African Customary Law

UNISA university of south africa

Q&A 2009 to 2014 Exams

Setwork 1: Evaluate the following statements

Disclaimer: These activities were compiled by Pierre Louw from UNISA study material, the prescribed book and legislation. They in no way claim to be 100% correct and you are advised to compare your answers & notes to check for correctness before applying these answers.

In a traditional court evidence is given under oath? 5x

In a traditional court, evidence is not given under oath.

Therefore, perjury (willfully giving false evidence under oath) is unknown.

No action is taken against a party or a witness who tells lies; if they do tell lies, it will merely harm their case.

A traditional leader is empowered to punish anyone? 5x

Limitations pertaining to Race:

- In offences where:
  - » any of the accused or victims are not blacks, or where
  - » the property involved does not belong to a black person…

  such offences may not be tried by a traditional leader.

However….

- A traditional leader is, however, empowered to punish any person, including a non-black, for contempt of his court *in facie curiae* *(in the face of the court):* see *Makapan v Khope* 1923 AD 551; *R v Vass* 1945 GWPD 34; against Prinsloo & Myburgh 248.

In African customary law there are certain crimes that can defile (pollute) the community? Discuss briefly. (5)

Crimes that defile the community…

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- In African customary law infringement of communal interests sometimes takes the form of defilement (pollution) of the community.
- Examples of polluting crimes are 'offences of the blood' eg: assault and homicide.
  - It is also believed that infanticide & abortion generate a ritual heat that keeps away the rain.
  - Incest – and in some communities contempt of the ruler as well - is considered defiling.

The Effect & Consequence of defilement or pollution of the community:

- In such cases - **not only** is punishment imposed, **but a** meal of lustration (purification) and conciliation is ordered **as well**.
- The cattle paid as a fine are generally slaughtered at the court.
  - » All those present, and particularly the members of the court council and the persons involved in the act of defilement, must join in the meal.
  - » In this way the offenders are visibly (in a concrete manner) reconciled with the community.

Indigenous law is an expression of community values. 3x

True.

- African customary law *gives expression to the values of the community*.
- In *many instances, these values are based on conceptions of the supernatural world***.**

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The family head's control over house property does not give him the authority to allocate marriage goods for daughters in one house to another house. 2x

- **House property is controlled by the head of the house, namely the husband.** In most cases, the husband is the head of various houses at the same time.
- **In his disposal of house property he is morally, but not legally, obliged to consult** the wife of the house and the house successor, if this person is already an adult.
- The wife has a reasonable degree of control over house property as far as daily household affairs are concerned. She decides, for instance, on what groceries to buy and is not expected to consult her husband about this.
- **When property from one house is used to the benefit of another house**, a debt relationship is created between the houses concerned.
- Such a debt has to be repaid at some time, although **no action for repayment can be instituted in an indigenous court**. The principle involved here is the one we referred to earlier on: **"an agnatic group cannot be divided against itself".**

Status determines the powers derived from objective law. Rank is just one factor that may influence a persons' status. 2x

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

'Status' - refers to a person's legal position in general, while

'Rank' - is only one factor influencing status.

In indigenous customary law, a distinction must be drawn between status and rank.

Status - determines the powers derived from objective law.

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In original indigenous law

- the individual shared his or her rights with the other members of the agnatic group which depended on his or her status within the group.
- status was influenced by factors such as family rank, house rank, age, sex and marital status.
- the principle of shared rights meant that there was **no** question of absolute majority or minority.
- the idea of a fixed age at which a person attained majority was unknown.
- The higher a person's status, the more powers he or she obtained, but never where he or she could act independently from the agnatic group.

In modern indigenous law

- a person's status is influenced strongly by the specific age (18) at which majority is attained, as prescribed in **s 17 of the Children's Act 38 of 2005**.

Rank:

- Rank is 1 factor which may influence person's status & plays a significant role in customary law.
- Thus, **the wives of a polygamist** (a man with two or more wives) **each have a particular rank**, as does **each of their houses.**
- At times this rank is **also affected by the specific division in the house-hold**.
- The members of the agnatic group also have a particular rank, i.t.o their **order of seniority** in the group.

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The ilobolo contract is an example of a real contract.

True, lobolo is probably the most important contract in customary law.

This contract can be described as an agreement between the parties concerned, by which one party undertakes to deliver a certain female person as a bride for a certain male person in return for the delivery of cattle or other property.

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

(i) Consent of the father or guardian of the bride to be

(ii) Consent of the bride

(iii) Consent of the bridegroom

(iv) Transfer of the bride

(v) Transfer of the lobolo

In original indigenous law, ownership of land was not subject to any limitations.

True, originally the only real right known to customary law was ownership, which is the **most comprehensive real right** *which can be acquired over material things*.

- All other categories of real rights are limited.

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Identify the absolute legal requirements for a traditional indigenous marriage ?

- The man and the woman concerned must **not be related** within the prohibited degrees of **kinship.**
- There must be **consensus** between the **two family groups** i.r.o the following:
  - » the two individuals to be **united** in marriage
  - » the marriage **goods** which must be delivered
- The bride must be **transferred** by *her family group to the man's family group*.
- The **woman may not** be already involved in a marital union.
- **Polygynous nature** of indigenous marriages, **men may** be already married to another

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Traditional customary (indigenous) marriage:

- Kinship: The man and woman concerned **must not be related to one another within the prohibited degrees of kinship**;
- Consensus: There must be **consensus** of the two family groups concerned on the **two individuals** to be united in marriage and the **marriage goods** which must be delivered;
- Transfer: There must be **transfer of the bride** by her family to the man's family group

- or –

- Woman – no other marital union: In case of woman there is a further requirement that she is not already involved in a marital union.

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Customary Union

The legal requirements for a Customary Union is that they are **not uniform** for all the areas in RSA the position in KZN differs from that in the rest of South Africa

Outside KZN requirements are the following:

* Consent of the bride's father or guardian;
* Consent of the groom **- or –** his father if minor);
* An agreement that lobolo will be delivered;
* There must be consent of the bride;
* Payment of (or delivery) of marriage goods;
* Transfer of the bride
* Handing over of the bride to the groom or the groom's family.
* Non-existence of common-law civil marriage

Requirements of customary union in KZN:

- The **consent** of bride's father or guardian is required if she is still a minor, which consent not be necessarily withheld;
- Consent of the groom's father or father head, if the groom is still a minor
- **Public declaration** by the bride to the official witness that the union takes place with her consent.

Customary Marriage

- The prospective spouses must both be **above the age of 18**;
- They **must both consent** to be married to each other under customary law;

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- Marriage must be **entered into and celebrated** in terms of customary law;
- Prospective spouses **must not be related to one another** within the prohibited degrees of kinship;

Similarities:

- The man and woman must concerned **must not be related to one another** within the prohibited degrees of kinship; This requirement applies to the Traditional customary (indigenous) marriage and Customary Marriage;
- There must be **consensus of the two family groups** concerned on the two individuals to be united in marriage and that of the two individuals and the marriage goods which must be delivered requirement is applicable in Customary Union and Traditional customary (indigenous) marriage;
- The must be **transfer of the bride** by her family to the man's family group, requirement is applicable in Customary Union (both in and outside KZN) and Traditional customary (indigenous) marriage
- In case of woman there is a further requirement that she is **not already involved in a marital union** in a Traditional customary (indigenous) marriage,
- **Non-existence of common-law(civil) marriage** in

Customary Union (outside KZN);

- There must be consent of:
  - the bride's father or guardian,
  - the bride,
  - the groom

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Customary Union (both in and outside KZN)

- the grooms father in certain circumstances(where groom is a minor) in and outside KZN

Differences:

- **Public declaration by the bride** to the official witness that the union takes place with her consent customary union in KZN
- The prospective spouses must both be above the age of 18;
- They must both consent to be married to each other under customary law;
- Marriage must be entered into and celebrated in terms of customary law;

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

The competence to enter into a traditional marriage:

The powers of the spouses

Age:

- There were **no fixed age** requirements.
  - Among some **Tswana**, **betrothal agreements** were made between family groups even **before the birth** of the boy and girl, and **concluded only upon sexual maturity**, **after** & provided completion of traditional **initiation** ceremonies. Even today, **sexual maturity**, rather than a stipulated age, is required.

Kinship:

- Marital unions within certain **degrees of kinship** are forbidden.
  - **These restrictions vary from group to group.**

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» Among **all groups** there is a **prohibition** on marriages between **ascendants and descendants** on the father's and mother's side, and between the children of the same mother and father.

» Among most **Nguni** groups these limitations cover a very wide range of kin.

➢ **Marriage between people with the same family name *(isibongo, isiduko)*** as that particular person, or the person's mother or father, **is forbidden.**

» Among the **Sotho-Tswana,** on the other hand, **preference is given to marriage within a particular degree of kinship.**

➢ Marriage **between cross-cousins** is particularly **encouraged.**

➢ This means marriage between a man and his mother's brothers' daughters or between a man and his father's sisters' daughters, are viewed as preferential marriages.

Mental capacity:

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

Sexual capacity:

▫ Impotence and serious physical defects:

» **could be substituted** for by most groups… but were….

» recognised as **grounds for** the **dissolution** of marriage.

Polygynous nature of marriage:

▫ Because of the **polygynous nature** of marriage, **a married woman was not competent to enter into another marriage**.

▫ A **married man**, however, **could enter** into further marriages. Some writers object to describing this type of marital union as a marriage.

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The purpose of marriage:

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

Briefly outline the changes that the Recognition of Customary Marriages Act 120 of 1998 has brought about with regard to the proprietary consequences of a customary marriage. 3x **(10)**

- **Originally, the house as a patrimonial unit,** continued to exist after the dissolution of the marriage.
  - » The wife lost all the rights and powers she had in respect of house property.
  - » Neither could she claim to be maintained from house property.
  - » Hence, original indigenous law was recognised virtually without change.
- The **Recognition of Customary Marriages Act 120 of 1998** makes specific provision for maintenance and matrimonial estate sharing.
- **Divorce is affected by:**
  - » the abandonment - by the wife and her family, of all the rights in the marriage, or
  - » the forfeiture by the husband and his family of all their rights.
- **Polygynous marriages:**
  - » In terms of s8 of the Act **a court must make an equitable order** regarding polygynous marriages and must consider all relevant factors, including contracts, agreements or court orders.

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» **Expectations and liabilities regarding the marriage goods** should also be considered when determining the assets of the estate that is to be divided.

» The present practise among some groups is that these remain with the father: he is obliged to help his sons give lobolo for their first wives, and he received lobolo for his daughters when they marry.

Discuss the reform which has taken place in terms of the Recognition of Customary Marriages Act 120 of 1998, with regard to the proprietary consequences of a customary marriage. 3x **(25)**

The **Recognition of Customary Marriages Act 120 of 1998 commenced on November 15th 2000** and determines as follows – regarding the property consequences of a customary marriage:

s7(1)

- the property consequences of a customary marriage entered into **before commencement** of the Act **continues to be governed by customary law**
- thus - the position concerning polygynous marriages (ie the creation of separate houses with their own house property that is controlled by the husband) **has been retained**.

s7(2)

- **A customary marriage entered into after the commencement of this Act** in which a spouse is not a partner in any other existing customary marriage, is a marriage in **community of property** and of profit and loss between the spouses, **unless such**

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consequences are specifically excluded by the spouses in an ante-nuptial contract which regulates the matrimonial property system of their marriage.

- A matrimonial property system determines exactly how the marriage affects the financial position of each marriage partner.

s7(3)

- Chapter III and sections18, 19, 20 and 24 of the Matrimonial Property Act, 88 of 1984, apply to a customary marriage which is in community of property. see below…

s7(4)

- The **court will authorise the parties to such marriage or marriages to enter into a written contract in terms of which the future matrimonial property system** of their marriage or marriages will be regulated according to conditions determined by the court
- In the case of a husband who is a spouse in **more than one customary marriage, all persons having a sufficient interest** in the matter, and in particular the applicant's existing spouse or spouses, **must be joined in the proceedings**

s7(5)

Section 21 of the **Matrimonial Property Act**, 1984 (Act No.88 of 1984) **is applicable to a customary marriage entered into after the commencement of this Act**… in which the husband does not have more than one spouse.

