used for both concepts.

In respect of the Bakwena ba Mogopa of Hebron in Bophuthatswana, Whelpton (1991:220) states that *kotlo* is derived from the verb *go otle* (to feed). The same term *otla* is also used for raising an animal as a pet. According to him, it sometimes happens that a person who is aware of people in needy circumstances may offer assistance with the rearing of a child. This is, however, only a humanitarian gesture (*botho*) which should not be linked to the rendering of a service of one kind or another. He mentions that when a woman is childless, one of her sisters may provide her with a child to care for to give her the opportunity to share in the joys of raising a child. In most of these cases the parents provide the woman with all the necessities to care for the child.

According to Whelpton, this is a family matter from which no rights or duties arise. Such a child may return to his or her parents at any stage, although in a case of this nature, there would be social pressure on them to return the child, especially if the child had been given to a childless woman to take care of for humanitarian reasons.

It is also very common for a child to be placed with his father's or mother's people merely as a sign of the bonds between the family members or to allow the child to enjoy the pleasure of the *bogadi* cattle that were given for his mother. No compensation is payable or claimable, although it is customary to give a beast as a token of appreciation to the people who cared for the child. There is, however, no obligation to deliver such a beast. Whelpton (1991:221) further mentions that the people in whose care the child has been placed have the benefit of the child's services. *O busa dikotlo*, it is said: "He compensates them for his upbringing and care". In addition, the child's own father is liable for the delicts of such a child and is entitled to claim damages for the defloration of his daughter, or to receive *bogadi* given for her.

From Whelpton's statement (1991:221) it becomes clear that *dikotlo* should not be confused with maintenance in the ordinary sense of the word or with adoption, in which case all the parental rights and duties are transferred to the person who adopted the child. With *dikotlo* there is thus no right of payment that vests in the child. The parent whose child is brought up and cared for, is also not *ex lege* obliged to deliver *dikotlo* and *dikotlo* also does not refer to compensation for past or present maintenance. According to Whelpton (1991:222) this is rather a custom *sui juris* that is commonly followed by the indigenous peoples of Southern Africa, and one should not attempt to describe it as a type of contract and to equate it with common law maintenance.

Notwithstanding these differences, *isondlo* or *dikotlo* is often confused with common law maintenance, sometimes deliberately, in order to relate indigenous law to modern circumstances. The decision in the case of *Hlengwa v Maphumulo* (1972 BAC 58 (NE)) placed *isondlo* in an uncertain position. In this case the husband had left the mother of his child, born during the customary marriage. The child was placed in the care of his maternal grandfather. The grandfather claimed an amount of R8,00 per month for maintenance of the child until the child became 18 years, or until he became self-supporting. The father of the child opposed the claim and offered one beast as *isondlo* with the intention that guardianship of the child should be transferred to him. The grandfather refused this offer and the court agreed that one beast was not nearly sufficient and awarded an amount of

R5,00 per month to the plaintiff. The court sought support for its decision in the fact that *lobolo* has undergone a change in the past 30 years in the sense that *lobolo* can now be paid in money. The *Hlengwa* decision now raises the question whether *isondlo* should now be equated with maintenance and whether both *isondlo* and maintenance can be claimed. Though this case can be seen as one of the few examples of where a court has created law, it would have been simpler to exclude indigenous law in favour of common law rather than attempting to convert *isondlo* into something that it has never been in indigenous law. If the plaintiff has common law maintenance in mind, *isondlo* cannot be used as a basis for the claim. It is, however, clear that in this instance the court confused *isondlo* with common law maintenance.

3 THE COMMON LAW POSITION

In terms of common law a wife in a customary marriage can institute an action for maintenance for herself and her children against her husband or the father of her children. A magistrate's court can act as a maintenance court to deal with an application in terms of the Maintenance Act 23 of 1963, after a complaint under oath has been submitted to a maintenance officer that a person who is lawfully liable to support another has failed to do so (ss 1, 2 and 4 of the Act).

A child's claim to support does not depend on whether he or she is legitimate or illegitimate. The father and the mother are liable for the child's support according to their respective assets or income. The fact that a child was born from a customary marriage does not affect the father's or mother's duty to support the child (*Muni v Muni*, 1980 AC (S) 39).

Liability for maintenance in terms of an application for support results from the prescriptions of common law (and not customary law): *Ngcobo v Nene*, 1982 AC (N-E) 343. Payment of *isondlo* can therefore not exempt a person liable for maintenance from that duty. A woman who is of age therefore has *locus standi* to bring an application under the Maintenance Act, 1963, without the assistance of her father or guardian (*Khapeyi v Sethepele*, 1975 AC 194). If she is a minor, she must be assisted by either her father or her guardian, or else the action has to be instituted by her father or guardian in his capacity as her father or guardian. He cannot, however, in his personal capacity institute an action in terms of common law (*Makhobo v Luvudo*, 1952 NAC (N-E) 45). Olivier *et al* (Privaatreg 1989 627) point out that customary law should be followed in a case where the father institutes a claim for maintenance in his personal capacity. In other words, the claim will then be one of *isondlo*. However, in terms of customary law an unmarried woman had no right to claim maintenance.

In *Lebone v Ramokone* (1946 NAC & O) 14) an unmarried woman of age submitted a claim for maintenance against the natural father of her child. The defence was, *inter alia*, that the claim should have been instituted in terms of customary law, in which case the plaintiff would have had no right of claim against the defendant. The court of appeal found, however, that there was no evidence that the plaintiff had renounced customary law and that the commissioner had given no reason why common law should be applied, and that he exercised his discretion incorrectly by adjudicating the case according to common law principles. In *Mgudu v Langa* (1949 NAC (N-E) 106) in the case of a similar claim by the mother of age of an illegitimate child, the viewpoint was adopted that the guardian of an illegitimate

child was not the mother, but the father of the mother and that it was his prerogative to institute a claim for maintenance (Olivier *Privaatreg* 1989 628).

Note that where a claim is instituted according to the one legal system and a defence is raised according to the other legal system, the court, in exercising its judicial discretion, is allowed to apply any one or both of the systems. It is also possible in the same action to apply one legal system in respect of the claim and the other legal system in respect of the counterclaim (*Kabe and Another v Inganga*, 1954 NAC 1 220).

SELF-EVALUATION

1. Discuss the institution of *isondlo*. (20)
2. Compare *isondlo* with common law maintenance. (10)
3. Evaluate the following statements:
 - 3.1 *Isondlo* is comparable to the common law notion of maintenance. (5)
 - 3.2 *Isondlo* is a form of compensation for bringing up the child of another. (5)
 - 3.3 In terms of indigenous law a child has no right against his or her parents to be maintained. (5)

ACTIVITY



Study the following hypothetical set of facts and answer the questions that follow. Justify your answers.

Mmapula, a Zulu girl, was born out of wedlock and was raised by her maternal grandfather Mbazo. Her own father, Mkhizo, never paid the *isondlo* or the *imvimba* beast for her. Last year when she was attending a cultural event specifically for girls of her age at the traditional leader's home, the traditional leader Bantubonke expressed an interest in marrying her as his second wife. He had previously married his first wife Matlakala according to Batswana customs. Two children were born of this marriage, Kedibone aged 4, and Pule aged 1, a girl and a boy respectively.

Negotiations for *lobolo* were made with Mbazo, who claimed fifteen head of cattle. Upon learning about this, Mkhizo was very angry and argued that he should be the one to negotiate the *lobolo* since he was Mmapule's biological father. According to him Mbazo was only entitled to the *isondlo* and or *imvimba* beast. Mmapula and the traditional leader proceeded to get married by civil rites without *lobola* being delivered. Meanwhile, Matlakala felt very threatened by the marriage of her husband to Mmapula, more so because her husband was hardly rendering her any conjugal rights. As a result, there was constant conflict between Matlakala and her husband, which resulted in Matlakala's filing for divorce in the divorce court. She left her marital house and now lives in Soweto with her children.

- (a) Who has the right of guardianship over Mmapula? (3)
 - (b) Could *isondlo* be accepted and should Mbazo accept it if is offered by Mkhizo? (4)
 - (c) Is *isondlo* equivalent to maintenance? (6)
 - (d) Does a legally valid marriage exist between Mmapula and the traditional leader Bantubonke? (4)
 - (e) Do Mbazo or Mkhizo have any claim for *lobola* for the marriage between the traditional leader Bantubonke and Mmapula? (6)
 - (f) On what grounds can a customary marriage be dissolved in customary law? Are they applicable in this case? (5)
 - (g) Do the divorce courts have the jurisdiction to hear the divorce suit between Matlakala and the traditional leader Bantubonke? (4)
 - (h) If the traditional leader Bantubonke and Matlakala get divorced, what effect will this have on Matlakala's house? (5)
 - (i) What consideration would the divorce courts take into account when making an order for custody of the two children born of the marriage? (8)
- [45]

LECTURE 4

The relationship between customary and civil marriages

INTRODUCTION

Additional reading

Bennett *A sourcebook of African customary law for Southern Africa* (1991)
137–139

STUDY OUTCOMES



After having studied this lecture you should be able to

- discuss and compare the characteristics of customary and civil marriages
- discuss the legal significance of the choice of law between customary and civil marriage

1 THE NATURE OF CUSTOMARY AND CIVIL MARRIAGES

You should be aware from your previous study of customary law that customary law covers various forms of marital union. We distinguish between the original customary marriage, customary union and customary marriage which has been adapted by legislation and the common law or civil marriage. Since customary marriage was discussed at length in the introductory module to customary law, the emphasis in this study unit falls on the relationship between customary marriage and civil marriage.

The customary marriage is characterised by:

- *Its private nature in that the government is not involved in its coming into being.* We shall not expand on the statutory requirements which are presently laid down in regard to the customary marriage in terms of section 3 of Act 120 of 1998. These requirements, which must be met, imply that the customary union can no longer be regarded as a matter of private concern.
- *The absence of a precise moment at which the marriage comes into being.* The marriage is a process which comes about gradually. This process is characterised by a number of events and rituals. Here the following are important: the agreement between the family groups, the transfer of the bride, the es-

establishment of a new property or house unit, the birth of children, and the transfer of marriage goods to the wife's group.

- *Its potentially polygynous nature.* This does not mean, however, that all the marriages were polygynous. A subsequent customary marriage between a man and another woman without his previous customary marriage having been dissolved or made defunct is, however, not prohibited. Polygynous marriages are implicitly recognised by Act 120 of 1998.
- *The importance of marriage goods.* The marriage goods determine whether the marriage will be accepted as a marriage by the family groups and the community, and determine the status of the children. Act 120 of 1998 contains no explicit reference to marriage goods as a requirement for a valid customary marriage.
- *The involvement of the family groups of both the man and the woman in the marriage.* The indigenous marriage is a union between two family groups rather than between two individuals. For this reason, the spouses cannot dissolve the marriage at will or without the cooperation of the family groups.

There are important differences between the original indigenous marriage and the civil marriage. The civil marriage is characterised by the following:

- *Its public nature,* which is evident from the prescribed formalities which must be complied with.
- *Its monogamous nature,* which is evident from the sanction against bigamy.
- *Its individual nature,* in the sense that consensus between the man and the woman is essential. The consent of the parents or guardians of the man and the woman is only required when the parties are minors, or one of the parties is a minor. The parents or guardians are, however, not parties to the marriage.

It is clear from the characteristics of these two forms of marriage that they are not easily compatible. The monogamous nature of the civil marriage is incompatible with the polygynous nature of the indigenous marriage. In the same way the individual nature of the civil marriage cannot easily be reconciled with the family involvement of the indigenous marriage. The Recognition of Customary Marriage Act 120 of 1998 retained the polygynous nature of the customary marriage, the involvement of families in the marriage process and their involvement in its dissolution. At the same time the Act provided for the equal status of husband and wife, thus empowering the wife to enter into contracts and to appear in court without assistance.

2 FORMS OF MARRIAGE AND CHOICE OF LAW

Two largely incompatible forms of marriage! The legal question is the following: To what extent should the form of marriage determine the rights and duties of the spouses towards each other, their children, their kin and the world?

Where the form of marriage and the personal rights of the spouses are the same, there is no problem. Where the form of marriage and the personal rights of the spouses differ, the question arises whether the law associated with the form of marriage should take precedence over the law associated with the personal rights of the spouses.

One viewpoint is that the choice of a particular form of marriage gives expression to the intentions of the spouses. This means that the form of marriage ceremony

is sufficient to determine the choice of law in regard to all related and subsequent rights and duties. How valid is such a viewpoint? It is, of course, a simple solution to a complex problem. The connection between a particular marriage ceremony and relatively far-removed issues, such as the devolution of an estate, is actually so far-fetched that this approach is not justifiable. Many people enter into a civil marriage merely to fulfil the requirements of their religion and without the intention of rejecting indigenous law, or without a proper understanding of the consequences of a civil marriage.

The problem is intensified in those cases where the spouses enter into both an indigenous and a civil marriage with each other, the so-called double marriage. Would the order of the marriages be an indication of a primary and a secondary intention and would the intention associated with the last marriage be decisive? In the following lectures we will return to these questions.

LECTURE 5

Civil marriages between Africans

Additional reading

Bennett *A sourcebook of African customary law for Southern Africa* (1991)
137–139

STUDY OUTCOMES



After having studied this lecture you should be able to

- explain the historical regulation of civil marriages for Africans historically
- indicate the legal requirements for the regulation of civil marriages according to the three legislative requirements.
- explain the legal effect of double marriages

1 INTRODUCTION

The law has historically allowed African people to enter into a customary marriage or a civil or Christian marriage. Three phases can be distinguished as characteristic of the status of the civil marriages entered into by African people in the legal history of South Africa. These can be referred to as the pre-regulation period for civil marriages between Africans; the period during which civil rites marriages between Africans were regulated; and the period following the amendment of the regulation of civil marriages between Africans. The last two are important because these marriages still obtain and these dispensations regulate existing marriages between African people in South Africa. Thus knowledge of the requirements for these marriages is still important as their validity is still a subject which has to be determined by the courts from time to time.

In this lecture we are going to discuss the requirements for these marriages. We also refer to the effect of the passing of the Recognition of Customary Law Marriages Act 120 of 1998 on civil marriages between Africans.

2 REGULATION OF CIVIL MARRIAGES

A. The period of regulation: Civil marriages entered into before 2 December 1988

The requirements for Africans entering into civil marriages before 2 December 1988 were contained in section 22 of the Black Administration Act 38 of 1927. Section 22(1) provides as follows:

No African male shall, during the subsistence of any customary union between him and any woman, contract a marriage with any other woman unless he has first declared upon oath, before the magistrate or Commissioner of the district in which he is domiciled, the name of every such first-mentioned woman; the name of every child of any such customary union; the nature and amount of the movable property (if any) allotted by him to each such woman or house under black custom; and such other information relating to any such union as the said official shall require.