Section 21 of the Matrimonial Property Act determines that: indigenous African people may approach a court to make the provisions of the Matrimonial Property Act applicable to their marriages.

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s7(6)

- **A husband in a customary marriage who wishes to enter into a <u>further customary marriage</u>** with another woman after the commencement of this Act must:
  - » <u>make an application to the court</u> to approve a <u>written contract</u> which will…
  - » <u>regulate the future matrimonial property system</u> of his marriages.

s7(7)

When considering the application **in** terms of subsection 6:

(a) **the court must-**

(i) in the case of a marriage which is <u>in community of property</u> or which is <u>subject to the accrual system</u>-

(aa) <u>terminate</u> the matrimonial property system which is applicable to the marriage : and

(bb) <u>effect a division</u> of the matrimonial property:

(ii) **<u>ensure an equitable distribution</u> of the property**; and

(iii) **<u>take into account all the relevant circumstances</u>** of the family groups which would be affected if the application is granted;

(b) **the court may-**

(i) **<u>allow further amendments</u>** to the terms of the contract;

(ii) **<u>grant the order</u>** subject to any condition it may deem just: or

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

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s7(8)

- **All persons having a sufficient interest** in the matter, and in particular the applicant's existing spouse or spouses and his prospective spouse **must be joined** in the proceedings instituted in terms of subsection (6).

s7(9)

- **If a court grants an application** contemplated in subsection (4) or (6), the registrar or clerk of the court, as the case may be, must:
  - **furnish each spouse with an order** of the court including a certified copy of such contract and
  - cause such order and a certified copy of such contract to be sent to each registrar of deeds of the area in which the court is situated.

In respect of **Section 7(3)** which provides that:

- Chapter III and sections 18, 19, 20 and 24 of the **Matrimonial Property Act**, 88 of 1984, apply to a customary marriage which is in community of property - the following…
  - Chapter III of the Matrimonial Property Act gives **equal powers** to the husband and wife to administer and control the joint estate.
  - The Act also provides that spouses in a customary marriage entered into before November 15th 2000 may jointly apply to a court for **leave to change the matrimonial property** system governing their marriage or marriages.

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The court may grant the application if it is satisfied that:

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

Provided that these requirements are met**, the court will order that the matrimonial property system applicable to such marriage or marriages will no longer apply**.

List & briefly discuss the legal requirements for a valid customary marriage in terms of the Recognition of Customary Marriages Act 120 of 1998. 3x (10)

The prospective spouses:

Age must both be **above** the age of **18 years**;

- **Originally -** the indigenous African people of Southern Africa had no specific age requirements for entering into a marriage, apart from the general requirements such as puberty and, amongst some, passing through initiation rites.

- **Currently -** The Act now lays down specific age requirements for the conclusion of a valid customary marriage. In order to achieve formal gender equality, the minimum age requirement is 18 for both males and females.

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Consent must **both consent** to be married to each other **under customary law**;

- According to the Recognition of Customary Marriages Act 120 of 1998, both prospective spouses must consent to be married under customary law.
- This section was included in order to prevent the conclusion of forced marriages.
- This provision is also in line with the equality clause - section 9 of the Constitution of the Republic of South Africa, 1996.

In respect of a minor:

» If either of the prospective spouses is a minor, consent is required from , both his or her parents, or if he or she has no parents, his or her legal guardian, must consent to the marriage.

The marriage:

Negotiation & entrance into…

» must be **negotiated and entered into** or celebrated **in accordance with customary law**.

- This means that although there are some statutory requirements for the validity of a customary marriage, the negotiation, entering into and celebration must be in accordance with customary law.
- Note that the negotiations, entering into and celebration of a customary marriage differ from group to group.

➢ Eg: generally speaking, the family groups of the two spouses must negotiate and consent to the two individuals to be united in marriage and to the delivery or payment of lobolo.

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- This indirectly renders lobolo a requirement for a customary marriage.
- Some groups also require the physical transfer of the bride to the bridegroom's family group for the conclusion of a marriage.

These statutory requirements are peremptory:

which means that **each requirement must be fulfilled** for a valid marriage to be concluded.

What are the grounds for dissolution of a customary marriage entered into according to the Recognition of Customary Marriages Act 120 of 1998? (10)

The customary marriage

A customary marriage can **only** be dissolved on the ground of the **irretrievable breakdown of the marriage** (sections 8(1) of Act 120 of 1998).

- This is in line with existing, living customary law, provided that not only the views of the spouses but also the views of the wider family groups *are taken into account when determining the fact of irretrievable breakdown*.
- **In order to grant a decree of divorce**, the relevant **court must be satisfied** that the marriage relationship has reached such a **state of disintegration** that there is **no reasonable prospect of the restoration** of a normal marriage relationship between the spouses (section 8(2) Recognition of Customary Marriages Act).
- This means that, *whether or not a marriage has irretrievably broken down is* a **question of fact** to be determined by reference to **all the relevant facts and circumstances** of the case.
- The **test** to be applied or the question to be posed in every case is:

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In the light of all the available evidence, is there a reasonable prospect that the parties will be able to restore a normal marriage relationship between them?

» If the answer is "yes" - then the marriage has not irretrievably broken down.

» If "no" - then the marriage has irretrievably broken down and must be dissolved.

According to **section 8(3)** of the Recognition of Customary Marriages Act 120 of 1998, both the **Mediation in Certain Divorce Matters Act 24 of 1987** and **section 6** of the **Divorce Act 70 of 1979 apply to the dissolution of a customary marriage.**

- The *Recognition of Customary Marriages Act 120 of 1998,* contains *no reference to facts or circumstances* which may be indicative of the irretrievable breakdown of a customary marriage.
- The relevant section 6 of the *Divorce Act 70 of 1979* deals with the interests and the *wellbeing of minor and dependent children* of divorcing spouses.
- The Mediation in Certain Divorce Matters Act 24 of 1987 regulates the *appointment of family advocates and makes provision for family counsellors* who help family advocates to draw up recommendations concerning the custody and control of minor children.

In terms of section 4(2) of the *Divorce Act70 of 1979* , the court may, **in the case of civil marriages**, **accept as proof of the irretrievable breakdown** of a marriage evidence that:

- the parties have not lived together as husband and wife for a continuous period of at least one year immediately prior to the date of the institution of the divorce action;
- the defendant has committed adultery and the plaintiff finds this irreconcilable with a continued marriage relationship; or

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- the defendant has, in terms of a sentence of a court, been declared a habitual criminal and is undergoing imprisonment as a result of such sentence.

The above are perhaps more than guidelines because it would appear that, once the existence of one or more of the situations described above has been established, the court has no option but to conclude that the marriage has irretrievably broken down.

Thus, proof of the existence of any of these situations creates a presumption that the marriage has irretrievably broken down. It is, however, doubtful whether these guidelines would serve any purpose as far as customary marriages are concerned, simply because they raise so many questions.

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

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Study the following hypothetical case and answer the questions that follow… Consider all possibilities and justify your answers in full. **4x**

- ***In 1998**, (LAST YEAR) Thanda(17) and cousin Nkele(23) and their families concluded an agreement in terms of which Thabo's family had to deliver six herd of cattle and R15000 as lobolo to Nkele's family.*
- *Thanda delivered the lobolo agreed upon and shortly thereafter Nkele was allowed to reside with Thanda and his family.*
- ***In 2002**, the couple decided to convert their marriage into a civil marriage.*
- ***In 2006**, Thanda married Mmapule by customary rites as his second wife.*

(a) Did a legally valid marriage come into being between Thanda and Nkele? (5)

Thanda and Nkele entered into their marriage in **1998**, which was **before the Recognition of Customary Marriages Act** 120 of 1998 **came into operation**.

IN KWAZULU-NATAL - the requirements for a valid customary union are:

- Therefore, in KwaZulu-Natal, s38(1) of **the Codes of Zulu Law requires** the following for the conclusion of a customary union:

Consent:

» **consent** of the bride's father or guardian if she is still a minor, which consent must not be unreasonably withheld;

» **consent** of the bridegroom's father or family head, if the bridegroom is still a minor.

➢ These requirements have been met, since both Thabo and Zandi were minors but they were given the consent of their respective fathers.

Public declaration:

» **a public declaration by the bride** to the official witness that the union takes place with her consent.

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- The **facts do not indicate** that Zandi made a public declaration to the official witness that her union with Thabo takes place with her consent. **As a result, there is no legally valid customary union between Zandi and Thabo.**

Kinship:

» **Kinship:** Furthermore, the prohibition against not marrying within the prohibited degrees of kinship extends to KwaZulu-Natal and their marriage is therefore not valid for this reason also.

IN THE REST OF SOUTH AFRICA

(outside KwaZulu-Natal) - the requirements for a valid customary union are;

Consent:

- consent of the bride's father or guardian;
- consent of the bride;
- consent of the groom;

Payment & delivery….

- payment or delivery of the marriage goods; and
- transfer of the bride.

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

(b) Would a legally valid marriage have come into being between Thanda and Nkele if they had concluded their marriage on 10 December 2001? (5)

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The Recognition of Customary Marriages Act 120 of 1998 commenced on November 15th 2000.

- Their marriage was on December 10th 2000.
- **Thus the requirements of this act would apply to their marriage**.

The legal requirements for a valid customary marriage i.t.o. the act are:

Age:

- the prospective spouses must both be **above the age of 18 years**
  - » Neither Thanda(17) and Nkele(16) were above the age of 18 years. They are minors
  - » **Neither are above 18** therefore this requirement **has not been fulfilled.**

Consent…

- of both **parents:**
  - » According to section 3(3) of Act 120 of 1998, both Thanda(17) and Nkele(16) **required the consent of both their parents** in order to conclude a valid customary marriage.
  - » The facts reveal that they only received the consent of their respective fathers & not their respective mothers.

    Both sets of parents have not consented therefore this requirement therefore has **not been fulfilled**.

- of both **partners:** s3 also states that…
  - » Both partners must **consent to be married to each other under customary law**

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» Thanda(17) and Nkele(16) & their respective fathers concluded an agreement…

The couple's consent was furnished and this requirement **has therefore been fulfilled.**

Negotiation & Celebration of marriage:

- The marriage must be negotiated and entered into or celebrated i.a.w customary law.
  - » The facts state that Thanda delivered the lobolo agreed upon and
  - » shortly thereafter Nkele was allowed to reside with Thanda and his family.

Thus the customary law requirements concerning the negotiation and celebration of the marriage **have been fulfilled**.

Kinship:

The Act maintains the prohibition of a customary marriage between persons related to each other within the prohibited degrees of kinship.

- Section 3(6) of the Act provides that the prohibition of a customary marriage between persons on account of their relationship by blood or affinity is determined by customary law.

Their marriage is therefore also invalid because Thabo and Zandi were related to each other.

Conclusion:

Since the first requirement was not fulfilled, Thabo and Zandi's customary marriage would not have been legally valid if they concluded it on 10 December 2000.

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***In 2002**, the couple decided to convert their marriage into a civil marriage.*
***In 2006**, Thanda married Mmapule by customary rites as his second wife.*

(c) Did a legally valid marriage come into being between Thanda and Mmapule? (5)

The marriage between Thanda and Mmapule is not valid but bigamous since Thanda had subsequently entered into a civil marriage with his first wife, Nkele.

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

The betrothal:

» does not create an enforceable right or duty towards a customary marriage

» it does create certain obligations for the man and the woman

» it entails the delivery of betrothal goods and give rise to a legal consequence i.r.o property, ownership i.r.o the establishment or termination of the betrothal.

Consequences of the betrothal:

The betrothal gives rise to particular obligations for the man and the woman.

Obligations of the Man	**Obligations of the Woman**
* Due the polygynous nature of the marriage, the man may pay attention to other women	* should not pay too much attention to other men during the betrothal period
* ensure that he does not neglect his betrothed	*
* must deliver betrothal goods during this period	*

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Property delivered during the betrothal period has a dual nature.

At times **fixed rules** regarding the type of articles which must be delivered to the woman's group.

Marriage Gifts: These are usually blankets, clothing or other household articles – and:

- These articles can, correctly, be described as '**betrothal gifts**'.
- Upon delivery, **property rights** over these articles are transferred to the woman or her group.
- **If** the betrothal is **terminated** for some reason or other, the articles are not automatically returned to the man or his group.
- It would appear that the **guilt factor determines** whether the articles are returned or not.
  - » If the termination of the betrothal is the **woman's fault**, the goods normally have to be returned.
  - » If the **man's fault**, the goods are not returned.

Marriage Goods: With the marriage in mind, other goods, usually cattle or lately also money, are given together with the betrothal gifts. These goods can be regarded as marriage goods.

- Some peoples demand that all the marriage goods be **delivered** before the marriage
- The **legal position** regarding these goods differs from that regarding the betrothal gifts.
  - » Ownership of marriage goods remains vested in the giver until the marriage is concluded.

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» Before the marriage, the man's group remains the owner of this property.

» **If the betrothal is terminated**, these goods have to be returned. pp58/62

Discuss the grounds for dissolution i.r.o various types of indigenous marital unions. **(15)**

The grounds of dissolution are fully discussed in section 6.3. In your answer, you need to distinguish between the position in KwaZulu-Natal and the position in other areas.

Original indigenous law

Traditionally, dissolution by way of **divorce was unknown**. However, over time this position changed.

There were no fixed grounds for dissolution.

» Any party could dissolve the indigenous marriage, even without a specific reason.

» Dissolution did have an effect on the marriage goods.

- These were returned if the husband dissolved the marriage on good grounds.
- If he did not have good grounds, or if the wife's group had good grounds, the husband usually forfeited the greater part of the marriage goods.
- Among the Tswana the marriage goods were not returned, which meant that a traditional indigenous marriage could not be dissolved.

In modern indigenous law, these principles are largely recognised.

In original indigenous law, the following grounds - dissolution were generally recognised: pp97

- **Non-fulfilment of child-bearing duties**;

» substitution was possible here.

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- **Failure to deliver marriage goods**;
  - » note, however, the wife's group was usually very patient about this.

- **Continual violation of conjugal fidelity by the wife,**
  - » amounting to repudiation;
  - » attempts by the wife to prevent her husband from taking action against her adulterous lover;

- **A single act of incest by the wife.**

- **Premarital pregnancy concealed from the husband;**
  - » there was a duty on the husband to take immediate action once aware of the pregnancy.

- **Neglect of mutual marital duties, including sexual intercourse.**

- **Expulsion of the wife by her husband, either directly or indirectly;**
  - » repudiation by the husband required formal action
  - » in most cases, the husband barred the entrance to the wife's house.

- **Desertion by the wife & persistent, unfounded refusal to return;**
  - » not South Nguni Custom - of *ukutheleka*, as the wife's people 'impound' her intermittently until marriage good have been paid / supplied in full.

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- **Accusations of witchcraft by the husband against the wife:**
  - » Were sufficient reason for the wife to leave her husband.
  - » This principle was subject to the fulfilment of two conditions:
    - ➢ namely, if the witchcraft was persistent (*Mathupa v Mahupye* 1933 NAC (N&T) 6, and
    - ➢ was followed by a formal process of 'smelling out' (*Links v Mdyobeli* 1947 NAC (C&O) 96).
- **Impotence of the husband, although substitution was permissible in this case.**

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

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

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

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- adultery
- continued refusal of conjugal rights
- wilful desertion
- continued gross misconduct
- imprisonment for at least five years
- a condition rendering the continuous living together of the spouses insupportable and dangerous

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

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

---

The customary marriage

A customary marriage can **only** be dissolved on the ground of the **irretrievable breakdown of the marriage** (sections 8(1) of Act 120 of 1998).

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

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

According to **section 8(3)** of the Recognition of Customary Marriages Act 120 of 1998, both the **Mediation in Certain Divorce Matters Act 24 of 1987** and **section 6** of the **Divorce Act 70 of 1979 apply to the dissolution of a customary marriage.**

- The *Recognition of Customary Marriages Act 120 of 1998,* contains *no reference to facts or circumstances* which may be indicative of the irretrievable breakdown of a customary marriage.
- The relevant section 6 of the *Divorce Act 70 of 1979* deals with the interests and the *wellbeing of minor and dependent children* of divorcing spouses.
- The Mediation in Certain Divorce Matters Act 24 of 1987 regulates the *appointment of family advocates and makes provision for family counsellors* who help family advocates to draw up recommendations concerning the custody and control of minor children.

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In terms of section 4(2) of the *Divorce Act70 of 1979* , the court may, **in the case of civil marriages**, **accept as proof of the irretrievable breakdown** of a marriage evidence that:

- the parties have not lived together as husband and wife for a continuous period of at least one year immediately prior to the date of the institution of the divorce action;
- the defendant has committed adultery and the plaintiff finds this irreconcilable with a continued marriage relationship; or
- the defendant has, in terms of a sentence of a court, been declared a habitual criminal and is undergoing imprisonment as a result of such sentence.

The above are perhaps more than guidelines because it would appear that, once the existence of one or more of the situations described above has been established, the court has no option but to conclude that the marriage has irretrievably broken down.

Thus, proof of the existence of any of these situations creates a presumption that the marriage has irretrievably broken down. It is, however, doubtful whether these guidelines would serve any purpose as far as customary marriages are concerned, simply because they raise so many questions.

It should be noted that the principle of irretrievable breakdown of a marriage is a vague concept which does not easily lend itself to precise definition. The question of whether or not a particular marriage has irretrievably broken down is a matter to be decided by the court and depends quite heavily on the discretion of the court. The court's discretion is limited, particularly in cases where the parties have agreed that their marriage has broken down and ought to be dissolved.

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In such situations the parties would simply agree that the defendant will not challenge the plaintiff's allegation of irretrievable breakdown. In this event, the court would have little option but to accept the plaintiff's unchallenged evidence and grant a decree of divorce.

In these circumstances, therefore, divorce would essentially be an option provided there is consensus between the parties.

Study the following hypothetical case and answer the questions that follow?

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

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

- If they had concluded their marriage in 2002, the Recognition of Customary Marriages Act 120 of 1998 would have been applicable to their marriage. The legal requirements for a valid customary marriage entered into after 15 November 2000 are provided for in section 3 of RoCM Act 120 of 1998 and are as follows:

The prospective spouses…

- **must both be above the age of 18 years:**

  The facts reveal that only Vuyo is above the age of 18. In terms of section 3(3) of the RoCM Act.

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

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Consent:

(3)(a) If the consent of the parent or legal guardian cannot be obtained, section 25 of the Marriage Act no 25 of 1961 applies…. (ministerial / official consent)

Because Karabo is only 17 and is therefore a minor, she requires the consent of both her parents before the marriage can be concluded. In this case, she only obtained the consent of her father.

The consent of her mother is lacking. **Requirement not fulfilled.**

- **Both partners must consent to be married to each other under customary law**

The facts state that Vuyo, Karabo and their respective fathers concluded an agreement. The couple's consent was obtained and this requirement has therefore been **fulfilled**.

Negotiation; entrance; celebration:

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

The facts state that Vuyo delivered part of the lobolo agreed upon and that, shortly afterwards, Karabo was allowed to reside with him and his family.

The customary law requirements concerning the negotiation and celebration of the marriage were therefore **fulfilled**.

However, since the first requirement was not fulfilled, Vuyo and Karabo's customary marriage would not have been legally valid.

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The fact that they failed to register their customary marriage is irrelevant, since failure to register a customary marriage does not influence the validity of the marriage in terms of s4(9) of RoCM.

(b) If we assume that a valid marriage did come into being between Vuyo and Karabo,

(i) what are the general consequences for them as husband & wife i.t.o cust law? (5)

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

- A **new and separate unit**, namely a **family or house**, comes into being.
  - » This unit is also a legal unit.
- The husband and wife have a **mutual obligation to live together.**
  - » Some groups allow a woman to live with her eldest son once he occupies his own independent residence.
- The husband and wife have a mutual duty **to allow each other sexual intercourse**.
  - » Each group has its own particular customs.
  - » These customs take reasonableness of demand into account.
- **Greater fidelity is expected from the wife** than from the husband, since…
  - » indigenous marriages are potentially polygynous.

- **The status of the man and woman changes.** s6 RoCM Act 120 '98, provides that:

  *'a wife in a customary marriage has, on the basis of **equality with her husband** and subject to the matrimonial property system governing the marriage, **full***

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status and capacity *to acquire and dispose of assets and to enter into contracts and to litigate.'*

(ii) Can Vuyo enter into a further customary marriage with another woman? (1)

Yes he may, as long as he complies with the requirements set out in section 7 of RoCM Act 120 of 1998 – which provides:

(1) **The proprietary consequences** of a customary marriage entered into before the commencement of this Act **continue to be governed by customary law**.

(2) A customary marriage entered into after the commencement of this Act in which the spouse is not a partner in any other existing customary marriage - **is a marriage in community of property** and of profit and loss between the spouses, unless such consequences are specifically excluded by the spouses in an ante-nuptial contract which regulates the matrimonial property system of their marriage.

(iii) If he does… will Vuyo have to follow any particular procedures to regulate the matrimonial property system of his marriages? (9)

Yes. In the case of a polygynous customary marriage, where the husband intends to enter into a further customary marriage with another woman, the provisions of the RoCM Act 120 of 1998 states that the husband must apply to the court to approve a written contract which will regulate the future matrimonial property system of his marriages (section 7(6)).

In terms of section 7(7), when considering such an application, the court must:

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(i) in the case of a marriage which is in community of property or which is subject to the accrual system-

(a) terminate the matrimonial property system which is applicable to the marriage; and

(b) effect a division of the matrimonial property;

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

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

The court may-

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

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

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

- **All persons having a sufficient interest in the matter**, and in particular the applicant's existing spouse or spouses and his prospective spouse, **must be joined in the proceedings** instituted in terms of section 7(6) (section 7(8)).
- **If a court grants an application** contemplated in sections 7(4) or 7(6), the registrar or clerk of the court, as the case may be, **must furnish each spouse with an order of the court**. This order must include a certified copy of such contract and the registrar or clerk of the court must cause such order and a certified copy of such contract to be sent to each registrar of deeds of the area in which the court is situated (s7(9)).

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What effect does the dissolution of a customary marriage have on marriage goods?

- Generally on the dissolution of the marital union, the marriage goods are **either returned** to the husband **or forfeited** by the husband in favour of the wife's group.
- In some cases, however, the marriage goods are **returned in part only**.

The following factors, however, are taken into account:

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

The amount of blame on either side:

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

The number of children born of the marital union

- Amongst most groups, the **wife's group is allowed certain deductions** should they have to return the marriage goods.
- In most cases, **one beast is allowed as a deduction for every child** the wife has borne.

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- This does not refer to living children only, but to **all children the wife has given birth to**, including miscarried children.
- Should the wife have had more children than the number of marriage beasts**, at least one beast** should be returned to the husband as concrete proof that the marriage has been dissolved.

The portion of marriage goods already delivered:

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

Failure to reach an agreement:

- Should the parties fail to reach a mutual agreement regarding the marriage goods, **the court may be approached for a decision**.
- In such a case the court is not asked the dissolve the union. The union is already dissolved, without the interference of the court.
- **The court merely decides on the marriage goods**.
- The position in respect of the customary marriage is not clear.
- **The suggestion here is that the parties**:
  - » make a specific point of agreeing on the fate of the marriage goods during the dissolution of the marriage or that the court be approached to make a decision.