Section 22(3) further provides as follows:

No minister of the Christian religion authorized under any law to solemnize marriages, nor any marriage officer, shall solemnize the marriage of any African male person unless he has first taken from such a person a declaration as to whether there is subsisting at the time any customary union between such person and any woman other than the woman to whom he is to be married and, in the event of any such union subsisting, unless there is produced to him by such person a certificate under the hand of a magistrate or Commissioner that the provisions of this section hereinbefore set out have been duly complied with.

The section referred to in section 22(3) is section 22(1). A marriage officer who solemnised a marriage without these requirements having been met was guilty of an offence. A man who entered into a marriage without making the declaration required by section 22(1) was guilty of an offence.

A civil marriage concluded by the husband subsequent to a customary marriage therefore had the effect of invalidating any existing customary marriages. This is because a civil marriage is by nature monogamous and a spouse to a civil marriage could not be understood to have other additional wives by either customary or civil law rites.

African spouses who had decided to contract a civil marriage had a choice of three matrimonial regimes. They could marry

- (1) in terms of section 22(6) of the Black Administration Act 38 of 1927. All African spouses to a civil marriage would automatically be governed by this section of the Act; which provided that the marriage would be out of community of property, with spouses having separate estates, but with the wife subject to the husband's marital power. Note, however, that today the marital power of the husband has been abolished irrespective of the date when the marriage was entered into, and irrespective of the race of the spouses.
- (2) by antenuptial contract. Such marriages are governed by the usual rules of this marriage property regime as provided by civil rites marriage. You can refer to the law of marriage and family modules in Private Law.
- (3) in community of property. If the spouses wish to marry by civil law, they could also choose to marry in community of property. In order to do so, they would have to make a declaration before a magistrate indicating that they did not wish the provisions of section 22(6) of the Black Administration Act to govern their marriage, and that they wished to be married in community of property.

B. The amendment to legislative regulation: civil marriages entered into after 2 December 1988

The civil matrimonial regime for African spouses that was envisaged under section 22 of the Black Administration Act was clearly prejudicial to women married by customary law. Their marriage could easily be superseded by a subsequent civil marriage by their husband to another woman. As a result the Marriage and Matrimonial Property Law Amendment Act 3 of 1988 was introduced. One of its provisions was the amendment of section 22 of the Black Administration Act 38 of 1927, which governed civil marriages by Africans. This Act provided that no spouse of an existing customary marriage should be allowed to contract a common law marriage. Of course the converse also applied, namely a spouse of a common law marriage was also not competent to contract a customary marriage. The amendments of the 1988 law therefore put a stop to the practice among men of discarding a customary law spouse and marrying a third person by civil rites.

However, provision was made for partners to a customary marriage to marry one another by civil rites, by exception. Thus spouses to a customary marriage could typically decide to celebrate their union anew under civil rites. The legal effect of that was that the customary union would fall away automatically, and the couple's marriage would be regulated by civil law.

Before 2 December 1988 there was a separate marriage regime for Africans who entered into a civil marriage, which was regulated by section 22(6) of the Black Administration Act 3 of 1927. However, after 2 December 1988 the matrimonial regimes governing civil marriages of Africans effectively became the same as the regimes that applied to persons of African races. The various marriage regimes were provided for under the Amendment Act 3 of 1988. For more information on the marriage regimes, please refer to page 115 of "Legal pluralism in South Africa: Aspects of African customary law Muslim and Hindu family law", which is one of the prescribed texts referred to above.

The Recognition of Customary Marriages Act 120 of 1998 and civil marriages between Africans

The Marriage and Matrimonial Property Law Amendment Act 3 of 1988 amended section 22 of the Black Administration Act by providing that no civil marriage can be contracted between Africans while a customary marriage still exists. Sub-sections (1), (2), (3) and (5) of section 22 were repealed by Act 120 of 1998 and replaced by sections 3(2), 10(1) and 10(4) of Act 120 of 1998

The Recognition of Customary Marriages Act 120 of 1998 came into operation on 15 November 2000. Section 3(2) provides as follows:

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 25 of 1961), during the subsistence of such customary marriage.

In terms of section 10(1), a man and a woman in a customary marriage may enter into a civil marriage with one another, if neither of them is a spouse in a subsisting customary marriage with any other person. This means that a monogamous customary marriage can be transformed into a civil marriage without first dissolving the customary marriage. The question that arises is what the legal status of the customary marriage would be should the civil marriage be dissolved afterwards by divorce. The question is whether the civil marriage has the effect of dissolving the monogamous customary marriage.

In terms of section 10(4) no spouse in a civil marriage under the Marriage Act 25 of 1961 may enter into any other marriage during the subsistence of such marriage. This means that nobody in a civil marriage may enter into another civil or customary marriage during the subsistence of a civil marriage. Bigamy is thus prohibited.

For a further commentary on this subject, please consult the relevant section on page 50 of your prescribed textbook.

2 THE LEGAL EFFECT OF DOUBLE MARRIAGES

2.1 CIVIL MARRIAGE FOLLOWING A CUSTOMARY MARRIAGE

As we have pointed out above, the husband and wife in an existing monogamous customary marriage may enter into a civil marriage with one another – the so-called double marriage. The implications of the transformation of a customary marriage into a civil marriage were considered in the case of *Kumalo v Jonas* (1982 ACCC (S) 111). The question whether the civil marriage had the effect of dissolving the customary marriage was considered explicitly. The court decided that this question should be answered in the light of customary law. According to customary law the mutual relationship between the spouses in the customary marriage was unaffected by the subsequent civil marriage. The status of the customary marriage was therefore also not affected. The implication of this finding is that a double marriage came into being and that “the union of both parties as man and wife continues uninterruptedly, albeit under two different forms of nuptial union” (at 118). It is not clear whether this also applies to the patrimonial consequences of the civil marriage. In terms of the customary marriage a house estate came into being. Civil marriages were out of community of property in terms of section 22(6) of Act 38 of 1927 unless an antenuptial contract determined otherwise.

The Act does not address the issue of the consequences of converting a customary marriage to a civil marriage. It is not clear whether or not the first marriage still subsists and if the parties can be held to be married under both systems of marriage.

2.2 CUSTOMARY MARRIAGE FOLLOWING A CIVIL MARRIAGE

A civil marriage excludes any further marriages during its existence. A subsequent customary marriage does not amount to bigamy since the customary marriage was not recognised as a valid marriage prior to 15 November 2000. However, a customary marriage entered into after an existing civil marriage is void *ab initio*. The woman in such a customary relationship is regarded as a concubine and has no status or rights in respect of the person and property of her “husband”. Likewise, her “husband” has no rights to or through the woman to her children, even if he has delivered *lobolo* in respect of the woman. He cannot reclaim the *lobolo* delivered since he is *in pari delicto* with the woman’s father or guardian. He also has no claim to any *lobolo* received in respect of daughters born from this union.

We have already mentioned that since 2 December 1988 a civil marriage cannot be entered into while a customary marriage is still valid, except in the case of a monogamous customary marriage being transformed into a civil marriage. The result of this is that a civil marriage will no longer dissolve a customary marriage by operation of law.

Section 22(7) of the Black Administration Act, which protected the property rights of a wife or wives where their customary marriage had been dissolved by a civil marriage, has also been repealed. Since the legislation is not retrospective, section 22(7) of the Black Administration Act will still apply to the discarded wife of a customary marriage which had been dissolved by a civil marriage prior to the new amendments introduced by the 1988 and 1998 Acts.

SELF-EVALUATION

1. Discuss the legal position of the so-called double marriage. (15)
2. Discuss the legal implications of a civil marriage following an existing monogamous and/or polygynous customary marriage. (15)
3. Discuss the legal implications of customary marriages following an existing civil marriage. (8)

Study the following hypothetical case and answer the questions that follow. Give full reasons for your answer.

In 1986 A and B concluded a customary marriage. In 1990, at the insistence of their priest, they concluded a civil marriage in community of property.

During 1998, A fell in love with C and intends concluding a customary marriage with her.

You are approached by A, who is unsure about the legal implications of a proposed marriage with C. He wants to know the following:

- (a) the status of his marriage with B in 1986 and 1990
- (b) whether the civil marriage dissolved his customary marriage
- (c) whether his proposed customary marriage with C will be valid

In the meantime B wants to divorce A because of his relationship with C. Advise B on the following:

- (d) how she should go about obtaining a divorce order
- (e) the grounds on which she could end her marriage
- (f) the effect of the divorce on the property of the marriage

LECTURE 6

The court's interpretation of Section 7 of Act 120 of 1998

Compulsory reading

Gumede v Gumede CCT 50/08 [2008] ZACC 24

Additional reading

Bennett *A sourcebook of African customary law for Southern Africa* (1991)
137–139

STUDY OUTCOMES



After having studied this lecture you should be able to

- explain the provisions of section 7(1) of Act 120 of 1998
- discuss the implications of the court's interpretation of section 7 of Act 120 of 1998

1 INTRODUCTION

The Recognition of Customary Marriages Act 120 of 1998 has not been without challenges regarding the interpretation of some of the provisions thereof. In this lecture the problems which have been encountered in the interpretation of section 7 of the Act will be discussed and the case of *Gumede v Gumede* will be analysed. Section 7 is not the only section of the Act that is problematic; other provisions which have not yet been the subject of legal interpretation may also need to be tested in the courts in future.

Section 7(1) of the Act provides that the patrimonial consequences of customary marriages which were concluded before the commencement of the Act are still governed by customary law. Therefore the Recognition of Customary Marriages Act draws a distinction between the proprietary consequences of customary marriages entered into before it came into operation, and the proprietary consequences of customary marriages entered into after it was enacted. The proprietary consequences of customary marriages entered into before the commencement of the Act continue to be governed by original customary law.

For a discussion of the consequences of marriage according to the traditional position, please refer to the recommended reading by Lesala Mofokeng "Legal pluralism in South Africa: Aspects of African customary, Muslim and Hindu family law", pp 78–81.

The implications of section 7(1) were considered in the case of *Gumede v Gumede* CCT 50/08 [2008] ZACC 24.

2 CASE DISCUSSION: THE GUMEDE CASE

Mrs Elizabeth Gumede entered into a customary marriage with her husband Amos Gumede on 29 May 1968.

The marriage relationship irretrievably broke down, and her husband instituted divorce proceedings against her in the North Eastern Divorce Court. Mrs Gumede consulted Sharita Samuel, of the Legal Resources Centre, who brought an application to stay that divorce action, pending the determination of unfair discrimination and constitutional invalidity by the Constitutional Court. "The issue in our application was the proprietary consequences of the customary marriage, and particularly in the context of the pending divorce action against Mrs Gumede. Her primary complaint was that the matrimonial property regime to which she is subject discriminates against her because she is a woman, and because she is an African," says Samuel. She adds: "Her secondary complaint is that while the Recognition of Customary Marriages Act 120 of 1998 recognises the discriminatory consequence of the relevant provisions of the customary law, and rectifies the position in respect of customary marriages entered into after the commencement of that Act (15 November 2000), it perpetuates this discrimination in other customary marriages. In other words, it is under-inclusive." Her application was opposed by the National Government (the First, Second and Sixth Respondents) and was heard in the Durban and Coast Local Division of the High Court on 6 December 2007. On 13 June 2008 Theron J handed down her judgment, which declared certain provisions of the Recognition of Customary Marriages Act, the Natal Code of Zulu Law Proclamation R151 of 1987 and the KwaZulu Act on the Code of Zulu Law 16 of 1995 inconsistent with the Constitution and invalid. The Court ordered, in terms of section 172(2)(a) of the Constitution, that its order be referred to the Constitutional Court for confirmation.

An application was made to the Constitutional Court for the confirmation of the order made by the High Court on 11 September 2008. On 8 December 2008, Moseneke DCJ, writing on behalf of the majority, found the above provisions to be discriminatory on the ground of gender. Only women in a customary marriage are subject to these unequal proprietary consequences. The court found that 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, prior to the commencement of the Recognition of Customary Marriages Act. The court held 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 in a customary marriage 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 court further held that 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 the Recognition Act.

SELF-EVALUATION

1. Outline the Constitutional Court's findings in the case of *Gumede v Gumede*. CCT 50/08 [2008] ZACC 24. Point out the court's findings on discrimination against women in respect to marriage property.

STUDY UNIT 3

AFRICAN CUSTOMARY LAW OF OBLIGATIONS

SECTION A: DELICTS

LECTURE 1

General principles

Additional reading

Van den Heever 'n Sistematiek vir die inheemse deliktereg van die swartman
(1984)

STUDY OBJECTIVES



After having studied this lecture you should be able to

- discuss the principles underlying the indigenous law of delict
- explain the elements of an indigenous delict
- discuss unlawfulness, including grounds of justification, as an element of a delict in indigenous law
- evaluate consent to harm the agnatic group
- discuss factors that may have an effect on guilt as an element of an indigenous delict.

1 INTRODUCTION

Van den Heever (226) notes that the problem of unlawful infliction of damage is usually approached casuistically. This does not mean, however, that general principles cannot be deduced.

In this lecture we follow Van den Heever's exposition to a large extent. We wish to emphasise, however, that these principles must be tested against the customs of various peoples. Provision must therefore be made for the many variations found among different groups.

Since you are familiar with the tenets regarding rights in indigenous law, we are going to proceed from the position that a delict is the unlawful infringement of a right. We therefore distinguish between the following elements of an unlawful act: act, unlawfulness, guilt, causality and damage or personal injury.

2 THE ACT

The abovementioned definition of an unlawful act assumes that there has been some kind of infringement of a right. Therefore, an act of some kind must have taken place. From your knowledge of law in general you should be aware that an act may be one of commission (*commissio*) or of omission (*omissio*). In terms of indigenous law, an act is limited to an act by a person.

3 UNLAWFULNESS

According to Myburgh (14), unlawfulness lies in the infringement of a right. This principle is also recognised in *Zulu v Mtetwa* 1954 NAC 162 (S) where the president of the court noted that “unless rights are infringed, there can be no cause of action”.

The indigenous law of delict also recognises certain grounds which exclude the unlawfulness of an apparently unlawful act. Van den Heever (235–276) discusses the following grounds for justification: defence, emergency, discipline, executing orders of duly empowered officials, spontaneous agency (*negotiorum gestio*), consent to injury and special grounds. He emphasises (273) that there is no fixed number of grounds for justification.