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The indigenous marital union has definite proprietary consequences. Discuss the issue of control over house property? Marriages before 15 November 2000? (7)

House property belongs to the **husband,** the **wife** of the house and their **children.**

» They all share in this property, and they each have a duty to contribute to the property.

- **The husband controls the property**
  - » on behalf of the house, in consultation with wife & the older children.

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

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» **s7** The RoCM Act provides for the position of a wife in a customary marriage. I.t.o. **s6 she has the capacity to acquire & dispose of assets, to enter into contracts and to litigate in court.**

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(9) Compare and contrast the legal requirements for a traditional indigenous marriage, a customary union and a customary marriage. (The Recognition of Customary Marriages Act 120 of 1998) (15)

CONTRASTING LEGAL REQUIREMENTS OF CUSTOMARY MARRIAGES IN SA		
GENERAL	**Recognition of customary marriages – prior to 15/11/2000** **2. (I) A marriage which** is a valid marriage at **customary law** and existing at the Commencement of this Act is for all purposes recognised as a marriage. (2) A customary marriage entered into after the commencement of this Act. Which complies with the requirements **of this** Act. is for all purposes recognised as a marriage. **(3)** If a person is a spouse in more than one customary marriage, all valid customary marriages entered into before the commencement of this Act are for all purposes recognised as marriages. (4) If a person is a spouse in more than one customary marriage, all such marriages entered into after the commencement of this Act, which comply with the provisions of this Act. are for all purposes recognised as marriages.	**3.** (1) For a customary marriage entered into after - the commencement of this Act to be valid- the prospective spouses - (i) must both be above the age of I8 years; and (ii) must both consent to be married to each other under customary law: and the marriage must be negotiated and entered into or celebrated in accordance with customary law.

CONTRASTING LEGAL REQUIREMENTS OF CUSTOMARY MARRIAGES IN SA		
GENERAL	* Validity of customary marriages entered into **before 15 November 2000** must be determined by testing the marriage against the requirements for the traditional indigenous marriage or the customary union	* The legal req's **after 15 Nov 2000** have to meet the require-ments found in Section 3(1)(a)(i) of Act 120 of 1998 * These req's are absolute

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MODALITY	TRAD INDIGENOUS MARRIAGE	CUSTOMARY UNION	CUSTOMARY MARRIAGE
KINSHIP	* The man and the woman concerned must **not be related** within the prohibited degrees of kinship.	* The same rule applies	* The same rule applies
CONSENSUS	* There must be consensus between the **two family groups** i.t.o. the marriage & the marriage goods	* **If a minor:** Consensus between father of the bride (or guardian) if the bride is still a minor (similar for groom if he is a minor) * **If a major** - father's consent is not required. * **Consensus** to marriage & the marriage goods is thus obtained	* **Consensus between groom, father of the bride and the bride** is required i.r.o. the marriage & marriage goods.
NEGOTIATIONS	* Marriage negotiations and the contracting of marriage were accompanied by **various ceremonies and customs**.	* The **groom, his father** or guardian **bride's father** or guardian as a party to the negotia-tions. Brides father's interest is **mainly material i.r.o lobola.**	* I.t.o. the Act marriage must be **negotiated & entered into or celebrated i.t.o. with customary law.**
CONSENT	* In **original indigenous law**, the agreement was between the **family groups** * **If a minor:** Consent via the family group, house-hold, father or guardian of the bride or groom. * Consent of the bride was not required * Consent of the groom - afforded by groom's father.	* **Minor:** Consent via the family group, household, father of the bride (or gaurdian) if the bride is still a minor (similar for groom if he is a minor) * **If a major - father's consent is not required**	* In **modern indigenous law** consent is concluded by particular **individuals.** * **KZN, section 38(1) of the Codes of Zulu Law :** Consent of the father family head; the groom is a minor. * Consent of the bride's father or guardian as a party

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			to the agreement or minor bride Not essential if major.
CUSTOMARY MARRIAGE CONSENT (continued)	* A public **declaration by the bride** to an official witness that union takes place with her consent * **s42 of the Codes of Zulu Law** * Agreement by the bride's father or guardian i.r.o. marriage goods indicates con-sent to the customary union. * **These are statutory requirements, therefore absolute requirements**		

TRANSFER OF BRIDE	* The bride must be transferred by her family group to the man's family group.	* These requirements show that the sources mentioned above agree on the requirements of consent and the transfer of the bride. the handing-over of the girl to the man or his family group	* Performance and counter performance consist of the transfer of the marital guardianship (for the purpose of marriage) over a wo-man by her group, on the 1 hand, and delivery of property, usually cattle & now also money, by the groom and his group on the other.
MAJORITY	* Although some people recognised child betrothals, the marriage was only contracted when the parties intending to marry had reached adulthood, including sexual maturity or completion of initiation rites	* Although some people recognised child betrothals, the marriage was only contracted when the parties intending to marry had reached adulthood, including sexual maturity or completion of initiation rites	* The Act now lays down specific age requirements for the conclusion of a valid customary marriage. In order to achieve formal gender equality, the minimum age requirement is 18 for both males and females. * The Act makes provision for the customary marriages of minors subject to specific provisions

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MARRIAGE GOODS	* Lobolo is probably the most important contract in customary law. Lobolo should be transferred, in full or partially before, or after the bride is transferred – depending on the tribal custom.	* The Codes of Zulu Law indicate that lobolo is a separate contract supplementary to the customary union & limited to the groom & the beneficiary thereof. * ss 61 and 62 stipulate the maximum number of cattle that may be delivered as lobolo. Latter is not an absolute requirement	* Although the Recognition of Customary Marriages Act 120 of 1998 makes no reference to *lobolo*, at least not in the sections setting out the requirements for the marriage. *'By implication thereof, it is now also a contractual accessory to marriage'* (Bennett)
PRE-EXISITNG UNION	* The woman may not be already involved in a marital union since a married woman may not have two husbands. In such a case the later union is null and void. Due to the polygynous nature of indigenous marriages, men may be already married to another woman	* the non-existence of a common-law (civil) marriage * Section 22 of the Black Administration Act 38 of 1927, a civil marriage excludes a subsequent customary union.	* If a person is a spouse in more than one customary marriage, all valid customary marriages entered into before or after the commencement of the Act are, for all purposes, recognised as marriages (sections 2(3) and(4)). * .
CUST. MARR PRE-EXIST UN	* The Act therefore confers legitimacy on polygyny, that is, the form of marriage in which one man is entitled to be married to more than one wife simultaneously		
NEGOTIATION FORMS	Zulu – Elope together : Custom = ***ukubaleka*** *(to flee).* Nguni – kidnapping the bride to be : Custom = ***ukuthwala*** (to carry).		

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In a traditional court evidence is given under oath? 5x

In a traditional court, evidence is not given under oath.

Therefore, perjury (willfully giving false evidence under oath) is unknown.

No action is taken against a party or a witness who tells lies; if they do tell lies, it will merely harm their case.

The parties to an action are responsible for seeing to it that:

- Their witnesses are present on the day of the trial. If a witness cannot attend the trial, the court may, on request, postpone the trial once.
- Alternatively, the court proceedings can continue without the witness until it appears that the particular witness is necessary, and then the case is postponed.

Further, the court is free to call upon any person to testify if it is of the opinion that the person concerned has some information.

- If a party cannot attend, he or she must give reasons beforehand, and if these reasons are acceptable, the case will be postponed.
- Today, the names of the plaintiff's witnesses are given to the headman when the case is reported. The defendant is then notified in writing of the case against him, and of the date of the trial. He is also asked to bring along his witnesses on that day.

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In court, evidence is given orally in the presence of the parties concerned, and is subject to questioning.

- Each party and all the witnesses are given full opportunity to testify at their discretion to the court, without interruption.
- The court patiently listens to the evidence and will seldom call on a witness to confine his or her evidence strictly to the case in hand.
- If, however, a person states his case in a very long-winded manner, without being specific, he will be asked to get to the point. If he does not do so, it can harm his case.

It is the court that determines the relevance of the evidence, with due allowance for all the facts of the matter as well as the motives of the witnesses. If it later appears that a person is wasting the court's time, he may be fined.

A traditional leader is empowered to punish anyone? 5x

Limitations pertaining to Race:

- In offences where:
  - » any of the accused or victims are not blacks, or where
  - » the property involved does not belong to a black person…

  such offences may not be tried by a traditional leader.

However….

- A traditional leader is, however, empowered to punish any person, including a non-black, **for contempt of his court *in facie curiae* *(in the face of the court):*** see *Makapan v Khope* 1923 [AD 551]; *R v Vass* 1945 [GWPD 34]; against Prinsloo & Myburgh [248].

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In African customary law there are certain crimes that can defile (pollute) the community? Discuss briefly. (5)

Crimes that defile the community…

- In African customary law **infringement of communal interests** sometimes takes the form of defilement (pollution) of the community.
- Examples of polluting crimes are **'offences of the blood'** eg: assault and homicide.
  - It is also believed that infanticide & abortion generate a ritual heat that keeps away the rain.
  - Incest – and in some communities contempt of the ruler as well - is considered defiling.

The Effect & Consequence of defilement or pollution of the community:

- In such cases - **not only** is punishment imposed, **but a** meal of lustration (purification) and conciliation is ordered **as well**.
- The cattle paid as a fine are generally slaughtered at the court.
  - » All those present, and particularly the members of the court council and the persons involved in the act of defilement, must join in the meal.
  - » In this way the offenders are visibly (in a concrete manner) reconciled with the community.

The head of the family group [which consists of related agnatic groups] is not responsible for the conduct of its members, and has no obligation towards negotiation for settling disputes between agnatic groups. **Critically evaluate? (10)**

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Discuss the African customary law process of negotiation for settling disputes within the agnatic group? (10)
To the contrary…..

Who are the parties involved, and what part does each of them play?

- **The head of the family group is responsible for**:
  - » the conduct of its members, and has to see to it that disputes among its members are settled.
  - » The family group consist of: related agnatic groups comprising at the most three generations,
- **If a matter cannot be settled within the family circle…**
  - » senior relatives outside the family are invited to help.
  - » If the matter cannot be settled within this circle either…
  - » the assistance of direct neighbours, who are often not relatives of the family, is called in.
- **Sometimes the help of neighbours is called** in before members of the wider family group are asked for help.
  - » In urban areas neighbours are virtually always invited to help, since the relatives of the parties concerned often do not live close by.
- **If it does happen that the parties still do not accept the proposed solution**…
  - » they have to take the dispute to the local headman.
- **The OBJECTIVE here is negotiation with a view to reconciliation.**

Briefly discuss the principle that the head of an agnatic group is liable for crimes committed by members of his group. (8)

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The head's liability is based on the principle of group rights and duties. Mention proverbs and examples as well.

In African customary law **the head of an agnatic group is always liable for the conduct of members** of his group.

He has co-liability because in the ACL the agnatic group has certain rights and duties.

- Therefore, the group is also liable for the crimes of its members.
- **The Northern Sotho use the following sayings** to refer to this type of liability:

  (i) If the herd boys in the veld are bitten, it will affect their elders at home.

  Tsa loma badisi nageng, di fetelsa bogolo gae

  (ii) A cow is brought to ruin by her calf.

  Kgomo ka mo gobe e wetswa ke namane

  (iii) A child that steals, gets his father into trouble.

  Ngwana a utswa o obela ragwe

- The group member himself incurs the liability and is punished, but **if there's a fine, it must be paid by the group**, represented by its head.
- The Northern Sotho say the following in this regard:

  » The big wolf has not guilt; the guilt is brought on by the little wolves.

  Phiritona ga e molato, molato e obelwa ke diphišana

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(9) Define what constitutes a crime? (3)

A wilful human act that is:

» in conflict with the generally accepted interests of the community,

» that can be blamed on the perpetrator, and

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» the consequence of which is…

  - that the perpetrator may be punished by the community constitutes a crime.

Describe the lodgement procedure? (8)

In your answer you must **distinguish between a civil action and a criminal action**. In **each case, indicate who takes the initiative** in instituting the action. Also **indicate to what extent the African customary procedure has been amended** through legislation and court decisions.