Note the following remarks:

- In principle, necessity, emergency, executing orders of duly empowered officials and spontaneous agency largely agree with the general law. You need to remember, however, that the fine and technical distinctions generally found in modern law are not typical of indigenous law.
- Discipline is accepted as a ground for justification in indigenous law. In private law this power extends to children, women and other persons under guardianship. In indigenous law, marital guardianship over the wife includes the husband’s power to chastise her within moderation. Where the bounds of discipline are exceeded the victim may approach his or her agnatic group for relief.
- Discipline in private law must be distinguished from discipline in terms of public law. Among most peoples who practise initiation, the initiation supervisor has the power to discipline the initiates. Among the Pedi at least, any adult has the power to punish a child who has misbehaved, regardless of the relationship between them and the rights infringed. Among some groups this rule has been amended so that infringement of an adult’s rights is now required before a child can be punished.
- Consent to injury and the special grounds to which Van den Heever refers require further elucidation. Van den Heever (265–273) refers to circumcision during initiation, rape, seduction, the services of doctors and herbalists, and stick and kirie fights as situations where consent to injury may feature as a ground for justification. The special grounds which Van den Heever (273–276) mentions refer to the seizing of *intlonze* and to possible grounds for justification which can be raised as a defence in the case of adultery.

It is doubtful whether consent to injury was a ground for justification in original indigenous law. In the case of initiation, we are dealing with a public-law ceremony which everyone had to undergo to obtain full membership of the community. In our view the argument that the initiate’s father consented to the risk of injury

is somewhat artificial. We believe that the issue concerns participation in a community institution and that this constitutes a ground for justification.

The same argument applies to injuries sustained during boys' stick and kerie fights. To argue that the father has agreed to his son's participation in fights, even where he is unaware of the fight in question, is perhaps far-fetched. We are of the opinion that in this case we are also dealing with a recognised community institution. In the same way, the explanation for the reason why in indigenous law a man cannot be guilty of raping his own wife lies in the institution of marriage. The seizure of *intlonze* also involves an institution.

Can consent exclude unlawfulness in cases of seduction, rape or adultery in indigenous law? In original indigenous law, where rights were vested in the agnatic group, the individual could not consent to an injury to the group. Thus the girl or woman could not consent. Similarly, the head of the group, as an individual, could not consent to an injury to the group's rights. In modern indigenous law, too, the consent of the girl or woman to intercourse would not exclude seduction or adultery since the view is that it is the guardian's rights which are infringed and not those of the female. What would the position be if the girl's father consented to the intercourse but the girl refused? What is your opinion? Would the father's consent also be regarded as *contra bonos mores*?

As regards consent to injury in respect of the doctor-patient relationship we believe that here too we should not too easily accept consent as a ground for justification. The traditional doctor-patient relationship is based on particular conceptions of the supernatural. It is difficult, however, to draw any conclusions in this regard since in original indigenous law it was virtually unheard of for a patient to sue the doctor in court. In our view, the explanation for this is to be found in these people's conceptions of sickness and misfortune. In most cases, sickness and misfortune have a supernatural cause. The doctor's inability to heal, or the apparently greater injury which may have resulted from the treatment, is not blamed on the doctor since in such a case the supernatural cause is stronger than the doctor's "power" and medicines. The blame is rather on the person who caused the sickness.

4 GUILT

The perpetrator should be legally blameable for the act. There are indications in indigenous law that pure chance (accidental) events do not lead to liability (Myburgh 16). Furthermore, the perpetrator is liable only if the act can be imputed to him. The perpetrator must therefore be criminally responsible.

4.1 ACCOUNTABILITY

In indigenous law factors which can affect accountability are youth, mental health and provocation. Van den Heever (299) also refers to drunkenness as a possible ground for exclusion of culpability.

- Youth is a factor taken into account among all groups to determine whether there is guilt. However, there is no particular age at which a child can be held to be accountable.

- Little research on mental illness as a factor affecting guilt has as yet been done in indigenous law. The available data, however, indicate that mental illness excludes guilt (Van den Heever 295–298). There is also information which indicates that the family head of a mentally ill person can be held liable for the acts of that person in certain circumstances. In modern indigenous law the family head will apparently not be held liable on the ground of the principle of natural justice (Van den Heever 298; s 1(1) of the Law of Evidence Amendment Act 45 of 1988). Further, in indigenous law a mentally ill person is not qualified to appear in court (*Dhlamini v Dhlamini* 1950 NAC 253 (N-E)).
- The issue of provocation comes most clearly to the fore in indigenous law where a man has caught his wife in an act of adultery. In such a case the husband may assault his wife and the adulterer and, among some groups, could formerly even kill them. From available information it is not clear whether provocation is a ground for justification or a ground for exclusion of culpability (also Van den Heever 304–309). There is also data which indicate that in certain circumstances provocation is merely a mitigating factor (Myburgh 28; Van den Heever 310).
- Van den Heever (303) comes to the conclusion that it is not possible to establish the effect of drunkenness on delictual liability from the available literature. However, it is clear from available information that drunkenness does not exclude guilt. It is not clear, however, whether drunkenness has an aggravating or mitigating effect.

4.2 FORMS OF GUILT

We distinguish between two forms of guilt, namely intent (*dolus*) and negligence (*culpa*). These distinctions also apply to indigenous law (Myburgh 16, 92, 113; Van den Heever 316–317, 323).

It is not clear from available information whether forms of intent can be distinguished in the indigenous law of delict (Van den Heever 318). Neither is it clear what criterion is used in indigenous law in the case of negligence (Van den Heever 322). There are indications that a person's conduct is measured against that of a reasonable person (Van den Heever 323–325), and in certain cases even against that of an expert (Van den Heever 320–321: conduct measured against that of a stock owner). It is also unclear from the data whether the test in indigenous law is objective or subjective, although there is information pointing to an objective test (Van den Heever 326).

5. CAUSALITY

There is little data on causality as a requirement for delictual liability in indigenous law. From the available data it is, however, clear that causality is known to indigenous law (Van den Heever 329, 335). Suffice it to say that no theory on the causality problem has been developed in indigenous law. Nevertheless, it is clear from the available data, however incomplete and imperfect, that, for there to be delictual liability, indigenous law requires a causal relation between the act and its consequences (Van den Heever 336).

6 DAMAGE OR PERSONAL INJURY IN INDIGENOUS LAW

In indigenous law damage or personal injury are required for delictual liability. Damage refers to patrimonial loss. If a patrimony is reduced in an unlawful manner there is talk of damage. Personal injury relates to the infringement of the rights of personality (Van den Heever 337–338). Patrimonial loss is made good by the awarding of damages, and personal injury by the granting of satisfaction (Myburgh 14, 92). Although the indigenous peoples do not have different terms for damages and satisfaction there are, nevertheless, indications that a distinction is made between forms of injury. Thus, according to Mönnig (The Pedi (1967) 324), the Pedi distinguish between damage to property (*go senya thoto*: “to break property”), *crimen iniuria* (*go senya leina*: “to break the name”) and the violation of a girl (*go senya mosetsane*: “to damage a girl”).

It is often not possible to distinguish from the data whether damages or satisfaction are in question. Apparently the reason is that in certain cases the consequence of a delictual act is patrimonial loss as well as personal injury (Myburgh 93). In particular cases the award made to the wronged person may include an element of punishment (Van den Heever 338–340).

SELF-EVALUATION

1. Discuss general principles underpinning the indigenous law of delict. (25)
2. Discuss grounds of justification in the indigenous law of delict. (20)
3. Discuss guilt as an element of a delict in indigenous law. (12)
4. Evaluate the following statements and justify your answers fully:
 - 4.1 According to indigenous law an omission resulting in the unlawful infringement of a right has no consequences for the wrongdoer. (5)
 - 4.2 According to indigenous law consent to violation of a right excludes delictual liability. (5)
 - 4.3 According to indigenous law delictual liability requires at least personal injury. (5)
 - 4.4 In terms of indigenous law of delict provocation is regarded as a ground of justification that excludes unlawfulness. (5)

LECTURE 2

Liability of family head for delicts

Recommended reading

Bekker JC *Seymour's customary law in Southern Africa* (1989) 82–90

OR

Olivier NJJ, Olivier WJ & Olivier NJJ (jr) *Die privaatreë van die Suid-Afrikaanse Bantoetaalsprekendes* (1989) 418–434

STUDY OBJECTIVES



After having studied this lecture you should be able to

- explain a family head's liability for delicts of members of the family
- explain the procedural requirements for a family head's liability for the delicts of family members
- evaluate the basis of the family head's liability for delicts of family members

1 INTRODUCTION

The liability of the family head, or "kraalhead" as he was formerly called, for the delicts of family members or kraal residents is a subject on which there is no agreement. Although the rules are clear, this is not the case regarding the basis of the family head's liability. Such liability has been described as joint liability, vicarious liability and accessorial liability. In this lecture we are going to take a closer look at some of these viewpoints. We shall first establish for whose delicts the family head is held liable in order to evaluate the basis of his liability. We shall also look at some procedural requirements relating to his liability.

2 LIMITATION OF LIABILITY

2.1 ORIGINAL INDIGENOUS LAW

In original indigenous law the members of the agnatic group shared their rights and duties. There was thus no possibility of delictual actions between members of the group. Furthermore, the group had only one representative, namely the head (Myburgh 15).

Since the group shared their rights they also shared their duties (Myburgh 16). If the individual member incurred liability, the agnatic group shared in it. If the family head did not incur liability himself he was liable only because of his share in the group's rights (Myburgh 17).

This position has been considerably amended in modern indigenous law. The main reason is apparently that certain members of the agnatic group have attained majority. This has resulted in a number of problems that we deal with in the sections which follow. The position in KwaZulu-Natal differs, however, from that in other areas.

3 PROCEDURAL REQUIREMENTS

Under the original indigenous legal system no one appeared in court alone. The family head and other senior members of the agnatic group stated the group's case in court. In most cases the wrongdoer was included in this group. Where the perpetrator was a child or a woman, the indigenous court proceedings would not be held in the cattle kraal but would be moved to a place alongside the cattle kraal.

This position has been amended in modern indigenous law. The plaintiff sues the wrongdoer. If the plaintiff also wishes to sue the family head, he must join the family head in the action as co-defendant. If only the family head is sued, he can raise the non-joinder of the wrongdoer as a defence. In such a case the claim will be dismissed. The plaintiff may thereafter sue the wrongdoer and the family head in a new action. Should the wrongdoer be sued alone, he cannot raise the non-joinder of the family head as a defence since he is the actual perpetrator. Nor can the plaintiff sue the family head after he has obtained judgment against the wrongdoer.

Modern indigenous law recognises the indigenous law principle that a case cannot become prescribed. Despite this a case is generally required to be reported as soon as possible. Although a delay in reporting a case does not lose the plaintiff his claim, the delay influences his credibility. A further consideration is that even should the wrongdoer die after the case has been reported, the plaintiff's claim will not lapse. The death of the family head has no effect on the plaintiff's claim since family headship is not terminated by the death of the family head.

The family head is further liable only for those delicts (of residents) that are known to indigenous law. The family head is not liable if the claim is instituted under common law.

4 BASIS OF LIABILITY

The liability of the family head for delicts of residents in the family dwelling has given rise to various explanations. We are going to briefly consider some of these explanations.

In original indigenous law rights were vested in the agnatic group. The members shared in the rights and duties. The individual member could incur liability for the group by his or her actions. The other members would then share in the liability. However, the group was represented by its head, which meant that the group

would be sued through its head. This position has been amended in modern indigenous law. The most important factor here has been the recognition of the status of majority of some of the members of the group. As you know, majors have contractual capacity. They can also appear in court unassisted. The effect of this is that there would be several persons within the agnatic group with contractual capacity. Nevertheless, the principle of the liability of the family head has been retained. Among other things, this has led to the family head being liable for the delicts of majors, for instance. The question then is how this liability should be explained.

4.1 FAMILY HEAD CONTROLS THE JOINT ESTATE

One view is that the family head is liable because he has control over the group's joint estate. Support for this view is to be found in the original rule that the members of the group acquired property on behalf of the group and that the group was also liable for debts. It is, however, noteworthy that obligations arising from shop debts were excluded (*Sifuba v Mbaswana and Ntleki* 1 NAC (1909) 222).

In modern indigenous law this view is no longer acceptable. In the first place, majors today mostly have their own estates. For example, section 13 of the Code of Zulu Law stipulates that any person may acquire movable property and, with certain reservations, immovable property as well. In the second place, it is questionable whether the family head should be held liable for the delicts of a minor in cases where he is neither the father nor the guardian of such a minor.

4.2 THE GROUP ACCEPTS LIABILITY

Another viewpoint is that the group accepts liability for the actions of its members. The family head is then liable because he represents the group. This view rests on the so-called group responsibility found among the indigenous peoples.

While this viewpoint is based on the original position of group responsibility it does not explain why the emphasis falls on residence and not on group membership.

Some elements of the principle of group membership are found among the Mpondo, where a family head could release himself from liability for the delicts of a non-related resident by delivering a *mgqoba* beast to the father or guardian of the wrongdoer (Bekker 86).

In present circumstances there is a strong tendency among family heads not to accept responsibility for the delicts of adult, unmarried sons. In tribal courts at present such sons increasingly tend to be held liable for their delicts. This tendency was not echoed in the former Commissioner's Courts, apparently because of the *stare decisis* rule. The situation thus arises that the principles of indigenous law may be invoked to hold family heads liable for the delicts of adult sons despite their clear non-acceptance of such liability.

4.3 THE FAMILY HEAD EXERCISES CONTROL OVER THE RESIDENTS

According to this viewpoint, the family head exercises control over the residents in the family dwelling. This approach reflects something of the original position in indigenous law, where the group exercised control over its members.

The position in modern indigenous law has, however, been amended so that the family head's control is limited to unmarried residents, minors and his own wives. The family head therefore no longer has control over all the residents, although residents owe him obedience in family matters (Codes of Zulu Law, s 22).

This viewpoint bases the family head's liability not so much on his control as on his lack of control. In such a case, the family head should be held liable only if the resident is actually resident in the family dwelling. Therefore he should not be liable for residents who are temporarily absent.

Furthermore, in particular cases the family head should be able to raise the defence that he did exercise proper control in the case in question. The steps which a Mpondo family head may take to indemnify himself against liability would, however, remain unexplained in such a case.

4.4 THE FAMILY HEAD IS VICARIOUSLY LIABLE

Various writers (Van den Heever 219 footnote 1) have also described the family head's liability as vicarious liability. Vicarious liability is a phenomenon which occurs in an employer-employee relationship. Furthermore the employer and employee are liable *in solidum* for the employee's delict, which must have been committed in the execution of his duties or while in his capacity as an employee.

The relationship between the family head and the residents is not analogous to an employer-employee relationship. Moreover, the family head and the wrongdoer are not liable *in solidum*.

4.5 THE FAMILY HEAD IS JOINTLY LIABLE

The term "co-liability" can also refer to a co-principal or accomplice. The concern here is not with the family head's complicity. For this reason the term "joint liability" should be avoided. Labuschagne and Visser ((1975) 159–165; (1976) 140–149) describe the family head's liability as accessorial. By this is meant that the family head is liable in addition to the liability of the wrongdoer. The authors in question do not, however, explain the meaning they attach to "accessorial".

To describe the family head's liability as "accessorial" apparently avoids the implications of complicity. It does not, however, contribute to an explanation of the basis of the family head's liability. In practice, a major unmarried resident can be sued alone. Non-joinder of the family head as co-defendant would not exclude a verdict against the wrongdoer in spite of the fact that the family head can potentially be held liable. Nor is the family head's liability ancillary in the sense of additional. "Accessorial" also carries the meaning of "ancillary to" in the sense of being subordinate. However, the family head's liability is not subordinate to that of the wrongdoer.

4.6 THE FAMILY HEAD'S LIABILITY IN MODERN CIRCUMSTANCES

With the exception of vicarious liability, all the abovementioned viewpoints contain elements of truth. However, none of the above viewpoints is totally satisfactory. Why not?

In our opinion all these points of view to a greater or lesser degree isolate the family head's position in original indigenous law as an immutable principle. However, the amendments to the status of residents are readily recognised. Thus the indigenous principle of liability has not kept pace with changes in indigenous law. In the course of time the rigid indigenous principle has given rise to inequities. We may, in all justification, ask whether the time has not arrived for the family head's liability to be limited to the delicts of his minor children and dependants. Something of this is also apparent from the provisions of section 102 of the Code of Zulu Law although the residence requirement is still adhered to.

SELF-EVALUATION

1. Discuss the degree of liability of a family head for the delicts of members of the family. (15)
2. Discuss the basis of a family head's liability for the delicts of family members. (25)
3. Evaluate the following statements and justify your answers fully:
 - 3.1 A claimant can institute an action against the family head even after he has obtained judgement against the wrongdoer. (5)
 - 3.2 A family head's liability for delicts of family members is based on his control of the family estate. (5)
 - 3.3 A family head's liability for delicts of family members does not take the majority status of family members into account. (5)

LECTURE 3

Specific African customary law delicts

Recommended reading

Bekker JC *Seymour's customary law in Southern Africa* (1989) 342–349, 364–377

OR

Olivier NJJ, Olivier WJ & Olivier NJJ (jr) *Die privaatreë van die Suid-Afrikaanse Bantoetaalsprekendes* (1989) 308–397

STUDY OBJECTIVES



After having studied this lecture you should be able to:

- classify the delicts in terms of indigenous law of delict
- discuss infringement of property rights
- discuss infringement of personality properties
- discuss adultery as a delict in indigenous law

1 INTRODUCTION

In this lecture we confine our attention to a few specific delicts we have chosen. The data given must be supplemented by information from the prescribed reading. You must ascertain what rights are infringed through a particular delict and what the relief is in each case. Where information is available, you must also establish what ground for justification would exclude unlawfulness in a particular case and what form of guilt is required.

2 CLASSIFICATION OF DELICTS

We have described a delict as an unlawful infringement of a right. It should therefore be possible to classify delicts by using the objects of the various rights as a starting point. Accordingly, we would be able to classify delicts into those which have a bearing on estates and those which have a bearing on personality.

This basic classification is not without problems, however. In practice, it frequently happens that a single unlawful act infringes on more than one right. Unlike South African common law, indigenous law does not have separate actions for patrimonial

loss and *crimen iniuria*. Furthermore, it is not possible to deduce from the action which right has been infringed. The nature and scope of the compensation as well as the utilisation thereof sometimes give an indication of the rights which have been infringed.

We may classify the delicts in indigenous law as follows:

- Infringement of the estate
 - loss of property: for example, theft, damage to property, trespass
 - infringement of guardianship: for example seduction, adultery, killing, abduction, kidnapping, enticement
- Infringement of personality properties
 - infringement of the body: for example assault
 - infringement of a person's honour and good name: for example defamation

Delicts such as seduction, adultery, abduction, kidnapping and enticement may, in certain circumstances, result in infringement of guardianship and infringement of a person's honour and good name. You will note that these delicts are all concerned with man as a person. Thus it is not possible to make a simple classification of the delicts in indigenous law.

3. INFRINGEMENT OF PROPERTY

3.1 TRESPASS

A person who has been allotted land for cultivation is not obliged to fence in his fields. Should he neglect to do so, this is not regarded as contributory negligence. There is no action for trespass by cultivation if it has occurred accidentally, but there is an action for wilful or negligent entry (*Rashu v Rashu* 1948 BAC (C & O) 2).

Section 97 of the Code of Zulu Law lays down that trespass on cultivated land does not found an action for damages unless accompanied by special damage.

3.2 THEFT

Theft seems to be a delict among all Bantu-speaking peoples. Sometimes the thief has to pay back several times the value of the stolen property. Among some Tswana it is twice the value while among the South Sotho it is as much as four times the value.

Stock theft, especially theft of cattle, is regarded in a very serious light and generally also punished as a crime. Among the Pedi, for example, all the thief's cattle are confiscated in the case of stock theft.

There is no agreement as to why the compensation exceeds the value of the stolen property.

Some writers believe that the compensation includes satisfaction for shock, trouble and dismay. Other writers deny that there is an element of satisfaction. In our view compensation does include an element of satisfaction, especially in the case of cattle theft. Cattle are not only a sign of economic welfare but have a special place in religious life. Some groups even refer to the beast as “the god with the wet nose” because it is the chosen sacrifice to the ancestors. To steal someone’s cattle, therefore, amounts to contempt for his ancestors and thus to impairment of his honour.

3.3 DAMAGE TO PROPERTY

Here the word “property” must be interpreted as anything, whether movable or immovable. Trespass as dealt with above is consequently also a form of damage to property.

As a general rule it may be stated that damaging the property of another is a delictual act. We distinguish between damage done by animals and damage done by people.

3.3.1 DAMAGE DONE BY ANIMALS

Damage may be done by animals in the dwelling area, for example a goat may come and eat blankets. The owner of the animal must usually replace the damaged article. Animals often damage crops in the fields. Usually if the owner of the stock is known, he is immediately informed so that he can inspect the damage.

If one animal has killed or injured another animal, the owner of the former animal must pay compensation. If the second animal is killed it must usually be replaced. Damages are payable only if the owner knew that the animal had violent tendencies and neglected to take the necessary precautions, such as failure to separate vicious animals from the rest or to blunt the horns of a beast after having been warned that the beast was vicious. Since a stallion is excitable by nature during the mating season and may become vicious, the owner may leave it on the commonage without incurring liability. The owner of a stallion should, however, take precautionary measures if the animal is an unusually vicious one.

3.3.2 DAMAGE DONE BY PEOPLE

Any person who damages the property of another can be held liable for damages. In *Tsalinkabi v Matete et al* (4 NAC 30) the assessors intimated that damages are payable even where no damage is proved. Perhaps this viewpoint should be qualified. Originally the damaged article had to be replaced. At present, money is also used as compensation.

No liability is incurred by damage caused accidentally. Intent or negligence is a requirement for liability. A person who wilfully or negligently causes a grass fire is liable for the damage caused. Among the Mpondo no liability is incurred if a child causes a grass fire. If an adult causes such a fire while smoking he escapes liability if he takes immediate steps to extinguish the fire.

Since cooking is done mostly in the open, a fire caused by a gust of wind blowing through the cooking place is regarded as an accident provided the person in charge takes steps to quench the fire.

Wilful or negligent injury of cattle when herdboys overdrive, stone or unmercifully beat the animals renders the herdboys liable either severally or jointly with their father, guardian or family head.

The seizing of *intlonze* as evidence is not limited to cases of adultery. An exhibit may be taken forcibly from any wrongdoer and retained by the plaintiff for the duration of the trial. The article may be damaged during the seizure of the *intlonze*. The owner of the article is probably not entitled to damages unless the bounds of reasonableness in the taking of the *intlonze* have been exceeded. What grounds for justification apply here?

4 INFRINGEMENT OF PERSONALITY PROPERTIES

4.1 INFRINGEMENT OF THE BODY AND HONOUR

Body

The body may be injured physically through assault and killing. The violation of the body includes causation of anxiety, sorrow, fright, consternation and trouble.

Honour

Honour or dignity may be injured by various forms of insults. Such injury may include pollution. Thus the killing of a member of an agnatic group also injures the honour of the group, because of the pollution brought by death. Insults may include cursing, such as saying "that a woman will bear her father-in-law children". Insults would also include swearing, the neglect of avoidance taboo (*hlonipha*), the offence of accusations of witchcraft and verbal allegations (for example, that someone is a sorcerer or adulterer). Honour includes good name or reputation in addition to privacy in the sense of peace in the home.

4.2 INFRINGEMENT OF THE HONOUR AND GOOD NAME

The honour and good name of a person or group are in question particularly in cases of defamation. It would seem from the ethnographic data that indigenous peoples do not distinguish clearly between defamation and insult. There are indeed indications that defamation leads to an action among most peoples.

5 INFRINGEMENT OF GUARDIANSHIP

As you are already aware, guardianship is a patrimonial right in indigenous law. Infringement of guardianship thus leads to an action for damages. Since this involves authority over people, the possibility of infringement of rights of personality is not excluded. Accordingly, besides the right of guardianship, acts such as seduction, adultery, abduction and kidnapping often touch upon the

honour and good name of the group.

We are not going to deal with all the possible acts which amount to infringement of guardianship. We shall confine our attention to adultery. Make notes from the prescribed textbooks on adultery as a delict in indigenous law. It is not necessary to go into all the variations found among the different groups. Restrict yourself to the main principles. Take particular note of the following:

- a definition of adultery
- the distinction between adultery with
 - a woman in a customary union
 - a widow
 - a woman in a civil marriage
- proof of adultery
- acts of adultery
- scope of compensation in cases of adultery
- defences

Has a man in a customary union an action against a non-black who commits adultery with his wife in the customary union? What would the position be should the customary union be recognised as a lawful marriage?

SELF-EVALUATION

1. Explain the classification of delicts in terms of indigenous law of delict. (8)
2. Discuss damage to property as a delict in indigenous law. (15)
3. Discuss the infringement of personality properties in indigenous law. (10)
4. Discuss infringement of indigenous guardianship with reference to adultery. (10)

LECTURE 4

SECTION B: Contracts

The nature of contracts in African customary law

Recommended reading

Centre for Indigenous Law *Indigenous contract in Bophuthatswana* (1990) 6–20
Myburgh *Papers on indigenous law in Southern Africa* (1985) 15–16, 54–55, 109–110

Olivier et al *Die privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes* (1989) 610–630, 636–640

Schapera "Contract in Tswana case law" *Journal of African Law* (1965) 9(3) 142–153

Whelpton *Die inheemse kontraktereg van die Bakwena ba Mogopa van Hebron in die Odi I distrik van Bophuthatswana* LLD thesis Unisa (1991)

STUDY OBJECTIVES



After having studied this lecture you should be able to

- describe the nature of the indigenous law of contract
- discuss the elements of an indigenous contract
- evaluate the basis of contractual liability
- discuss breach of contract and remedies for relief
- explain the parties to a contract
- discuss the termination of an indigenous contract

1 INTRODUCTION

Generally the law of contract comprises those rules of law which apply to the conclusion and consequences of contracts. These include the rights and duties of the contracting parties resulting from the contract. These rules form the basis of contractual liability and determine the requirements contracts should meet in order to be valid. The law of contract also determines when a contracting party is guilty of breach of contract, what legal remedies are available to an innocent party and how patrimonial rights stemming from a contract are terminated.

It is possible to identify general principles and different contracts in indigenous law. The individual character of each contract must always be borne in mind since

a contract in indigenous law is more than an instrument enabling one to participate in economic and legal life. Indigenous contracts primarily emphasise the relations between people rather than the objects of performances. Although in indigenous law the reasonable expectations of the parties are fulfilled, contractual justice lies mainly in “bartering justice”.

“Bartering justice” can be illustrated by the following example: X and Y enter into an agreement in terms of which X has to give four head of cattle as compensation for repairs to X’s house by Y. Nothing is said about the condition or gender of the cattle. Y satisfactorily completes the repair work and X delivers the cattle. However, one of the animals is a cow that is in good condition but blind in one eye; the second is a young ox and the other two are thin heifers. The question that arises is whether X’s performance is in compliance with the requirements of the contract. According to indigenous law, X’s performance would be acceptable since the calves can still grow and become fat, while the cow with the blind eye can still breed and give milk. In this regard, compare the following Tswana maxim: *lemme ga le bolae go bolaya lefifi* (“ugliness kills not, darkness kills”).

In indigenous law the element of debt, rather than the element of right, is seen as the most important. Therefore, in the case of breach of contract, a creditor is not entitled to damages in the form of the reimbursement of his expenses incurred in anticipation of counter-performance by the debtor. If the indebted party repays what he has received, he cannot be held liable to fulfil his own obligations under the terms of the contract; in other words, it is not a requirement that consequential damages should also be compensated.

Most contractual disputes are resolved within the recognised dispute settlement forums by means of negotiation and mediation. Thus, indigenous law of contract also gives expression to community values or the general moral code of the community. Although the indigenous law of contract is showing clear signs of adapting to new developments, there is also proof that established legal principles and human values are being retained (Whelpton 66–76).

2 DEFINITION OF AN INDIGENOUS CONTRACT

There is no general definition of a contract in indigenous law. With regard to the Batswana of Botswana, Schapera (“Contract in Tswana case law” 1965 *Journal of African Law* 142) describes a contract as follows:

A contract in Tswana law is, basically, a voluntary agreement (*tumalano*) between two parties, imposing obligations upon one (or both) and reciprocally conferring rights upon the other (or both). Both the obligation and the reciprocal right are described by the same term *tshwanelo*, for which the most suitable English translation is “due”.

The problem with this definition lies in the translation of *tshwanelo* as “due”, that is to say payable or claimable. The word *tshwanelo* is derived from the auxiliary verb *swanelo*, which can translated as “ought to”. The concept of *tshwanelo* does not imply an element of force or obligation, and should therefore not be related to payable (Whelpton *Die inheemse kontraktereg van die Bakwena ba Mogopa van Hebron in die Odi I distrik van Bophuthatswana* 1991 69).