In a civil case… set down

» The plaintiff's agnatic group first tried to negotiate with the defendant's agnatic group.

» If the negotiations however *did not lead to an agreement*, and the plaintiff's group reported the matter to their headman.

» If the defendant and the plaintiff live in the same ward their headman, the plaintiff and the headman sets the date of the trial and notifies the defendant.

» If they do not live in the same ward the *plaintiff's headman sends the plaintiff's group, together with a representative of the ward, to the headman of the defendant in order to report the matter to the latter*.

» The headman of the defendant will then set a date.

» **The general principle is that a case is tried in the court of the defendant's headman.**

- **The Hearing:**

  » On the day of the hearing, *both parties and their witnesses must be present*.

  » The *case may not be heard in the absence of one of the parties*.

  » The Northern-Sotho say in this regard:

    - ***molato wa meetse o rerwa moeteng***
      - *a case about water is heard with the pot at hand* or
    - ***mpa e sekwa ke moladi wa yona***

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- *a pregnancy is decided on with the sleeping partner present.*

» If one of the parties ***cannot be present and offered apologies prior to the proceedings the case is postponed.***

» If a party is absent ***without an excuse***, the case is postponed and the absent *party is warned to be present when the case is heard again*.

» If a party is absent without an excuse for a **second time**, he or she is *generally brought to the court by messengers*.

» ***Such a party may be punished for contempt of court.***

▫ **Statutory court rules:**

» **Under statutory court rules a civil case may be heard in a chief's court** in the absence of a party (Rule 2(1), GN R2082 of 1967), and ***such a party may even be sentenced in his absence.***

» This we call **'judgment by default'**. In such a case the party may **not be** punished for contempt of court as well (*S v Khuzwayo* 1969(1) SA 70 (N)).

» *If one of the parties is not satisfied with the decision* of the headman's court the dissatisfied party ***may ask that the case be referred to the chief's court***.

» *The dissatisfied party and a representative of the headman's court then report the case to the chief's court*.

» A ***headman's court may also refer*** a case to the chief's court ***if it is complicated***.

» At the chief's court there is *usually a person who 'receives' these cases and who sets a date for the trial on the chief's behalf*.

» The procedure in the chief's court is the same as that in the headman's court.

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In a criminal case:

- The general procedure is that the agnatic group of the harmed person reports the case to the local headman.
- In exceptional cases the complaint may be lodged directly with the chief's court.
- The *headman investigates the matter* and *reports to the chief.*
- If the *complaint is founded*, the *chief sets a date for the trial*.
- The *parties concerned are notified accordingly*.
- *Each party must see to it that its witnesses are present on the day of the trial*.
- In criminal cases the customary procedure applies, to such an extent that it is not in conflict with public policy and natural justice.
- It was therefore decided in the high courts that a person may not be sentenced in his absence (cf. *R v Buthelezi 1960(1) SA 284 (N)*) and that a chief may not administer justice in a case in which he himself is the complainant.

Explain the principles behind evidential burden under civil and criminal cases? 3x

As far as the evidential burden is concerned, ***the principle is that a party must prove its claims in court.***

In a civil action:

- ***The plaintiff's group must submit evidence which*** -
  - *together with other evidence submitted* to the court and
  - *evidence obtained through questioning* by the court - ***proves its claim.***
  - *Otherwise, judgment is given in favour of the defendant, and the plaintiff's claim is disallowed.*

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- ***Likewise, the defendant's group must submit proof*** which –
  - » *together with other evidence before and in the court…*
  - » ***rebuts (disproves) the case against it*** and shows the ***claim to be unfounded***.

As said above, all evidence is judged merely on its merits, and the court is not bound to technical rules of evidence.

- A **party is therefore not required to prove an issue of fact conclusively** (ie decisively).
- The court plays an active part in examining the parties and is therefore in a position to judge the rendering of the facts by itself.

In criminal cases:

- Similarly, ***the principle is that a party must prove its claims in court.***
- *Sometimes it is said that the onus (duty or responsibility) is on the accused to prove his or her innocence*.
  - » This means that *the accused is expected to submit evidence to the court that proves the charge to be unfounded*.
- **In African customary law *there is no prosecutor who submits evidence on behalf of the court***.
- The court however plays an active part in the process of questioning and may even call witnesses to give evidence.
- However, the **principle** that the case against the accused must be **proved beyond reasonable doubt** as it exists in the general law of the land, **is unknown in African customary law.**

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Absolution from the Instance – thus not possible

» From the above it is clear that in African customary law no court case can end in an 'absolution from the instance'.

('Absolution from the instance' means the dismissal of a claim by the court because it could not make a decision in favour of one of the parties on the evidence submitted to it.)

- ***In African customary law neither of the parties, nor both of them together, have the burden of proving their case.***
- ***It is the court who acquires proof by playing an active part in the process of questioning so that it will be able to give judgment***.

During an initiation ceremony, H incurs severe injuries as a result of D (the initiation master). *H accuses D of assault with intent of grievous bodily harm*. **What defence can D raise in court? (6) 5x**

Institutional action excludes unlawfulness?

In indigenous law there are certain circumstances where what looks like an unlawful act is, in fact, still considered lawful.

- In indigenous law, institutional action is one ground for the justification of an unlawful act - (ie. action according to a recognised cultural institution) excludes unlawfulness.
- Injuries sustained by young men in recognised stick and 'kierie' fights do not constitute assault.

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- The same applies to injuries sustained in the circumcision process during recognised initiation ceremonies.
- **If an agnatic group has consented to a certain act** and this act causes a person injury or harm, unlawfulness is excluded.
  - Therefore, a medicine specialist who gives medicine with the consent of the head of the patient's agnatic group is not liable for harm resulting from that act.

What is meant by 'a free system of evidence'? (5)

This means that there are no formal rules of evidence and that in principle no evidential material is excluded.

It is the task of the court to establish the truth by considering and weighing all the evidence.

- The African customary law of evidence is ***based on custom*** and does not consist of formal rules in the ordinary sense of the word.
- Its free system of evidence (in principle, ***no evidence is excluded: all evidence is admissible,*** and is judged on its merits by the court)
- Since the African customary law of evidence is so informal and free in nature, there is ***no scientific reasoning concerning the burden of proof***
- In African customary law *neither of the parties has the burden of proving their case.*
- It is the *court that acquires proof by playing an active part in the process of questioning* so that it will be able to give judgment

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Discuss contempt of the ruler as a crime in African customary law. (10)

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Discuss this crime and refer specifically to the different elements of a crime. Discuss the forms that the act of contempt can take, which grounds of justification can exclude the unlawfulness of the act and which punishments may be imposed on a person found guilty of this crime.

Contempt of the ruler is a serious crime:

- *Any act of a subject that intentionally rejects, disregards, opposes or disputes the authority of the ruler constitutes a crime*.
- Rejection of the authority of the *traditional leader, the national assembly or the representative of the ruler, such as a headman or a messenger, is also regarded as contempt of the ruler.*

The act:

The following are examples of acts that were punished in African customary courts as contempt of the ruler:

- *explicitly rejecting the ruler's authority*
- *unlawfully calling and holding a tribal meeting*
- *usurping a headmanship*
- *conspiring to usurp the ruler's position*
- *encouraging and canvassing subjects to divide the traditional authority and establish an independent traditional authority*
- *encouraging subjects to leave the tribal area and to join another ruler*
- *rejecting the authority of a headman*
- *adultery with the 'tribal wife'*

The unlawfulness…

Grounds of justification that can exclude unlawfulness in each case

- In Tswana and Northern Sotho contempt of the ruler is known as go *nyatsa kgosi*.
- The Southern Ndebele refer to it as *ukunyaza ikosi*.

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the requirement of guilt (culpability)

- Contempt of the ruler **requires intent** as a form of guilt (culpability).
- **A stranger** visiting the ruler's area does not have an allegiance with the ruler and **cannot commit this crime.**

the punishment

In former days, this crime was punished in one of the following ways:

- ***banishment***, because of the maxim

go nyatsa kgosi ke go tloga

'contempt of the ruler means to leave'

- ***the death penalty*** for serious forms of contempt, together with confiscation of property
- ***a fine***
- ***corporal punishment***

Because the *death penalty and corporal punishment as forms of punishment have been abolished by the Constitutional Court*, *these forms of punishment can no longer be imposed*.

Nowadays traditional leaders *do not have the authority to banish subjects either*, and ***the only valid form of punishment is a fine***.

Indicate the value attached to evidential material in African customary law:

The answers to this question are set out clearly in the text. The question that needs to be answered throughout is whether this type of evidence is admissible, in which circumstances it is admissible, and whether the evidence alone is decisive (enough).

***hearsay evidence** (3)*

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Hearsay evidence is admissible and is considered together with other evidence.

Hearsay can also serve as a guideline in the questioning of the parties and their witnesses and is therefore admissible.

However, a case relying mainly on hearsay has little chance of success.

***Concrete evidential material** (5)*

Concrete evidential material has especially strong evidential value.

A piece of clothing or some other personal belonging of an offender shown to the court has special evidential value since no person would entrust a personal belonging to a 'stranger', that is a non-relative, without a sound reason.

This is a form of judicial notice & a presumption.

The court takes notice of the fact that because of ritual reasons a person does not voluntarily entrust his personal belongings to others. This also leads to the presumption that the person is involved in a wrongful deed or a crime.

Concrete evidential material can include

- a piece of personal clothing such as a pair of men's trousers or a personal belonging such as a kierie.
- Sometimes a person caught in the act is also 'marked' by giving him one or two blows on the body, preferably on the back, with a *kierie*.
- That person must then explain to the court how his property came to be in the possession of another, or how he was injured or wounded. Injuries on the back do not point to a case of assault, because then the person would have defended himself.

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- Concrete evidential material together with other evidence is often decisive. *(considered sufficient proof).*

***Admissions** (5)*

- ***Civil cases** are first discussed by the agnatic groups concerned. If this process does not lead to a settlement, the case is taken to the court of the headman.*
- *By that time there must be reasonable clarity about the facts in dispute*. It is therefore not necessary for the court to ask the parties to admit certain facts.
- ***In criminal cases**, the case is usually investigated by the accuser's local headman and his councillors.*
- If the accused admits all the facts, he is punished without a further hearing.
- If he admits certain facts and denies others, the facts that have been admitted are accepted as proven. If all the facts against a party are admitted in the course of the case, judgment may be given.
- Admissions made by a party outside the court may be used as evidence in court.

***Extraordinary evidential material** (7)*

In former times, the assistance of a traditional healer (*inyanga*) could be called in.

- If the facts of a case were difficult to prove, the court would send the parties, accompanied by two or more messengers of the court, to an *inyanga*.

***Today,** members of the tribal police are used for this purpose.*

- It is the task of the inyanga, by *extrajudicial methods* such as *throwing the bones* or other tests, to determine whether the accused is guilty of the charge against him.

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- The finding of the *inyanga* is conveyed to the messengers. This can be done by shaving the hair of the accused, in order to indicate his or her guilt.
- These messengers convey the finding of the *inyanga* to the court; the *inyanga* himself or herself does not appear in court to give evidence.
- *The finding of the inyanga is accepted as decisive evidence by the court*: that is, no further evidence is required.
- All that remains to be done is for the court to give judgment.

Which punishments could formerly be imposed for contempt of the ruler- & - the present position? **(5)**

Banishment, the death penalty, confiscation of property, a fine and corporal punishment. Nowadays only a fine may be imposed.

In former days, this crime was punished in one of the following ways:

- **banishment**, because of the maxim *go nyatsa kgosi ke go tloga* (literally: 'contempt of the ruler means to leave')
- **the death penalty** for serious forms of contempt, together with confiscation of property
- **a fine**
- **corporal punishment**

Because the death penalty and corporal punishment as forms of punishment have been abolished by the Constitutional Court, these forms of punishment can no longer be imposed.