In terms of indigenous law entering into a contract is one method of acquiring rights and duties in a concrete manner. Originally contracts were entered into between agnatic groups in the presence of witnesses. Currently contracts are also put in writing to serve as proof in the case of a dispute. Recording of a contract in writing is, however, not a requirement for a valid contract.

According to indigenous law, contractual liability stems from agreement plus performance or part performance by one of the parties. A mere agreement is not sufficient to establish contractual liability as it does not give rise to a relation of mutual obligation between the parties. However, as soon as a party has performed in terms of an agreement, he cannot reclaim his performance on the ground that it was not due. Such an obligation is not claimable, however, until one of the parties has performed in full or in part. The Bakwena ba Mogopa explain this legal principle with a legal maxim, *lentswe la maabane ga le tlhabe kgomo* (yesterday's word does not slaughter an ox). In other words, no legal consequences stem from an agreement alone. The parties can change their point of view at any time. This principle is expressed in the saying *motlhalefi o fetola mogopolo wa gagwe* (a clever man changes his mind) (Whelpton 70).

This principle gives rise to the question whether a party can be compelled to accept performance on the ground of the agreement alone. Prinsloo and Vorster (*Indigenous contract in Bophuthatswana* 10) are of the opinion that in indigenous law a mere agreement is not without legal consequences, at least in the sense that a party can be compelled to accept performance when it is offered.

3 REQUIREMENTS OF INDIGENOUS CONTRACTS

An agreement to create obligations does not necessarily create obligations. An agreement directed at the creation of obligations should meet several requirements before it is binding and creates an obligation. These requirements are consensus, capacity of the parties to contract, lawfulness, possibility of performance, determinable performance and various formalities.

With regard to the *Bakwena ba Mogopa*, Whelpton (81–109) mentions the following requirements:

- There must be consensus.
- Performance must be possible.
- Performance must be determinable.
- Contracting, performance and the aim of the contract must be lawful.
- Performance or part performance must be delivered.
- The parties must have contractual capacity.
- The prescribed formalities must be met.

LECTURE 5

Parties to a customary contract

Recommended reading

Centre for Indigenous Law *Indigenous contract in Bophuthatswana* (1990) 21–25.

Whelpton *Die inheemse kontraktereg van die Bakwena ba Mogopa van Hebron in die Odi I distrik van Bophuthatswana* LLD thesis Unisa (1991) 113–138.

STUDY OBJECTIVES



After having studied this lecture you should be able to

- describe the capacity of parties to enter into indigenous contracts
- evaluate the involvement of third parties in indigenous contracts
- evaluate the possibility of substituting parties to an indigenous contract

1 INTRODUCTION

In this lecture the emphasis is on the acting parties involved in indigenous contracts. We consider the question whether it is possible to involve more than two parties in an indigenous contract. In this regard we deal with representation and stipulation in favour of a third party. We also consider whether it is possible to replace or substitute parties to an existing contract. Reference is made to phenomena such as cession, delegation and assignation.

2 CAPACITY TO CONTRACT

According to original indigenous law, the family and the household were usually the acting parties. Individuals were not independent bearers of rights and duties and therefore could not enter into contracts as individuals. Status factors such as age, sex and the mental state of individuals were therefore not decisive; membership of the agnatic group was important, however.

At present the emphasis is rather on the individual. All persons who are majors and of sound mind can lawfully enter into contracts. Minors, that is minor children, have no capacity to contract and must be assisted by their guardians. In terms of section 15 of the Code of Zulu Law, a minor in KwaZulu-Natal may enter into a valid contract only with the consent or assistance, implicit or explicit, of his guardian. However, if it is proved that a contract entered into by a minor without the required consent or assistance is to the advantage of such minor or of the

household to which he belongs, the contract is valid. In such a case the minor or his household is not expected to perform in terms of the contract. However, in the case of the household, the question arises whether it is a matter of advantage or of undue enrichment. We submit that in such a case the household and family head should have quasi-contractual liability on the grounds of enrichment.

With the aid of the compulsory reading, ensure that you are able to name and describe the categories of persons with contractual capacity according to original and modern indigenous law, name the general principles with regard to the contractual capacity of the family, the agnatic group or household, individual members of the household, a married woman, a drunk person, and a lunatic. Keep in mind that the capacity of a married woman in a customary marriage has been amended by the Recognition of Customary Marriages Act 120 of 1998.

3 INVOLVEMENT OF THIRD PARTIES IN INDIGENOUS CONTRACTS

3.1 INTRODUCTION

We have indicated that according to indigenous law an obligation creates a legal relationship in terms of which the contracting parties can claim performance in terms of the contract. We also indicated that an obligation involves a relationship between two parties. The question arises whether in indigenous law it is possible to have more than two parties involved in a contract.

3.2 REPRESENTATION

From your study of the law of contract in general, you should know that in a transaction between X and Y it is possible for X to act, not in his own name but as a representative of or substitute for a third person C; in other words X acts on behalf of C. The intention of X and Y is to create a legal tie between Y and C with immediate effect. Once an agreement is reached, X is no longer involved. X can derive his power to represent C from an explicit instruction by C or from the law (eg where a guardian acts on behalf of a minor).

The available sources are not unanimous on whether representation occurs in indigenous law. De Clercq et al (*Report on the indigenous law of the Matenjwa tribe of the Ingwavuma district in KwaZulu* 1985 96) maintain that it is unknown to the Matenjwa (Zulu). Coetzee et al (*Privaatreg van ses Tswanastamme in die Republiek van Bophuthatswana* 1985 145), however, hold that representation often occurs among the Tswana and cite the conclusion of a marriage as a well-known example of representation. Whelpton (121), however, is of the opinion that representation as known in Western legal systems is unknown to the Bakwena ba Mogopa, who are also a group of Tswana.

One would probably be able to make out a case that the keeper and intermediary are examples of representation. Where a family head is absent from the household for a while and nominates a non-relative as keeper, he would be bound as principal by the contracts of his keeper even if he was not present at the conclusion of

the contract. If a relative (usually the successor) is appointed as keeper, it would not amount to representation. A relative who is appointed as keeper is in fact a member of the agnatic group and, like the family head, only acts as its mouthpiece. Therefore, the successor (or relative who is part of the agnatic group) does not act as representative. In our opinion the intermediary during the conclusion of a marriage would probably not constitute representation for the same reason.

Where a non-relative is used as an intermediary, for example in negotiations about *lobolo*, claims for additional *lobolo*, and claims arising from seduction, the agreement is binding on the principal even if he was not present. However, the question can be raised whether this phenomenon does not refer to mandate rather than to representation.

It seems, therefore, that representation as known in Western legal systems is not known in indigenous law.

4 SUBSTITUTION OF CONTRACTING PARTIES

According to indigenous law the substitution of contracting parties should be distinguished from the substitution of an employee. Since indigenous contracts are entered into between agnatic groups, individual members of the groups involved can fulfil the duties without entering as independent parties to the contracts. Where one member of the group stands in for another member in a service contract, it is still the group that fulfils the duties under the contract as a party to it.

SELF-EVALUATION

1. Discuss the capacity of parties to enter into indigenous contracts. (15)
2. Evaluate the viewpoints regarding the substitution of contracting parties in indigenous law. (15)

LECTURE 6

Specific African customary law contracts

Recommended reading

Bekker *Seymour's customary law in Southern Africa* (1989) 90–92, 134–140, 160, 242–246, 333–338.

OR

Olivier et al *Die privaatreë van die Suid-Afrikaanse Bantoetaalsprekendes* (1989) 80–95, 151–154, 551–562, 576–577.

AND

Centre for Indigenous Law *Indigenous contract in Bophuthatswana* (1990) 28–60, 69–72.

STUDY OBJECTIVES



After having studied this lecture you should be able to

- discuss the elements of particular indigenous contracts
- evaluate whether particular contracts are known to indigenous law of contract

1 INTRODUCTION

In this lecture we deal with a few aspects of some contracts. You are required to study the prescribed contracts in detail from the textbooks.

Use the general principles discussed in lectures 1 and 2 above as a framework and always bear in mind the particular nature of indigenous law of contract. Note, for instance, the role of consultation, the role of kinship and that of the kinship group, the polygynous nature of the indigenous marriage, and the concrete nature of indigenous contracts.

2 THE GIFT

A gift is a unilateral contract but a multilateral legal act. A contract is unilateral when only one party undertakes to perform the duty.

In indigenous law the giving and receiving of gifts can stem from various motives, for example to perpetuate kinship or friendship ties, to pay respect or to show

gratitude. Subject to the general principles of indigenous law of succession and the patrimonial ties within the household and between the constituent houses, a family head is free to transfer property from the general estate to any individual by means of a gift. Nowadays a person having full contractual capacity can also donate his or her personal property to another.

Some people distinguish between conditional and unconditional gifts. A conditional gift means that it is made subject to a stipulation of some kind. For example, the Tswana distinguish between an unconditional gift (*mpho*), where ownership of the gift is immediately transferred to the recipient, and a conditional gift (*tshwaisô* or *setshwalô*), where ownership of the gift is only transferred to the recipient at a later stage, for example after the death of the donor.

We already know that real contracts are typical of indigenous law. The gift clearly illustrates this. The mere agreement establishes debt but no contractual liability. Thus the donee cannot institute an action against the donor for delivery. Delivery of the gift makes the agreement a contract and at the same time satisfies the obligation. The donor cannot reclaim the gift, since what is delivered, is what was owed.

Compile your own notes from the prescribed literature and pay particular attention to the following aspects of the gift:

- the categories of persons who can make donations
- the legal maxim *seyakgosing ga se boe*
- gifts that are forbidden

3 QUASI-CONTRACTS

In lecture 1 above we indicated that quasi-contracts refer to a phenomenon of law that does not satisfy all the requirements of a contract. In the case of quasi-contracts, liability arises from performance without agreement based on enrichment or *negotiorum gestio*. *Ukwethula* is an example of enrichment and *isondlo* of *negotiorum gestio*.

3.1 UKWETHULA

Section 1(1) of the relevant codes of Zulu law defines *ethula* as a custom whereby a junior house incurs an obligation for the repayment of *lobolo* taken from a senior house to establish the particular junior house. The *lobolo* for the eldest daughter of the particular junior house is indicated as the source from which the debt must be discharged. This custom is not recognised as being applicable to the handing over of the *ethula* girl herself as pledge for the payment.

In general, *ethula* property is not legally claimable. Why not? The reason is that it concerns a debt between two houses of the same household. In a court action, the family head would have to represent the plaintiff as well as the defendant. Compliance with this custom is also optional in most cases, but the custom may give rise to a debt and an indication may be given of the source from which the debt could be settled. Where there is an agreement between the houses concerned, the duty is contractual. Where there is no agreement, the duty is of a quasi-contractual nature on the basis of enrichment.

The duty to return the *lobolo* which a family head supplies for the first wife of every son is also described as being quasi-contractual. The duty to return is only found among the Nguni peoples and, in the case of the Tembu, lapses upon the death of the family head.

From the prescribed literature and in the light of the background information given above, compile notes on the *ethula* custom.

3.2 ISONDLO

Indigenous law makes provision for the payment of compensation (Zulu-Xhosa:*isondlo*; Tswana:*kotlo*) to a person for the care of a child who is not a member of his group. In rare cases *isondlo* is payable in respect of the care of adults, for example mentally deficient persons.

The duty to pay *isondlo* may arise from an express agreement, in which case it is contractual. The duty can also arise from the circumstances of each case, for example, from *negotiorum gestio*, which would make it quasi-contractual.

Compile notes from the prescribed literature, paying attention to the following questions:

- Is *isondlo* comparable to the common-law concept of maintenance?
- Is *isondlo* claimable in all cases?

4 OTHER OBLIGATIONS

In this section we deal with a specific obligation based on performance which does not arise by reason of a contract or a quasi-contract. A quasi-contract refers to a phenomenon of law that does not satisfy all the requirements of a contract. In the case of quasi-contracts, liability arises from performance without agreement based on enrichment or *negotiorum gestio*.

Ukufakwa is defined by Bekker (1989 337) as “an agreement to pay a loan or debt from dowry to be received for a girl”.

Ukufakwa literally means “to be put into ...” In other words, the creditor is connected with the girl’s marriage goods.

In *Nobumba v Mfecane* (2 NAC 104) the court stated as follows in regard to this custom:

- *ukufakwa* applies where contributions are made in connection with the ceremonies connected with those of puberty (*ntonjane*) or marriage or other circumstances of women in which the contributor is *fakwaed* or put into the *lobolo* of the woman.

A relative of the girl’s father is thus “put into” the marriage goods and becomes a participant in the marriage goods if he contributed towards

- the girl’s puberty ceremonies, or
- the expenses of her marriage outfit, or
- the expenses of her marriage, or
- any other expenses to which the father usually has to contribute

In *Thomas v Ntantiso* (1945 NAC (C O) 38) the assessors were unanimous in their decision that the *ukufakwa* custom was not applicable to cash loans to settle shop debts. A contract according to which a defendant agreed to pay such a loan from the *lobolo* of his daughter is, however, enforceable as an ordinary contract.

In *Nkethleni v Mlanjeni* (4 NAC 368) the court stated that *ukufakwa* is a well-known contract and it was recognised by the then Transkeian courts. It requires similar proof in similar circumstances to any other contract.

In *Titi v Titi* (4 NAC 369) the assessors advised the court that should a man have a claim on the *lobolo* of a certain girl under the *ukufakwa* custom and the girl dies before her marriage, he has a claim on the *lobolo* of the next sister and so forth, until the last sister.

Sometimes, in order to settle a debt, a debtor designates damages or the *lobolo* expected to be received for a girl. This means that the creditor agrees to wait for the settlement of his debt until the damages or the *lobolo* for the girl has been paid. The girl's guardian receives the damages or *lobolo* and is obliged to settle the debt out of it. This designation is apparently analogous to constructive delivery. Performance is thus achieved by means of this designation.

In contrast to the position of third parties, the position of the creditor has not yet been argued in court. The creditor does not stand in a creditor-debtor relationship: he is "put in" as a participant in the debt to the degree to which he has contributed. If no *lobolo* is received, he receives nothing, despite his contribution since he also shares in the "nothing" received.

In our view *ukufakwa* is not a contract but is rather a form of performance. By means of designation, the plaintiff becomes co-owner of the *lobolo* if and when it is delivered.

SELF-EVALUATION

1. Discuss gift as an indigenous contract. (10)
2. Discuss *ukufakwa* as a legal phenomenon. (10)

ACTIVITY



A farmed out 8 head of cattle to B in terms of a *sisa* contract.