Nowadays traditional leaders do not have the authority to banish subjects either, and ***the only valid form of punishment is a fine.***

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Explain the legal significance of *mangangahlaa*. **(10)**

Refer to the following possibilities: goods to close the court proceedings; compensation to the members of the court council; reconciliation; the element of punishment.

The *mangangahlaa Custom*

- In cases **where there is no fixed amount of compensation** prescribed by tribal law…
  - » the court takes account of factors such as the status, the economic situation and the circumstances of the parties when the offence took place.
- **Sometimes the court orders** additional goods or money, other than damages, to be delivered.
  - » This may be called 'a court levy', or 'court costs'.
  - » It is called a 'levy' because in former times no money was used.
- ***The Sotho-speaking groups refer to this 'levy' as:***

Mangangahlaa….. 'to tighten the jaw or to move the jaw a lot'

- In this sense it refers to the ***amount of talking*** *that the court councillors need to do in order* ***to try to convince a difficult litigant of his guilt.***
  - » In this context *mangangahlaa* may be *regarded as compensation to the court for the time its members have spent on the case.*
  - » Another explanation is *that these are goods that are given in order to close the court proceedings.*

In former times *a goat, and even a head of cattle*, if the case took a long time, was given.

- The animal was slaughtered for the members of the court, and then eaten in a *meal shared by them and the litigants*.

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- » *In this way any trace of dissidence (disagreement) that still existed among the litigants was removed in a visible and a concrete manner.*
- » *In this respect mangangahlaa also plays a role in the **reconciliation of the parties**.*

- Sometimes *mangangahlaa* is also ordered to compensate for malicious damage that has been caused.
- It is also ordered if, during negotiations, *one of the parties unreasonably refused to come to an accord with another family group*. In this respect *mangangahlaa* **contains an element of punishment.**
- **In criminal cases** the fine that is imposed sometimes includes *mangangahlaa*.
- The *mangangahlaa* part is usually used for the food served to the members of the council and the accused.

Today the court levy takes the form of money, which by law (s 9, Act 68 of 1951) *must be paid into the tribal fund*.

The court levy or court fees are usually due by the party against whom judgment is given.

Which factors are taken into account by an African customary courts when giving judgment in a case? (10)

Refer to factors such as intentional damage, unfounded claims, the attitude of the parties concerned, their status and economic situation, as well as the circumstances in which the offence took place. Also briefly refer to the influence each factor may have on the sentence or judgment concerned.

One of the most important functions of the modern court as a legal instrument is **'finding of the law'** which is relevant to the sentence that has to be executed by the court. The question is:

How does the African customary court reach a judgment & which factors play a role?

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General court procedure:

- Judgment of an African customary court is based on ***consensus*** (general agreement).
  - » *There is no majority or minority judgment*.
  - » The *African customary court makes statements on behalf of the community*
  - » The *court and must 'find' the law as it accords with the current law of the community*.
- In this process an attempt is made to **bring about reconciliation** *between the parties, and between the parties and the community*.
  - » This *reconciliation also entails* that the party that has been harmed should receive some form of *restitution* (compensation).

A feature of judgments by an African customary court is that **each case is judged on its merits**.

- » There is no judicial precedent in customary law.
- » The court is therefore not bound to previous judgments in comparable cases.
- » The court comes to a decision after considering all the relevant information.

Judgment

In criminal cases:

Judgment - may mean… punishing the accused…

- » This punishment can take the form of a reprimand, a warning, corporal punishment, a fine, the attachment (seizure) of property, and in former times even banishment from the area.

In civil cases:

Judgment - may mean… rejecting or accepting the plaintiff's claim…

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- » If the plaintiff's claim is accepted, the defendant is usually asked to compensate for the plaintiff's damage.

Distinction - if any – civil vs criminal cases?

- In African customary law there is not always a clear difference between civil and criminal cases, nor is there a distinction between the civil and the criminal elements.
- The Northern Ndebele, however, do use terminology (i.e. words) to distinguish between a fine and compensation.
  - » **'Fine'** refers to the punitive element (i.e. the element of punishment), whereas
  - » **'compensation'** refers to the civil element of a case.
  - » Judgment pertaining to a case with both a criminal and a civil element will therefore also *comprise an element of punishment and an element of compensation*.

Determination of a fine or compensation:

- Various factors are taken into account in determining the amount of compensation to be paid.
  - » If, for instance, the damage was done – with ***intent*** - intentionally (i.e. in a purposeful and calculated manner), this is taken into account.
  - » Here the compensation is set for a higher amount than the damage that was actually done.
- The court may reject a plaintiff's claim if:
  - » *it is found to be unfounded or his attitude is found to be inflexible, and*
  - » *it may warn the plaintiff 'not to waste the court's time with trivialities'.*

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Predetermined fines or compensation…

For certain offences, eg: making an unmarried woman pregnant and adultery, there is, in most cases, a fixed amount of compensation…

- **However -** court may amend (i.e. increase or decrease) this amount, it does not readily do so.

Would you say that the institution of the small claims court has solved the problem of black litigants in regard to access to the law? Give reasons for your answer. (10)

Briefly discuss the reasons why the small claims court was instituted.

The establishment of small claims courts was recommended by the **Hoexter Commission** (Fourth Interim Report (**1982**) 52) to relieve the pressure on the magistrates' courts.

The aim was to obviate various difficulties including:

- relieve the pressure on the magistrates' courts
- the high cost of engaging lawyers;
- delay in bringing cases before the courts;
- the psychological barriers many litigants experience when appearing in formal tribunals;
- and barriers caused by poverty, ignorance and feelings of alienation.

The Commission was of the opinion that small claims courts:

- should operate in an informal manner;
- should attempt to reconcile the parties;
- that the presiding officials should play a more active inquisitorial role (par 13.6).

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The recommendations were translated into law by the Small Claims Courts Act 61 of 1984.

The effect of the Small Claims Courts for the black litigant:

- **Efficacy:** Although the small claims court is a cheaper & more informal process, it is doubtful whether it will satisfy the needs of the black litigant.
- **Jurisdiction:** The jurisdiction of the courts is restricted to the hearing of small claims which, in terms of section 15(a) of the Act, are principally cases of action not exceeding an amount determined by the Minister from time to time in the *Government Gazette*. Which currently is a maximum amount is currently set at R3000 in value.

Exclusions: Certain matters are specifically excluded from the jurisdiction of small claims courts (s 1b):

» the dissolution of African customary-law marriages,

» actions for damages for seduction,

» and breach of promise to marry.

These claims must be heard in magistrates' courts.

Thus the black litigant is faced with disadvantages of higher costs and more formalities.

- **Presiding officers:**

The officers presiding in these courts are advocates, attorneys or magistrates & they act as commissioners.

- **Legal representation:**

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Except in the case of minors or other persons lacking locus standi, no legal representation is permitted.

- **Rules of evidence:**
  - General rules of evidence are not applicable.
  - Questioning of witnesses may be on an inquisitorial basis.
  - According to the inquisitorial procedure, the court plays an active part in the investigation.
  - This procedure is similar to the customary court procedure.
  - There is **no requirement** in the Small Claims Courts Act 61 of 1984 that the commissioners should be able to speak a Bantu language **or** that they should be proficient in African customary law.
  - It may be argued that a commissioner's failure to know and apply African customary law may constitute a 'gross irregularity' in terms of section 46(c), warranting review by the Supreme Court.
  - It is unlikely, however, that the type of litigant for whom such courts were designed will have the time, education or initiative to challenge the court's decision.

Discuss the execution of a sentence by an indigenous court? (10)

Unless the judgement of the indigenous court is taken on appeal, it must be executed.

- Execution of the judgement or sentence must take place as soon as judgement is passed.

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- The fine (in whatever prescribed form) must be taken to the court where the judgement is given; part of this fine may be used to serve a meal to the court members (usually livestock).

It is possible to extract the payment goods by force if the fined person refuses or neglects to pay the fine or compensation within a reasonable time.

- A specially designated person then acts as messenger to perform the function of forcefully effecting the judgement of the court.
- If this happens, the fine and the compensation may be increased summarily. The increase may be regarded as a fine for contempt of court.
- In Sotho terms, this increase was referred to as **'thupa'** (stick or admonition), used for the maintenance of the messengers as execution costs perhaps in today's terms.
- It is possible to make an arrangement with the court to allow for the fine or compensation to be paid in instalments.
- In **former times**, sentences in the form of corporal punishment and banishment were enforced directly after the court session.
- **Today** a sentence by an indigenous court may be enforced **only** if no notice of appeal is received within thirty days after registration of the judgement with the local magistrate's court.

If the property to be confiscated is situated outside the area of jurisdiction of an indigenous court, application must be made to the clerk of the magistrate's court for the execution of the sentence.

- Also, today, the messengers of the indigenous court are not allowed to use force in order to execute a sentence or judgement.

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- Any interference with the messenger in the execution of his duties is considered a crime. However, no more goods may be seized than are laid down in the judgement.
- Section 20(5) of Act 38 of 1927 makes provision for another way in which to exact fines.
- If an indigenous court cannot exact a fine, the court may arrest the guilty person, or have the person arrested, and make him/her appear in the local magistrate's court within 48 hours.
- If the magistrate is satisfied that the fine was imposed in a proper manner and finds that all or part of it is still outstanding, the magistrate may order that the fine be paid immediately. Failure to do so may lead to the guilty person being sentenced to imprisonment of a period not exceeding three months.

Describe the execution of a sentence or judgment by an African customary court? (10)

Describe the following principles:
- Execution takes place as soon as possible after sentencing or judgment.
- Any delivery of goods (in the form of animals or money) takes place at the court.
- It is possible to seize goods, even by force.
- Today execution of judgment requires prior registration at the local magistrate's court.
- Act 38 of 1927 makes provision for another way of exacting outstanding fines.

The execution of judgment in a customary court, takes place as soon as possible after sentencing or judgment.

- The judgment of an African customary court must be executed, unless it is taken on appeal - thus:
  - » The compensation or the fine, whichever the case may be, must be paid as soon as possible after judgment has been given.
  - » The cattle, goats, or other goods or amounts of money are taken to the court where judgment was given.

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» In the case of compensation the successful party is notified that the goods or livestock may be fetched.

» Sometimes this party then gives part of the goods or livestock to the court, to be used for serving food to its members. In this respect it should be remembered that in former times members of the court were not rewarded for their services.

» Should a person refuse or neglect to pay the fine or compensation owing within a reasonable period of time, the African customary court would order the confiscation of that person's property.

» In such a case force could be used to confiscate the property. Some groups had a special messenger, known as an ***umsila*** among the Xhosa, who performed this function. In such a case the fine and the compensation were usually increased summarily.

» The increase may be regarded as a fine for contempt of court. This additional levy was called ***thupa*** **('stick'** or **'admonition' - warning)** by the Northern Sotho. It was used for maintenance of the messengers, and can therefore also be regarded as execution costs.

» The **judgment debtor**, that is, the person against whom judgment was given for payment of a fine or damages, may also arrange with the court to pay the judgment goods in instalments.

» **In former times, sentences** in the form of corporal punishment and banishment were enforced directly after the court session.

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- » **Today a sentence** by an African customary court may be enforced only if no notice of appeal was received within 30 days after registration of the judgment with the local magistrate's court.
- » If the property to be confiscated is situated outside the area of jurisdiction of an African customary court application must be made to the clerk of the magistrate's court for execution of the sentence or judgment. pp166
- » **Today the messengers** of the African customary court are not allowed to use force in order to execute a sentence or judgment.
  - ➢ Any interference with the messenger in the execution of his duty is considered a crime (Rule 8(4), GN R2082 of 1967).
  - ➢ However, no more goods may be seized than is laid down in the judgment. Section 20(5) of the *Black Administration Act 38 of 1927* makes provision for another way in which to exact unpaid fines.