When A requested the return of the cattle together with their increase, B replied that he no longer had the cattle and undertook to repay his debt from the marriage goods (*lobolo*) he would receive for his daughter Z. After the death of A and B, A's successor claimed the 10 head of cattle B's successor received as *lobolo* for Z. B's successor pleaded that the debt had prescribed, that he had not received any goods from his father by succession and that he was not liable for his father's debts.) Discuss. (15)

STUDY UNIT 4

CUSTOMARY LAW OF THINGS

LECTURE 1

Customary real rights in movable property

Recommended reading

Bekker *Seymour's customary law in Southern Africa* (1989), 49–51

OR

Olivier et al *Die privaatreë van die Suid-Afrikaanse Bantoetaalsprekendes* (1989), 543–544

AND

Myburgh *Papers on indigenous law in Southern Africa* (1985), 89–91, 112

STUDY OUTCOMES



After having studied this lecture you should be able to

- distinguish various indigenous categories of rights over property
- discuss indigenous ownership of movable property
- describe indigenous ways of acquiring rights over movable property

1 INTRODUCTION

The law of things is that division of private law which defines property and sets out the rules and principles regarding rights in things. Rights in things are known as real rights.

Generally, various categories of real rights are known. Ownership is the most comprehensive real right, while other real rights are more restricted than ownership.

It would appear that ownership was the only real right originally known to the Bantu-speaking peoples. Among some peoples there were also phenomena which resembled pledge. However, the information on these phenomena is too limited to allow a pronouncement on their nature. More real rights are known in modern indigenous law.

In original indigenous law the vestees of rights, and thus also of real rights, were the agnatic group (household) and the house as division of the agnatic group. Property allocated to a house, or produced by the house, is known as house property. Property which is not house property and which belongs to the agnatic group is general property. We presume that you are familiar with the distinction between house and general property and with the control over each.

This distinction is important since house property cannot devolve by will (cf study unit 5: lecture 3).

In this lecture we deal with indigenous real rights in movable property. The legal position in respect of immovable property is dealt with in lecture 2 below.

2 OWNERSHIP OF MOVABLE PROPERTY

2.1 SUBJECTS AND OBJECTS

Corresponding to the distinction between general and house property, the subjects of ownership in movable property were pre-eminently the household and the house. It is not clear whether the individual could be the owner of movable property such as personal possessions, for example, clothes and weapons. It is known that certain objects, such as clothes and weapons as well, were of a personal nature. To our knowledge, such property could not form the basis of litigation between members of the agnatic group. Within the group the property is protected by various taboos.

The importance of general and house property is recognised in modern indigenous law. Personal property has, however, increased in importance.

All material objects except land may feature as objects of ownership in movable property. In original indigenous law stock, and cattle in particular, were the most important kinds of movable property. Although cattle are still important, objects such as furniture and household articles are perhaps more important today as movable property.

The respective Codes for Zulu law lay down the following (in section 114):

Traditional dwellings, commonly called huts, and constructed of thatch or wattle and daub, are by their nature not permanent structures, or are constructed in such a way that they can be readily be dismantled and removed for re-erection elsewhere, shall be deemed to be movable property.

2.2 CONTENT

The content of ownership in movable property is the power of the vestees of the right to dispose of it as they see fit, subject to restrictions which may be set by public and private law.

2.3 ACQUISITION

Ownership in movable property is acquired by:

- appropriation
- manufacture, breeding, or cultivation
- transfer

The former two ways of acquiring property are original ways. Transfer is a derivative mode of acquiring property.

- Appropriation is accomplished by taking possession of wild animals, wild plants or water, for example. Members of the tribe were free to fish, hunt and gather within the tribal area. As soon as a person had exercised this freedom the product became the property of his group, subject to certain conditions. For instance, among the Tswana, certain game animals might only be hunted by, or with the permission of, the traditional authority. In the past the chief, and sometimes also the ward head, had to be given a portion of the game as tribute. Examples of this are ivory and ostrich feathers. Game found dead in the veld usually belonged to the finder and his group. Lost property could presumably be claimed by the owners. Abandoned property probably became the property of the finder and his group. At present people in tribal areas are free to collect firewood, medicinal plants, water and building material on the commons.
- A person and his or her group have the ownership in things manufactured or grown by such a person or produced by the animals of his or her group. Such things might include woodwork, clay pots, the young of livestock, the yield of cultivated plants, and today also the interest on investments.
- Ownership in movable property can further be acquired by transfer in respect of transactions such as exchange, gift giving, purchase and service contracts, and the *lobolo* contract. It can also be acquired by transfer in the form of damages.
- Acquisition of property by prescription is unknown to indigenous law.

2.4 LOSS

Ownership in movables is lost by destruction, abandonment or transfer thereof. It can also be lost by forfeiture, or compulsory surrender thereof, for example as fines or damages.

3 OTHER REAL RIGHTS

To our knowledge ownership was the only real right in original indigenous law. The phenomena which resemble pledge were apparently a form of fiduciary transfer of property.

In modern indigenous law other real rights in movables can be acquired, largely by means of testamentary disposition, for example, usufruct of stock. These limited rights are not, however, governed by the rules of indigenous law, but by the rules of common law.

SELF-EVALUATION

1. Briefly distinguish between personal, house and family property. (7)
2. Discuss ownership of movable property in terms of indigenous law. (15)
3. Evaluate the following statements and justify your answers in full:

- 3.1 Various categories of real rights in movable property are known to indigenous law. (5)
- 3.2 In terms of indigenous law ownership in movable property can only be acquired by derivative means. (5)

LECTURE 2

Customary real rights in immovable property

Recommended reading

Kerr *The Customary Law of Immovable Property and of Succession* (1976)
25–80

Vorster *Grondbesit en Grondgebruik by die Bakwena Bamare-a-Phogole* (1981),
64–73

STUDY OBJECTIVES

After having studied this lecture you should be able to



- discuss indigenous rights in land
- evaluate the nature of indigenous rights in land
- discuss personal and praedial servitudes in land in terms of indigenous law
- discuss current land reform measures with regard to customary land rights

1 INTRODUCTION

Not much has been written on indigenous real rights in immovable property. Among others, the following writers have made a contribution:

Holleman (1949), Hughes (1972), Jeppe (1978), Kerr (1976), Pauw (1985), Prinsloo (1976), Schapera (1938, 1943), Sheddick (1954), Vorster (1981) and Van der Post (1984).

Holleman rightly points out that there is uncertainty in the textbooks, legislation and law reports regarding the original indigenous law governing land. These rules are, however, of practical importance since they still apply in rural areas. Moreover, the current land reform measures make provision for the protection of some of these rights.

Immovable property refers mainly to land and objects directly connected to it, such as plants and permanent structures. Section 114 of the respective Codes on Zulu Law lays down that traditional dwellings do not constitute permanent structures and are thus not immovable property.

2 RIGHTS IN LAND

2.1 OBJECTS AND SUBJECTS

The main object of rights in immovables is land. Objects directly connected to the land, such as plants and permanent structures, are included.

Originally tribal territory was divided into three main categories on the basis of the purposes for which it was used, namely:

- land for residential purposes
- land for cultivation purposes
- land for grazing and general use

Among all tribal communities land for residential and cultivation purposes was allotted to the various households. Each household had the use of this allotted land to the exclusion of other members of the tribe. The use of land was, however, subject to various restrictions. Land not allocated to households was controlled by the tribal organs of authority. Such land was available for the general use of members of the tribe but they could not acquire rights therein.

The legal position regarding land was thus briefly as follows:

- The tribal area as a whole was controlled by the organs of authority under public law; the nature of this control was dealt with fully in the introductory module on indigenous public law (IND203X).
- Land for residential and cultivation purposes was allotted to the various households of the tribe. From the land thus allocated each household could make further allotments to each of the constituent houses of the household. The household and its respective houses consequently acquired particular powers in respect of such allotted land.

2.2 CONTENT OF POWERS OVER ALLOTTED LAND

- The household and each house had exclusive, full and unhampered enjoyment and use of the land allocated to them and of the profit from that land.
- As controller of the land, the family head could allocate portions thereof to the constituent houses for their use. He could also transfer portions to unrelated members of the tribe or permit them to cultivate such portions.
- The household could approach the courts and organs of authority for the protection of their rights over the land.

2.3 ACQUISITION OF RIGHTS OVER LAND

Rights over land could be acquired in three ways. At this stage we leave open the question of the nature of these rights.

- Rights over land could be acquired by administrative (public law) allocation of a portion of the tribal area. This is an original way of acquiring property. As Kerr (1976 41–43) rightly remarks, the tribal chief's control over the allocation of land within the tribal territory is not that of an owner of that territory.

Within a ward, the ward head undertakes the allocation on behalf of the chief. The ward head acts as an organ of authority and not as an owner. A ward head allots land to a household when he has acquainted himself with the location and size of the available land and the need therefor, and is certain that another's rights will not be prejudiced by such an allocation. The household acquires rights over this allotted land to the exclusion of other households.

- Rights over land can be acquired by transfer as a derivative means of acquiring property. Among some Tswana people, a person can request a relative or even a friend to transfer land to him. No compensation is paid for the land. Among some Kgatla (Tswana) peoples, a heifer is paid for cleared land (cf Schapera 151-152; Vorster 69). This compensation should be seen as compensation for the labour involved in clearing the land. Among the Tswana it appears that the approval of the head of the jural community, for example the ward head, was not a requirement for transfer of land to a ward member. The ward head and the neighbours had to be notified, however. The neighbours could object to the proposed transfer if the intended transferees were quarrelsome or otherwise undesirable. If the transferors of the property ignored the neighbours' objections the latter could call upon the ward head to forbid the transfer. If the transfer were being made to a stranger, however, it was usual to obtain the prior approval of the head of the jural community.
- Rights over land can be acquired (in private law) by means of an allocation made to a particular house by the family head. Such an allocation is a form of derivative acquisition.

2.4 LIMITATIONS

The most important limitations on land allocated to a household are the following:

- Only members of the jural community concerned can become owners within the jural community. Members of another jural community, for example another ward, are excluded, except in regard to fields among the Tswana (Schapera 45, 145).
- When the vestees of the right leave the communal area permanently, the right is terminated and the head of the territory again has full power over it. If a subordinate jural community abandons its territory it again falls under the control of the inclusive jural community (cf Schapera 178, 182).
- In the public interest the right can be interfered with in cases where:
 - the land is required for a common purpose, such as grazing, the dwelling site of the ward or tribal head, or a borehole
 - the vestees of the right are moved away in the interests of public peace; this could happen, for example, if they persist in acts of trespass on the land of others or of rebellion or disobedience to the tribal authority
 - a household does not use a portion of their land (This presumably relates to the scarcity of arable land.)
- Members of a jural community are free to graze their cattle on stubble fields after these have been reaped (cf Vorster 71).
- Further general restrictions imposed by the community are that members of and strangers to the group may gather natural products and minerals and that members of the group and their cattle must be allowed free passage. It should also be mentioned that it is a requirement that the approval of the authorities

should be obtained for transfer of land, sinking a borehole on the land, gathering the harvest and, occasionally, for erecting fences.

- Among the Zulu a household has preference over land which borders on the land they have been allocated, that is, over their natural area of expansion. In our view this preference does not have to do with a right but rather with a rule of public law to which the organ of authority must adhere.

2.5 LOSS

Rights over land can be lost by transfer, abandonment by permanent departure and deprivation in public law such as confiscation and banishment.

3 NATURE OF RIGHTS IN LAND

There is no agreement in the literature on the nature of the rights which could originally be acquired over land in indigenous law. There are two main viewpoints, namely that ownership of land was originally unknown to indigenous law and, conversely, that it was known. In respect of the latter there is no agreement as to who the owner of the land was.

We will briefly analyse and evaluate these viewpoints. The view that the tribal head or the tribe was the owner or trustee of tribal land was dealt with comprehensively in the introductory module and will not be repeated here. We presume that you are familiar with the arguments presented.

3.1 OWNERSHIP OF LAND IS FOREIGN TO INDIGENOUS LAW

You will notice that neither Bekker nor the Oliviers discuss ownership of land (cf Bekker 49 and Olivier et al 543). Although the arguments supporting this view are nowhere specifically or systematically presented, the following are the most important:

- Individual rights in land were originally unknown.
- Land could not be sold or exchanged and thus had no commercial value.
- Land belonged to the tribal head or the tribe and was not subject to ownership.
- Land was subject to so many restrictions that the right cannot be described as ownership.

Let's briefly evaluate these arguments. The nature of a right is not dependent on the vestee thereof. It therefore makes no difference whether an object is owned by an individual or by a group of individuals jointly; the right remains ownership.

Sometimes the argument of individual rights is linked to the view that land is owned communally by the tribe and that members of the tribe only have "right of use" of the land. In other cases the members' use of the land is described in terms of usufruct. Members of the tribe have thus a limited real right in the land while the most comprehensive real right in land, namely ownership, is absent or is only vested in the tribal head or the tribe. We have already indicated in the introduction to indigenous private law (IND101S) that the tribal head or the tribe cannot be the owners of the land.

This leaves us with the question whether a limited real right can exist in cases where the most comprehensive real right is absent. In our view this is not possible because what right would limit the limited real right? The limitations in question are limitations in public law and not limitations arising from a real right.

The fact that land is neither sold nor exchanged does not indicate that it has no commercial value. Furthermore, the ban on the sale or exchange of an object does not mean that the object is not owned. Although land could not be sold under original indigenous law it could be transferred in other ways. The holder of the land therefore had the power to dispose of the land, although this power was limited.

3.2 OWNERSHIP OF LAND WAS KNOWN

Holleman rightly notes that the right over residential and arable land could be classified as ownership and, in fact, as "Bantu ownership". By this he indicates that ownership in land in indigenous law is not identical to ownership in other legal systems. The content of the rights in land is such that it can be described as ownership. Kerr (74–80) and Vorster (70–71) also come to the conclusion that the right over residential and arable land can justly be classified as ownership.

On the question of who the owner was, there is still no agreement. According to Kerr the family head as an individual was the owner. In our view, the agnatic group and, in fact, the household and the various houses were the owners of the said land. The members of the group shared in the rights in the land. In the course of time, under the influence of the Western legal system, the emphasis has shifted from group to individual rights. The principle of the group right in land is evident in the protection which a widow enjoys in respect of her deceased husband's land.

4 OTHER REAL RIGHTS IN LAND

According to Kerr (112–121) the claim of a widow to the use of residential and arable land arises from a personal servitude in her favour. In our view there was no question of servitude in original indigenous law. The widow's relationship with her deceased husband's family was not severed by his death. She thus remained a member of her house and as such shared in the ownership of her house and the house's lands as house property.

Kerr (111–112) also refers to praedial servitude and then to *umlimandlela* and *strata* as examples of such a servitude. *Strata* is a path which gives access to the cultivated fields and is a public path rather than an example of a praedial servitude. *Umlimandlela* refers to the unploughed strip between adjacent fields. The owners of the adjacent fields may cut thatching grass from the strip but neither they, nor anyone else, may cultivate it. Kerr is not certain whether or not this is a praedial servitude. In our opinion this strip is part of the adjacent fields. The power to cut thatching grass therefrom is that of co-owners. The prohibition on its cultivation is of a public law nature and disregard thereof is punishable as a crime. Fields were originally unfenced and the strip served to indicate the boundary between them. This reduced uncertainty regarding the position of boundaries and helped to restrict disputes (cf Vorster 1981 72–73). Here there is no question of a praedial servitude but only of the powers of co-owners arising from ownership.

It therefore appears that originally only one real right over land was known, namely ownership.

5 LAND REFORM MEASURES

Before 1994 the traditional land rights were amended by the Black Areas Land Regulations, Proclamation R188 of 1969. These regulations were promulgated in terms of section 25 of the Black Administration Act 38 of 1927. This section has since been repealed but the regulations still apply.

The regulations provided for the administration of land in tribal areas and two types of land tenure, namely permission to occupy and quitrent. Permission to occupy residential and arable land was granted by the local magistrate after consultation with the traditional authority. Traditional authorities have no power to grant such permissions to occupy. A register of such permissions is kept in the office of the local magistrate.

Quitrent land is mainly confined to areas in the Eastern Cape (the former Transkei and Ciskei). The regulations provide for the registration of a grant and transfer of quitrent, as well as the cancellation of title deeds granted under quitrent tenure. Quitrent tenure confers a better right to land than a permission to occupy since the latter is not registered in the deeds office.

The Upgrading of Land Tenure Rights Act 112 of 1991 made provision for a procedure to upgrade rights of quitrent and permission to occupy to full ownership by registration in the deeds office. Many people made use of the opportunity to convert their rights to land to full ownership.

Since 1994 the government's land reform measures include the upgrading of existing land rights, the improvement of security of tenure without upgrading existing rights, and also the introduction of new rights. The main purpose of these reform measures is to upgrade existing weak land rights and interests in land, and to improve security of tenure. We limit our discussion to the position of customary land rights in tribal areas.

The Interim Protection of Informal Land Rights Act 31 of 1996 also provides for the protection of "informal land rights". These rights include customary land rights, and rights of access, use and occupation of land in terms of custom. Since this Act also applies to tribal areas, the customary land rights described above are protected in terms of this right.

SELF-EVALUATION

1. Discuss indigenous rights in land critically. (20)
2. Discuss the nature of indigenous rights in land. (15)
3. Discuss the rights of a widow to land of her house and the household. (5)
4. Evaluate the following statements and justify your answers fully:
 - 4.1 Indigenous law recognises various kinds of rights in land. (5)

- 4.2 Indigenous law does not recognise ownership of land. (5)
- 4.3 Personal and praedial servitudes over land are known to indigenous law. (5)
- 4.4 Current land reform measures do not take account of customary land rights. (5)

STUDY UNIT 5

CUSTOMARY LAW OF SUCCESSION AND
INHERITANCE

LECTURE 1

General principles

Recommended reading

Bekker JC *Seymour's customary law in Southern Africa* (1998) 273–279, 297–303

OR

Olivier NJJ, Olivier WJ & Olivier NJJ (jr) *Die privaatreë van die Suid-Afrikaanse Bantoetaalsprekendes* (1989) 435–450, 484–487

Kerr AJ *The customary law of immovable property and of succession* (1976) 124–139, 208–218

STUDY OUTCOMES

After having studied this lecture you should be able to



- discuss the principles underpinning indigenous law of succession and inheritance
- discuss the order of succession
- discuss the rights and duties of the successor
- discuss the compatibility of indigenous principles of succession and inheritance with the Constitution

1 INTRODUCTION

Original indigenous law distinguished between two types of estates to which succession and inheritance were possible. These are separate house estates and general estates. A general estate is that estate which does not belong to a particular house but to the entire household. These types of estates are also recognised in modern indigenous law.

You will note that we refer to the law of succession and inheritance. In original indigenous law the control over the estate was not divided but went over to the successor, while property could be divided between members of the household. The successor succeeded to the position of the deceased in regard to his control over the members of the household as well as his control over the property of the house or household. Succession and inheritance were thus related to status and property. This principle is to some extent recognised in the statutes.

We assume that you know what is meant by personal, house and general property.

Please note that in the following general principles succession to family status and inheritance of property are discussed together as if they refer to one and the same

thing. In fact they do not, at least as far as contemporary African customary law is concerned. Although it is true that succession to family status almost always influenced inheritance to property in the past (*Mthembu v Letsela* 1997(2) SA 936 (T), and on appeal 2000 (3) SA 867 (SCA)), men and women are now treated equally for the purposes of inheritance (*Bhe v The Magistrate, Khayelitsha and Others* 2004(1) BCLR 27(C), and on appeal 2005(1) SA 580 (CC). Any reference to male primogeniture must therefore be taken as relating to succession only, and no longer to inheritance. The reason for this is that the successor succeeds to religious and cultural responsibilities to which constitutional limitations do not apply.

2 GENERAL PRINCIPLES

Make sure that you understand the following principles:

2.1 SUCCESSION AT DEATH

Originally, only the death of the family head was important for purposes of succession. As individuals, the other members of the household had no control over property. Their death had little effect on the control of the house and general estate.

In modern indigenous law individuals are competent to hold rights and to dispose of their own property. However, this does not necessarily mean that they are entitled to succeed to status positions within the household.

2.2 UNIVERSAL AND SINGULAR SUCCESSION

Succession was originally universal, and collective. This means that the whole estate, that is, the rights as well as duties, remained in the hands of the collective, under the new leadership of the successor. This succession stands in contrast to singular succession or succession to specific rights and duties. Usually singular succession is related to succession to ownership in specific things, which is also known to customary law.

Creditors are endangered by singular succession but not by universal succession. The former can at most entail the successor's liability to the extent of the deceased's assets, whereas the latter is not limited, since in this case the successor continues the personality of the deceased.

The universal succession of original indigenous law is presently only partly recognised. Make sure that you know to what extent it is recognised.

2.3 SPECIAL AND GENERAL SUCCESSION

Special succession is concerned with succession to control over members of a particular house and the house property. General succession is concerned with succession to control over members of the household and the general property of the household.

Traditionally succession to status positions was limited to males in the patrilineal. A woman could not succeed to a status position in original indigenous law. Furthermore a person could not succeed through a woman with the exception of the case of a son of an unmarried woman who could succeed to a status position in his mother's family.

2.4 SUCCESSION ACCORDING TO THE RIGHT OF PRIMOGENITURE

The eldest male descendant (son) of a deceased is his successor. In the case of house succession, it is the eldest son of the house. In the case of general succession, it is the eldest son of the main house.

3 RIGHTS AND DUTIES OF THE SUCCESSOR

The person who succeeds the family head, whether as a general or house successor, has the same rights and duties in respect of these estates as the deceased. The rights and duties of a successor in a particular house may be summarised as follows:

- He must support the widow and other members of the house; the property must be managed in consultation with the widow and she can take steps against him if he dissipates the property.
- He must provide marriage goods for the first wife of each son of the house, and he must furnish daughters with marriage outfits.
- He must ensure that all debts are covered.
- He can be held liable for the delicts of members of the house.

The general successor, or new family head, is empowered with the abovementioned rights and duties in respect of the house or houses to which he has succeeded. In addition, he acts as the new family head and as controller of the general estate in the place of the deceased. In this capacity he has essentially the same functions as the deceased although he has less authority over the deceased's families. He is liable for the debts of the deceased regardless of whether the liabilities exceeded the assets. Where debts are entered into on behalf of a particular house he can recover the debts from the house in question. He is also liable for the delicts of the members of the household.

5 THE SUCCESSOR'S LIABILITY FOR DEBTS

Succession was originally universal and collective. Furthermore, succession was a duty which the successor could not refuse. The principle was thus that the successor had to settle all his predecessor's debts, even if the deceased had left no assets. This principle has been amended in modern indigenous law so that succession is no longer fully universal. However, the principle that succession is a duty is still recognised.

The successor might not be liable for a debt arising from a mere business transaction unless the deceased has left some assets. The reason for this would be that the debt did not arise from a transaction typical of indigenous law.

SELF-EVALUATION

1. Discuss the principles underpinning indigenous law of succession and inheritance. (20)
2. Discuss the rights and duties of a successor in indigenous law. (15)
3. Discuss the compatibility of indigenous principles of succession and inheritance with the Constitution. (15)

LECTURE 2

Factors influencing the customary rules of succession

Recommended reading

Bekker JC *Seymour's customary law in Southern Africa* (1989) 279–294, 303–306

OR

Olivier NJJ, Olivier WJ & Olivier NJJ (jr) *Die privaatreë van die Suid-Afrikaanse Bantoetaalsprekendes* (1989) 450–463, 474–483

Kerr AJ *The customary law of immovable property and of succession* (1976) 139–158

***Sigcau v Sigcau* 1944 AD 67**

STUDY OUTCOMES



After having studied this lecture you should be able to

- discuss factors which may counteract the strict application of the rules of succession
- discuss ways to provide for a successor in a house
- discuss the legal significance of disinheritance

1 INTRODUCTION

In lecture 1 above, we stated that succession is a duty in indigenous law and that it is universal and takes place according to a particular order of succession. We have already indicated that sons are ranked in a particular order according to which they are considered for succession. However, there are other factors which influence the rules of succession. In this lecture we deal briefly with factors that could counteract the strict application of the rules of succession. On the one hand, we will be looking at customs which allow the property to be divided to a certain extent and on the other, at customs which have the effect of excluding a particular successor from the line of succession. Thus we will be dealing with ways of circumventing the strict application of the rules of succession and inheritance as well as with a way of interrupting the line of succession.

2 DISPOSITIONS

Although succession and inheritance in indigenous law follows a fixed pattern, during his lifetime a family head can use certain methods to favour a particular relative or to influence the choice of his successor in a particular house. These methods are presently still recognised as valid. We will only deal with some of these.

2.1 ALLOCATION OF PROPERTY

One form of an indigenous will among the Bantu-speaking peoples is the provision that a family head can make reasonable allocations of property to various members of his family before his death. This has to be done in a manner that will not prejudice the successors in the various houses. For instance, he cannot allocate the property of one house to another or make an allocation that will impoverish a house. Neither can he make an allocation which has the indirect consequence of “disinheriting” a legitimate successor. In all cases the allocation has to be made in a formal manner, namely before relatives and other witnesses.

An allocation can come into immediate effect during the family head’s lifetime as a disposition *inter vivos*. However, the allocation can also come into effect only after the family head’s death as a disposition *mortis causa*. An allocation can be made at any time and it is not necessary that it should be made just before the family head’s death, that is, on his deathbed.

Testamentary dispositions are now commonly found. A family head can dispose of certain property by means of a will (cf lecture 3 below). He may even “disinherit” a legitimate successor by a testamentary allocation of all his property to someone other than his legitimate successor. Note, however, that this development is in conflict with the principle of collective ownership of family property, and is a distortion of African customary law.

2.2 ADOPTION

According to this custom, the son of another family outside the household is formally adopted so that the household can acquire a successor. The adopted son cannot, however, exclude a legitimate son born later on. The Zulu do not recognise adoption for the purposes of succession.

2.3 TRANSFER OF A SON

According to this custom, a younger son of one house can be transferred as a successor to another house which has no successor. This procedure requires a formal meeting of the family council. Such a son will succeed in the house concerned, unless a son is born to that house later on, see *Sigcau v Sigcau 1944 AD 67*.

2.4 SEED-RAISING

If one of the wives is past the age of childbearing or for any other reason has borne no successor, the family head may marry another wife as a “seed-raiser” and place her in the house lacking a successor. A son from this woman then becomes the successor in the house concerned, provided that the first wife has not borne a son.

A family head cannot place a “seed-raiser” in a house which has a successor, even if the wife of that house is past childbearing age. Neither may the family head place a “seed-raiser” in an affiliated house (*qadi* house) since this would amount to creating a *qadi* for a *qadi*. Indeed, the purpose of affiliating houses is to ensure a successor for the main house. In cases where a *qadi* house has no successor, the successor of the main house to which the *qadi* house is affiliated succeeds in that *qadi* house also.

It would appear that no formal declaration is required when a family head places a “seed-raiser” in a house. He only needs to advise his family circle.

2.5 THE UKUNGENA CUSTOM

Since the widow keeps her status of “wife” after her husband’s death she is also expected to bear children for his family. Among most groups it is customary that any such children should be fathered by a blood relative of the deceased. Any male child of a widow has a potential right to succeed to her husband’s estate. There are, however, variations which should be taken into account but but these do not concern us further here.

As far as succession is concerned the following principles seem clear: firstly, a child who is not born of a valid *ngena* union cannot succeed to the estate of the deceased; secondly, a *ngena* union is not valid unless it is sanctioned by the deceased family, in particular by his nearest male relatives at a meeting of the family council; thirdly, it is generally considered to be incest if a male relative of the deceased other than the one properly appointed during the council meeting has intercourse with the widow; and fourthly, a widow cannot be compelled to enter into a *ngena* union. The relative claim of a *ngena* son to succeed to the deceased’s estate depends on the order of succession, which has been discussed in lecture 1 above.

SELF-EVALUATION

1. Discuss factors which may counteract the strict application of the indigenous rules of succession. (20)
2. Discuss ways to provide for a successor in a house without a son. (12)
3. Discuss the legal significance of disinherison. (10)

LECTURE 3

African customary law of succession and the Constitution

Compulsory reading

The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, sections 1 and 8

Recommended reading

Pieterse "Killing it softly: customary law in the new constitutional order" (2000) 33(1) *De Jure* 35–53

Pieterse "The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: Final nail in the customary law coffin?" 2000 *SALJ* 627–635

Pieterse "Its a 'Black thing': upholding culture and customary law in a society founded on non-racialism" (2001) 17(3) *SA Journal of Human Rights* :364–403

STUDY OBJECTIVES



After having studied this lecture you should be able to

- discuss the vision that African customary law can be reconciled with the Constitution in the context of the democratic South Africa which is founded on democratic values, social justice and fundamental human rights
- indicate the effect of Act 4 of 2000 on reforming indigenous law

1 INTRODUCTION

Since the new constitutional dispensation in 1994, few topics have received as much attention as African customary law. Section 211(3) of the Constitution provides for the application of African customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with it. This recognition of indigenous law led to a debate on the future of African customary law in a human rights dispensation, since African customary law in South Africa is rooted in a cultural system of patriarchy that discriminates against women. The core of the debate is the conflict of the right to equality as one of the cornerstones of the South African democracy and the right to culture. It was argued on the one hand that cultural practices that discriminate against women can no longer be tolerated in terms of section 9 of the Constitution or of international human rights

law. On the other hand, it has been argued that the right to culture (sections 30 and 31 of the Constitution) mandates a degree of tolerance for African customary law, ensuring that the Bill of Rights would not result in simply superimposing Western norms and standards onto customary African values. It is assumed that the Constitution necessitates a tolerant approach to law reform in which the social context and consequences of the abolition of customary practices will be taken into account.