- ▫ If an African customary court cannot exact a fine, the court may arrest the guilty person, or have the person arrested, and make him or her appear in the local magistrate's court within 48 hours.
- ▫ If the magistrate is satisfied that the fine was imposed in a proper manner and finds that all, or part, of it is still outstanding, the magistrate may order that the fine be paid immediately.
- ▫ Failure to do so may lead to the guilty person being sentenced to imprisonment of a period not exceeding three months.

Discuss rape as a crime in African customary law / indigenous law. (25)

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Discuss the different elements of a crime with regard to rape according to the general guidelines given for the answer to question 1 above.

Rape… the act

- According to African customary law rape occurs when a man uses violence to force a woman to have sex with him without being married to him.
- Sex with a girl who is not sexually mature (i.e. old enough) is punishable as rape, even if there is no violence. The Tswana call this *go senya*, which means 'to destroy or to waste'.

Culpability the requirement of guilt

Only a man can commit rape – not a woman….

The use of violence is a requirement for rape.

The woman therefore has to offer resistance, unless she is threatened.

The terms used for 'rape' emphasise the element of violence.

- *The Northern Sotho refer to rape as **kato**, meaning 'to hold tight'.*
- *The Tswana use **petelelo** (**derived from betelele**), meaning 'to constrain' or 'to overpower', or*
- ***gatelelo** (**derived from gatelela**), meaning 'to trample' or 'to push down'.*

Violence:

- If, under the law of the Northern Sotho, it is proven that the woman was thrown on the ground or that she was constrained and that her clothes were torn, while she was screaming or was offering resistance in any other way, these are sufficient grounds for the attacker to be found guilty of rape. However, the woman must have reported the matter to the head of her family immediately.

Penetration:

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- Some groups do require penetration for rape to have taken place. This is the practice among the Tswana of North-West and the Ndebele of Mpumalanga. If there is no penetration, the offence is sometimes regarded as assault, and not as rape.

Non-Consent:

- The mere fact that the woman had not consented to sexual intercourse did not mean that a rape had been committed. There had to be violence as well. Here we must remember that according to African customary law the individual can never consent to harming the rights of the group. Therefore, if the woman consents to intercourse it cannot be used as a defence in a case of rape.
- **Unlawfulness:** and particularly the grounds of justification that can exclude unlawfulness in each case. Rape is a serious crime and is regarded as unlawful and intentional harm to the woman's body and honour. At the same time it also harms the honour of the agnatic group.

The punishment

In former times, rape could be punished with the death penalty, particularly if the victim was the wife of the traditional ruler.

- Other recognised forms of punishment were *fines or corporal punishment, or both*.
- A person who caught a rapist in the act with his wife, daughter or sister could give him a severe thrashing without himself incurring punishment.
- There are also known cases where the rapist was killed and the killer was not punished.
- The Northern Sotho have the following saying in this regard:

mpsa e bolaelwa mafekong - 'a dog is killed where he copulates'

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- The killing and the assault (the thrashing, in this case) were regarded as lawful means of self-help that excluded the unlawfulness of the killing and the assault. The killing and the assault also serve as lawful means of protecting guardianship.
- The infringement of the agnatic group's guardianship over a member of the group, namely the rape*, is compensated for by killing or assaulting the rapist*.
- The killing and the thrashing must therefore also be seen as forms of satisfaction.

Nowadays:

rape may not be tried by an African customary court as a crime, but only as a delict.

Since, according to African customary procedure, criminal and delictual liability resulting from a single act must be tried at the same court trial, the above distinction is not understood by the people concerned.

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Discuss mediation and judicial control according to African customary law over the traditional leader's administrative actions. 3x (15)

Mediation embraces the solution to a dispute outside of court with the intervention of a third party.

Mediation according to African customary law

- **Objections to administrative action of the ruler** must go before the **private council for mediation**.
- This council exercises the most control over the actions of the ruler, and **ensures that it is actually the ruling family that rules with the ruler as mouthpiece only**.

Procedure for mediation in customary law:

- **An aggrieved subject…**
  - » **relates his complaint to a member of the private council**, who **consults the ruler in secret.**
  - » If he finds that the ruler acted incorrectly, he can **reprimand him** and require him to **offer his pardon** to the subject.
  - » **One or more pieces of cattle** can be delivered by way of reconciliation.
- **The private council…**
  - » **Can also act on its own** against the wrongful action of the ruler.
  - » If the private council and the ruler **cannot come to a compromise**…

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- **In the past** *the matter was referred to the* **representative council.**

  If this council did not succeed in reconciling the ruler and the subject, the *matter was referred to the people's assembly*, **where it was dealt with publicly.**

- **At present the traditional authority also fulfils this function.**

- **Examples** i.r.o aggrieved administrative action of a ruler…

  Circumstances where a complaint was lodged against the ruler's action included:

  - the administration of corporal punishment to women;
  - incorrect composition of the representative council;
  - mismanagement of tribal funds;
  - refusal to award residential land to a subject.

Judicial control according to African customary law

- **African customary law does not allow a court action** to a subject to oppose an administrative action of the ruler in the tribal court.
- The reason for this is that **the ruler will then** act as **judge and accused** in the same case.
- An aggrieved subject can however **use indirect means to oppose an administrative determination** of the ruler **by raising the invalidity of the act** as a defence **in a criminal suit.**
- **For example**, where people were accused of not carrying out the ruler's instruction to deliver cattle. **After it was proved that they had not received notification of such an order, the case against them was dropped.**

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Distinguish between a general and a particular administrative determination. Why is this distinction important? 3x **(8)**

The difference between a general and a particular determination is important, because:

» **the rules of creation, revocation and interpretation of a general determination… do not apply to particular determinations.**

» **Determinations can, on the basis of their effect…**

- be divided into general and particular determinations.

Particular determinations: (i.r.o a specific individual)

- **Create, amend or terminate particular legal relations;**
- Is directed at a **particular subject** and is conveyed to the person concerned by **personal notification**.
- The **essence and content** of the determination must be **clear and understandable**.
- **Example:** The allocation of a residential site to a particular family or the removal of a particular family from one place to another

A General determination (i.r.o a specific the broader community)

- A general determination involves the creation, amendment, substitution or termination of legal relations between **an organ of authority and its subjects in a community.**
  - This decision is **valid for all subjects**
  - Must be **made known in public** in such a way that the whole chiefdom can take notice. i.e. a general determination is made known during meetings of the ward or the general assembly.

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- The **essence and content** of the determination must be **clear and understandable**.

  Example: A traditional leader's decision or determination to reserve a particular area as grazing land for a specified time.

Dispute of determination:

When some subjects successfully dispute the effect of a general determination on the grounds that the determination did not fulfil the legal requirements, and is thus invalid, the whole of the determination is annulled.

This affects the whole functioning of the determination, as it falls away in relation to all the subjects and not only the particular subject who opposes it.

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

- *Mr Mbuyazwe, a traditional leader, issued several determinations regarding his subjects conduct during times of bereavement. One of the determinations determines that, when families are in mourning, nobody in their neighbourhood should engage in any work activity until the day after the funeral. The bereaved families are also barred from providing meals to persons attending the funeral.*
- *Buza's father, who is a subject of Mr Mbuyazwe, passed away shortly after the announcement of the determinations.*
- *Some of his relatives came from far to attend the funeral and Buza's family therefore decided to provide them with food.*
- *They consequently cooked a meal on the day of the funeral and served it to Buza's relatives*

Advise Buza on the steps that he can take if Mr Mbuyazwe decides to fine him for not obeying his orders in terms of… **(8)**

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This question revolves around the issue of control over the traditional leader's actions.

African customary law provides for legal remedies when a subject *is wronged by an administrative action of the ruler, ward head or another organ of authority*. I.t.o this scenario we will focus only on remedies pertaining to control over the ruler.

We distinguish between the following remedies:

» *mediation & judicial control according to African customary law*

» *internal review according to common law – and –*

» *judicial control according to common law.*

African customary law:

Under African customary law, the wronged subject has access to…

- ***mediation and***
- ***judicial control*** *according to indigenous law against the traditional leader*.

Mediation according to African customary law

Mediation embraces the out-of-court resolution of disputes *with the intervention of a third party*

In customary law the following principle applies:

- **Any objection** to an administrative action by the ruler **must go before:**
  - » the private council for mediation… which council…
  - » exercises the most control over the actions of the ruler, and
  - » ensures that it is actually the ruling family that rules with the ruler as mouthpiece only.

An aggrieved subject relates his complaint to a member of the private council, who

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- » consults the ruler in secret…
- » If he finds that the ruler acted incorrectly, he can
  - ➢ reprimand him and
  - ➢ require him to offer his pardon to the subject.
    - * one or more pieces of cattle can be delivered by way of reconciliation.

The council can also act on its own against the wrongful action of the ruler.

- ▫ **If the private council and the ruler cannot reach a compromise:**
  - » **in the past** the matter was referred to the representative council.
  - » If this council did not succeed in reconciling the ruler and the subject, the matter was referred to the people's assembly, where it was dealt with publicly.
- ▫ At present the **traditional authority** also fulfils this function.

Examples of circumstances where a complaint was lodged against the ruler's action….

- ▫ *the administration of corporal punishment to women;*
- ▫ *incorrect composition of the representative council;*
- ▫ *mismanagement of tribal funds;*
- ▫ *refusal to award residential land to a subject*.

_____ooo_____

Judicial control according to **African customary law**

African customary law does not allow a court action by a subject to oppose an administrative action of the ruler in the tribal court.

The reason, is that the ruler would then have to act as judge & accused in the same case.

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- **An aggrieved subject can, however, use indirect means** to oppose an administrative determination by the ruler by:
  - raising the invalidity of the act as a defence in a criminal suit.
  - **For example**, in one case people were accused of failing to carry out the ruler's instruction to deliver cattle. After it had been proved that they had not received notification of such an order, the case against them was dropped.

_____ooo_____

Common law:

- ***internal review and***
- ***judicial review***

are the controls over a ruler's administrative action:

Judicial control *according to* ***common law***

Today, the traditional ruler functions within a hierarchy of organs of authority.

This means that his actions can also be reviewed by a higher authority within the same hierarchy of power.

- The *local magistrate*, the *provincial minister* *entrusted* with traditional authorities, and the *State President* can review the administrative actions of the traditional ruler.
- Internal review can be done:
  - *at the request of an aggrieved subject or…*
  - *of the higher organ's own accord.*
- The higher authority can consider:
  - *the validity of the act as well as*
  - *the desirability and effectiveness of the act.*

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- The particular organ can confirm, disprove, amend or replace the action.
- The reviewing authority can also:
  - *take new facts into account and*
  - *apply new considerations.*
- However, the decision must fulfil the validity requirements of administrative determinations.
- If a subject is not satisfied with the decision of the reviewing authority, he can oppose it in a court of law *as the decision does not have the power of a court decision*.
- However, **the traditional ruler cannot oppose the decision in a court of law**, because *he and the magistrate belong to the same hierarchy* of power and are not independent parties in such a case.
- The *ruler can appeal to a higher official in the hierarchy* if he is not satisfied with the decision of the reviewing authority.

_____ooo_____

Internal review according to **common law**

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

The subject can:

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

- The act complained of can be opposed indirectly by raising the invalidity of the act as a defence in a criminal case.
- *The institution of an action does not defer the force of the ruler's administrative act.*
- **If the subject wants a deferment, he must specially apply for a temporary interdict.**
- *With review the court merely looks at the validity requirements of the administrative act and not at its effectiveness.*

_____ooo_____

- **Today** a ***traditional leader is held privately and criminally liable*** for his invalid administrative actions.
  - For example, if he:
    - » deprives a subject of his property or damages it without authorisation, or
    - » allows a subject to undergo initiation rites i.e. circumcised without his consent

      the subject can institute a claim against him.

      A traditional leader who metes out corporal punishment can also be charged with assault.

_____ooo_____

(1) **Judicial review** according to legislation

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- In terms of *section 6(1) of the Promotion of Administrative Justice Act 30 of 2000*, **any person may institute proceedings in a court or tribunal for the judicial review of an administrative action**.