Since the new constitutional dispensation African customary marriage law has been reformed by the Recognition of Customary Marriages Act 120 of 1998, which came into operation on 15 November 2000. The SA Law Commission has submitted two documents with proposals on the reform of the African customary law of succession. These proposals have now been enacted as the Reform of Succession and Regulation of Related Matters Act 11 of 2009.

Meanwhile the courts have on various occasions decided on the constitutionality of particular customs and statutory provisions concerning African customary law. We consider these in lectures 2, 3 and 4 below. The courts' decisions seem to indicate a tolerant approach towards African customary law in a multicultural context. In the Mthembu case (2000 at 884) it was indicated that development of the principle of primogeniture was best left to the legislator to reform.

Act 4 of 2000 has since been promulgated, suggesting a less tolerant approach towards cultural practices that are seemingly discriminatory. For our purposes section 8, is the most important.

2 ACT 4 OF 2000

This Act strives to ensure compliance with South Africa's duties under international law and also gives effect to the requirements of section 9(4) of The Constitution. Section 9(4) provides as follows:

No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

The preamble to Act 4 of 2000 emphasises that

the consolidation of democracy in our country requires the eradication of social and economic inequalities, especially those that are systemic in nature, which were generated in our history of colonialism, apartheid and patriarchy, and which brought pain and suffering to the great majority of our people; Although significant progress has been made in restructuring and transforming our society and its institutions, systemic inequalities and unfair discrimination remain deeply embedded in social structure, practices and attitudes, undermining the aspirations of our constitutional democracy ...

The constant references to "practices" throughout the Act (preamble, s 6(d) and s 28(3)(b)(i)) are an indication that virtually every aspect of African customary law is intended to be subject to the Act. In terms of the Act all systemic discrimination and inequalities brought about by colonialism, apartheid and patriarchy must be eradicated. Patriarchy has been identified as a leading cause of ingrained systemic inequality. One of the objectives of the Act is to "purify" African customary law of

all practices rooted in patriarchy to the extent that they incorporate consequences harmful to women. This does not mean that those inequalities rooted in colonialism and apartheid should be spared.

Section 8 provides as follows:

Subject to section 6, no person may unfairly discriminate against any person on the ground of gender, including – (a)

(b)

(c) the system of preventing women from inheriting family property;

(d) 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 wellbeing of the girl child;

(e) any policy or conduct that unfairly limits access of women to land rights, finance and other resources ...”

In the lectures that follow you should consider the effect of these provisions on the indigenous customs that are at stake.

SELF-EVALUATION

1. Discuss how the tension between the Bill of Rights and indigenous law can be reconciled with the Bill of Rights. (15)
2. Discuss the relevance of Act 4 of 2000 to the reform of indigenous law. (15)

LECTURE 4

The African Customary law principle of primogeniture and the Constitution

Compulsory reading

Mthembu v Letsela and Another 1997 (2) SA 936-947 TPD

Mthembu v Letsela and Another 1998 (2) 675-688 TPD

Mthembu v Letsela and Another 2000 (3) 867-885 (SCA)

Bhe v The Magistrate Khayelitsha and Others 2004 (1) BCLR 27 (C)

Bhe v The Magistrate Khayelitsha and Others 2005 (1) 580 (CC)

STUDY OBJECTIVES



After having studied this lecture you should be able to

- identify the distinction between inheritance of property and succession to status
- distinguish between the primogeniture principle in a private law, and the operation of this principle in public law

1 INTRODUCTION

Nwamitwa v Philia and Others 2005 (3) SA 536 (T)

Shilubana and Others v Nwamitwa 2007 (2) SA 432 (SCA)

Shilubana v Nwamitwa 2008 (9) BCLR 914 (CC)

In the *Shilubana* cases the daughter of a former traditional leader did not succeed to her father's position when he died in 1968, because she was a woman. Instead her deceased uncle was appointed. The latter's son expected to succeed his father in terms of customary law. However the Valoyi Traditional Council recommended the daughter for appointment, although she was not the child of the preceding traditional leader. The son of the preceding traditional leader, although favoured by custom, was sidelined by the decision of the Council.

Recommended reading

Pieterse "Killing it softly: customary law in the new constitutional order" (2000)
33(1) *De Jure* 35–53

STUDY OBJECTIVES



After having studied this lecture you should be able to

- explain and evaluate the arguments which holds that the practice of allowing only the eldest son to succeed is discriminatory on the grounds of age, gender and ethnic origin
- evaluate the court finding that the indigenous law of primogeniture does not amount to unfair discrimination

1 INTRODUCTION

The theme of this lecture is whether this form of African customary law of succession and inheritance is reconcilable with provisions of the Constitution, 1996. Of particular relevance in this regard are sections 9, 30 and 31 of the Constitution. When studying the compulsory and recommended literature you should keep in mind that the viewpoints in these sources are based on the provisions of the Interim Constitution Act 200 of 1993. The present Constitution has subsequently come into effect but the relevant provisions do not differ significantly.

The position of the horizontal application of the Constitution was not clearly set out in the Interim Constitution and the result has been contradictory court decisions in this regard. Section 8 of the present Constitution explicitly deals with the horizontal application of the Constitution. In addition, section 211(3) of the new Constitution provides for the application of customary law by the courts. Accordingly, all courts are bound to apply customary law when that law is applicable, subject to the Constitution.

2 ASSERTIONS THAT AFRICAN CUSTOMARY LAW OF INHERITANCE IS IN CONFLICT WITH THE CONSTITUTION

The main points to which objections have been raised in this regard are the following:

- The distorted principle that only the eldest son can inherit is an obvious form of discrimination on the grounds of age and gender.
- The recognition of the African customary law of inheritance constitutes discrimination on the grounds of ethnic descent.
- The fact that black intestate estates were administered by the local magistrate constitutes unequal treatment by the law since all other intestate estates were administered by the Master of the High Court.

In your own notes evaluate these arguments critically.

3 THE DECISIONS IN MTHEMBU V LETSELA AND ANOTHER

Study the decisions and make sure that you

- can substantiate the viewpoint that the African customary law of succession is not in conflict with the Constitution
- can relate the recognition of the right to culture referred to in the decision to ethnic descent as a ground for discrimination

Note that the decisions do not address the question of enforcing the duty to care and to maintain. What remedies would be available to members of the family, should the "heir" not fulfil his duties? Would a widow have any remedy in the event of the family evicting her from the family home as a way of circumventing their duty to care for her?

SELF-EVALUATION

1. How can it be argued that the indigenous principle of primogeniture is irreconcilable with the constitutional principles if both the right to culture and the right to equality are entrenched in the Bill of Rights? (20)
2. Discuss the possible effect Act 4 of 2000 may have on the SCA decision in Mthembu. (15)
3. Evaluate the decision of the High Court, the Supreme Court of Appeal and the Constitutional Court in the *Shilubana v Nwamitwa* dispute and explain the possible contribution of each of these courts to the development of customary law. (15)
4. Examine the decisions in each of the *Mthembu* judgments, and then compare them with each of the *Bhe* judgments. (15)

LECTURE 5

Intestate inheritance of illegitimate children and the Constitution

Compulsory reading

Zondi v President of the RSA 2000 (2) SA 49 (N)
Intestate Succession Act 81 of 1987

STUDY OBJECTIVES



After having studied this lecture you should be able to

- explain and evaluate the arguments concerning discrimination in the above-mentioned case
- argue the issue of legal reform

In this case the constitutionality of regulation 2 of the Regulations for the Administration and Distribution of Estates of Deceased Blacks, GN R200 of 1987, was considered. In this particular case the effect of the regulation was that illegitimate children of a deceased man whose civil marriage was regulated by section 22(6) of the Black Administration Act 38 of 1927 would not be eligible to inherit from the estate if the deceased died intestate.

This case was decided in the Natal Division of the High Court. In our view it was not necessary for the court to consider regulation 2, since the Code of Zulu Law provide that such estates should be administered in terms of the Succession Act 13 of 1934 (section 81(5) of the KwaZulu Act on the Code of Zulu Law, Act 16 of 1985 and section 79(3) of the Natal Code of Zulu Law, Proclamation R151 of 1987).

You must remember that the *Bhe* judgement made all children, male or female, legitimate or illegitimate, black or white, equal before the law for the purposes of inheritance, see also **Act 4 of 2000**.

SELF-EVALUATION

1. Discuss the court's finding that regulation 2 is unconstitutional. (20)
2. Analyse the implications of the Intestate Succession Act 81 of 1987 for African customary law of succession, in so far as the Act provides for the inheritance of illegitimate children in their parents' estates.

LECTURE 6

Administration of intestate estates and the Constitution

Compulsory reading

Moseneke and others v The Master and Another 2001 (2) SA 18
Reform of Customary Law of Succession and Regulation of Related Matters
Act 11 of 2009.

STUDY OBJECTIVES



After having studied this lecture you should be able to

- explain and evaluate the arguments of unfair discrimination raised in the *Moseneke* case
- discuss the reform of indigenous law by the courts

Section 23(7)(a) of the Black Administration Act 38 of 1927 and regulation 3(1) of Government Notice R200 of 1987 created a dual system of administration of intestate estates. In terms of these provisions the position was that all testate estates and intestate estates of non-blacks were administered by the Master of the High Court while intestate estates of blacks were administered by the local magistrate.

In this case we are dealing with statutory measures concerning the administration of estates that do not arise from indigenous law. In the *Moseneke* case it was argued that the separate ways of administering estates offended the right to equality and the right to dignity. We include the decision of Judge Sachs.

***Shilubana v Nwamitwa* Case CCT 03/07 [2008] ACC (unreported)**

With regard to *Shilubana v Nwamitwa*, the Constitutional Court's judgment clarified two very important issues in customary public law, namely the powers of traditional authorities to develop customary law under the Constitution, and the appointment of women, previously overlooked owing to gender discrimination, in positions of traditional leadership. The Court found that the traditional authorities of the Valoyi community had the power in terms of section 211(2) of the Constitution to develop their community's customary law to reflect equality between men and women as required by the Bill of Rights. This includes the right to amend and repeal their law.

With regard to the primogeniture principle, it would seem that in public law the eldest child (male or female) of a Hosi has a claim to succeed his/her parent in that

position. If such a child is a female she can still claim that position even though it was given to her nearest male relative owing to unfair gender discrimination some decades ago during the long years of colonialism and apartheid.

SELF-EVALUATION

1. Discuss the court's finding that the limitations on the rights to equality and dignity were not reasonable and justifiable in an open and democratic society. (20)
2. The discriminatory issues highlighted in this case are associated with a system of patriarchy, colonialism and apartheid and amount to systemic discrimination. Evaluate this statement. (10)

ACTIVITY



Didi, a family head, has three sons from different mothers. Pule is the son born to Didi's second wife whose marriage goods were delivered by his father. Tai is the son born to the wife Didi married first and for whom he had delivered 10 head of his own cattle as lobolo. Toto is the son born to Didi's mistress for whom he was contemplating delivering R10 000 as lobolo. This money had not been handed over by Didi when he, passed away suddenly.

Didi's estate includes the following:

- a house in a rural township near Burgersfort in the Northern Province where Pule and his mother live
- a house in Tembisa where Toto and his mother live
- another house in Tembisa where Tai and his mother live
- land in the rural area which was not allocated to any of his houses
- 60 head of cattle, some of which he inherited from his father

Advise his family on how his estate should be distributed. (25)

Literature cited

- Coetzee JH et al *Privaatreg van ses Tswanastamme in die Republiek van Bophuthatswana* (1985)
- De Clercq JLW et al *Report on the indigenous law of the Mathenjiva tribe of the Ingwavuma district in KwaZulu* (1985)
- De Wet JC & Van Wyk AH *Die Suid-Afrikaanse kontraktereg en handelsreg* 4th edition (1978)
- Holleman FD *Het Bantoe-grondenrecht in de Unie van Zuid-Afrika en omgeving* (1949)
- Hosten WJ et al *Inleiding tot die Suid-Afrikaanse reg en regsleer* (1980)
- Hughes AJB *Land tenure, land rights and land communities on Swazi Nation land in Swaziland* (1972)
- Jeppe Wjo *Bophuthatswana: regte op grond en ontwikkeling* (1978)
- Kerr AJ *The customary law of immovable property and of succession* (1976)

- Labuschagne JMT & Visser DP "Deliktuele aanspreeklikheidsaksessoriteit in die Bantoereg" (1975) 8(2); (1976) 9(1) *De Jure*
- Mönnig HO *The Pedi* (1967)
- Myburgh AC *Papers on indigenous law in Southern Africa* (1985)
- Pauw HC *Die Persone-, sake- en immateriële goedere-, kontrakte- en deliktereg van die imiDushane (amaXhosa) en amaBhele (amaMfengu) van Ciskei* (1985)
- Prinsloo MW *Grondslae van die administratiefreg by die matlala van Maserumule* (1976)
- Prinsloo MW *Inheemse strafreg van die noord-Sotho* (1978)
- Schapera I *A handbook of Tswana law and custom* (1938)
- Schapera I *Native land tenure in the Bechuanaland Protectorate* (1943)
- Sheddick VGJ *Land tenure in Basutoland* (1954)
- Stafford WG & Franklin E *Principles of native law and the Natal Code* (1950)
- Van den Heever JA *'n Sisteematiek vir die inheemse deliktereg van die swartman* (1984)
- Van der Post *'n Regshistoriese oorsig van sekere individuele grondbesitstelsels in Suider-Afrika* (1984)
- Vorster LP *Grondbesit en grondgebruik by die Bakwena Bamare-a-Phogole* (1981)
- Whelpton FP van R *Die inheemse kontraktereg van die Bakwena ba Mogopa van Hebron in die Odi 1 distrik van Bophuthatswana* (1991)