Administrative action *refers only to:*

- *an action taken by an organ of state*
- *when exercising a power i.t.o the Constitution or Provincial Constitution or*
- *exercising a public power or performing a public function in terms of any legislation, or*
- *by a natural or juristic person other than an organ of state in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect.*

- It has already been shown above that traditional leaders, headman and traditional authorities do make decisions of an administrative nature likely to have the said effects.
- Thus the provisions of the said Act also apply to the administrative decisions of traditional leaders but not to their judicial functions. (See s1 of the Act.)

Korter vraag… (10)

What remedies are available to ….. against the traditional leader's actions?

- African customary law provides for legal remedies when a subject is wronged by an administrative action of the ruler, ward head or another organ of authority.
- Here we pay attention only to control over the ruler.
- We distinguish between…

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(1) Mediation

(2) judicial control according to African customary law

(3) internal review according to common law and

(4) judicial control according to common law.

Can …. And his family be legally banished from the area?

- In the case of sorcery, for instance, the whole family might be banished and even killed. Note that fines have to be paid by the group.
- banishment, because of the maxim *go nyatsa kgosi ke go tloga* (literally: 'contempt of the ruler means to leave')

Discuss the CONTROL over the traditional leader's administrative actions? (25)

General Control over the actions of the Traditional Leader:

- The **general form** of control over the actions of the traditional leader is through advice by the different councils.
- The basis of this control is expressed in the *Northern-Sotho legal maxim:*

kgosi ke kgosi ka batho - *a kgosi is kgosi thanks to people*

- This means that the ruler must act in accordance with the will of the people.

Oversight of the People – A process of Consultation

Previously it was the:

- private council and the
- representative council that advised the ruler i.r.o administrative acts.

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At present the

- traditional authority is empowered to perform this function (s 4, Act 68 of 1951).

Any adult male tribal member can discuss the actions of the traditional leader during a meeting of the tribal assembly.

The process of consultation is a form of control which precedes the administrative action.

Enforcement of Requirements for Equitable Administrative Action:

- The requirements of administrative determinations are incomplete unless the **law also provides for methods to enforce** these requirements.
- African customary law provides for legal remedies when a subject is wronged by an administrative action of the ruler, ward head or another organ of authority.
- Here we pay attention only to control over the ruler.
- We distinguish between the following legal remedies when a subject is wronged by an administrative action of the ruler:
  - *Mediation*
  - *judicial control according to African customary law*
  - *internal review according to common law and*
  - *judicial control according to common law.*

(1) **Mediation**

- Mediation embraces the out-of-court resolution of disputes with the intervention of a third party.

In customary law the following principle applies:

- Any objection to an administrative action by the ruler must go before the private council for mediation.
- This **private council** exercises the most control over the actions of the ruler, and ensures that it is actually the ruling family that rules with the ruler as mouthpiece only.

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- **An aggrieved subject** relates his complaint to a member of the private council, who consults the ruler in secret.
  - » If he finds that the ruler acted incorrectly, he can reprimand him **and**
  - » require him to offer his pardon to the subject.
    - ➢ One or more pieces of cattle can be delivered by way of reconciliation.
- **The council can also act on its own** against the wrongful action of the ruler.
  - » If the private council and the ruler cannot reach a compromise, in the past the matter was referred to the representative council.
  - » If this council did not succeed in reconciling the ruler and the subject, the matter was referred to the people's assembly, where it was dealt with publicly.

At present the traditional authority also fulfils this function.

Examples of circumstances where a **complaint** was lodged against the ruler's action included the following:

- *the administration of corporal punishment to women;*
- *incorrect composition of the representative council;*
- *mismanagement of tribal funds;*
- *refusal to award residential land to a subject.*

_____ooo_____

(2) **Judicial control** according to African customary law:

- African customary law does not allow a court action by a subject to oppose an administrative action of the ruler in the tribal court.
- The reason, is that the ruler would then have to act as judge & accused in the same case.
  - ➢ An aggrieved subject can, however, use indirect means to oppose an administrative determination by the ruler by raising the invalidity of the act as a defence in a criminal suit. For example: *in one case people were accused of failing to carry out the ruler's instruction to deliver cattle. After it had been proved that they had not received notification of such an order, the case against them was dropped*.

_____ooo_____

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(2) **Internal review** according to common law

- **Today**, the traditional ruler functions within a hierarchy of organs of authority.
- This means that his **actions can also be reviewed** by a higher authority within the same hierarchy of power. The *local magistrate*, the *provincial minister* *entrusted* with traditional authorities, and the *State President* can review the administrative actions of the traditional ruler.
- **Internal review** can be done **at the request of** an aggrieved subject **or** of the higher organ's own accord.
  - The higher authority can consider the validity of the act as well as the desirability and effectiveness of the act.
  - The particular organ can confirm, disprove, amend or replace the action.
- The reviewing authority can also take new facts into account and apply new considerations. However, the decision must fulfil the validity requirements of administrative determinations.
- If a subject is not satisfied with the decision of the reviewing authority, he can oppose it in a court of law as the decision does not have the power of a court decision.
- However, *the traditional ruler cannot oppose the decision in a court of law, because he and the magistrate belong to the same hierarchy of power* and are not independent parties in such a case.
  - The ruler can appeal to a higher official in the hierarchy *if he is not satisfied with the decision of the reviewing authority.*

_____ooo_____

(3) **Internal review** according to common law

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

The subject can:

- *apply for **review** of the validity of the administrative act*

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

- The act complained of can be opposed indirectly by raising the invalidity of the act as a defence in a criminal case.
- *The institution of an action does not defer the force of the ruler's administrative act.* If the subject wants a deferment, he must specially apply for a temporary interdict.
- With review the court merely looks at the validity requirements of the administrative act and not at its effectiveness.

_____ooo_____

- **Today** a ***traditional leader is held privately and criminally liable*** for his invalid administrative actions.
  - For example, if he:
    - » deprives a subject of his property or damages it without authorisation, or
    - » allows a subject to undergo initiation rites without his consent and to be circumcised,

  the subject can institute a claim against him.

A traditional leader who metes out corporal punishment can also be charged with assault.

_____ooo_____

(4) **Judicial review** according to legislation

- In terms of *section 6(1) of the Promotion of Administrative Justice Act 30 of 2000*, **any person may institute proceedings in a court or tribunal for the judicial review of an administrative action**.

Administrative action *refers only to:*

- *an action taken by an organ of state*
- *when exercising a power i.t.o the Constitution or Provincial Constitution or*
- *exercising a public power or performing a public function in terms of any legislation, or*

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- *by a natural or juristic person other than an organ of state in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect.*
  - It has already been shown above that traditional leaders, headman and traditional authorities do make decisions of an administrative nature likely to have the said effects.
  - Thus the provisions of the said Act also apply to the administrative decisions of traditional leaders but not to their judicial functions.

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

'Status' - refers to a person's legal position in general, while

'Rank' - is only one factor influencing status.

In indigenous customary law, a distinction must be drawn between status and rank.

_____ooo_____

Status - determines the powers derived from objective law.

Status in original indigenous law

- the individual shared his or her rights with the other members of the agnatic group which depended on his or her status within the group.
- status was influenced by factors such as family rank, house rank, age, sex and marital status.
- the principle of shared rights meant that there was **no** question of absolute majority or minority.
- the idea of a fixed age at which a person attained majority was unknown.
- The higher a person's status, the more powers he or she obtained, but never where he or she could act independently from the agnatic group.

_____ooo_____

Status in modern indigenous law

- a person's status is influenced strongly by the specific age (18) at which majority is attained, as prescribed in **s 17 of the Children's Act 38 of 2005**.

_____ooo_____

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Rank:

- **Rank is 1 factor which may influence person's status & plays a significant role in customary law.**
- Thus, **the wives of a polygamist** (a man with two or more wives) **each have a particular rank**, as does **each of their houses.**
- At times this rank is **also affected by the specific division in the house-hold**.
- **The members of the agnatic group also have a particular rank**, i.t.o their **order of seniority** in the group.

Briefly describe the factors that promote the observance of customary law. (10)

The presence of law enforcement organs such as the police, courts & judges encourages the observance of the law - in many communities there are more important motivating factors - such as:

» Religious or sacral (holy) element of the law.

» Public opinion, ie sensitivity about what other people may think and say about one's behaviour.

» The knowledge of the availability of recourse: compensation and or measures of protection

» Communal knowledge of the law and participation in the legal process, and handed down law

» Fear of punishment - especially to punishment of supernatural origin…

» Influence: indigenous leaders as living representatives of the ancestors & authority – including:

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- Communication with the ancestral spirits because of their hereditary (inherited) position
- Ensuring observance of the law
- Consultation with local headmen & heads of families prior to important decisions
- As the bearers of the local community's traditions they ensure observance of traditions
- Hold authority in deciding rules i.r.o allocation of land for residential and agricultural purposes
- Admitting strangers to the communal territory

Give an exposition the factors that promote the observance of customary law. (20)

» It is significant that the vast majority of the members of any community generally observe most rules for living, including legal rules, faithfully on a daily basis without feeling that they are being 'forced'' to comply.

» The motives for such voluntary observance of the law often indicate that a particular rule is a rule of law, even though its nature has never been determined by a court.

_____ooo_____

Why do people voluntarily observe legal rules and rules for living?

The availability of law enforcing organs such as the police, courts, and judges certainly encourages the observance of the law in any community, but in many communities there are other factors that are more important than the availability of such organs.

I.r.o ACL, the following factors may be **of importance** in this respect:

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- The **religious or sacral (holy)** element of the law. Think of examples of your own religious beliefs and also keep in mind what we said earlier on about the belief in ancestral spirits.
- **Public opinion**, and particularly sensitivity about what other people may think and say about one's behaviour.

  In ACL - the interests of the community are very important.
- **The knowledge of the availability of recourse: that - if a person is harmed**, that person will endeavour to get **compensation** or will take **measures to protect** him- or herself.

  ACL, for instance, allows for the use of all kinds of medicines to protect a person from harm – ie: sorcery etc.
- **Widespread general knowledge of the law**. This is because there is **general participation** in the legal process, and the **law is handed down**, orally, from one generation to the next.

  In short, everybody has an opportunity to find out how the law operates in that particular society.
- **Fear of punishment**. Especially punishment of supernatural origin, when the conduct in question conflicts with accepted legal principles.
- **The influence of indigenous leaders** in the community.

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

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- Of particular importance is the fact that the recognised indigenous leaders played an important part in the communities' daily life without having to refer to their judicial authority.
- For instance, because of their hereditary (inherited) position, indigenous leaders played an important part in allocating land for residential and agricultural purposes, in admitting strangers to the communal territory, and in communicating with the ancestral spirits.
- The authority emanating (flowing) from these positions alone was enough to ensure observance of the law, without any formal administration of justice being necessary.
- Also, local heads of families and kinship groups were consulted before anything important, such as the institution of legal action, was undertaken.
- This ensured that the proposed action would not be opposed and that the interests of others would not be harmed in an unfair and unlawful manner. It also meant that the local headmen and leaders would be informed about the matter should any legal dispute arise from that particular action.

» Finally, it must be remembered that these leaders, with their advisors, are the bearers of the local community's traditions and that it is they who must ensure that these traditions are observed.

» They are therefore regarded as the people who have the authority to pronounce on what is allowed and what is not allowed

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Discuss the nature of customary law with reference to the following: Ind.Law is known for its **group orientation**, **concrete approach**, **religious** and **governmental** **functions.**

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(a) Group orientation in customary law is evident from:

In tribal authority group orientation is evident from:

- the fact that the ruler, for instance, does not rule as an individual, but only as a representative of members of the ruling family, who were the true rulers.
- the public takes an active part in legal proceedings, that always take place in the open.

In indigenous law of marriage group orientation is evident from:

- the indigenous marriage is a relationship which concerns not only the husband and the wife, but also the respective families.
- both family groups participate not only in the matter of the choice of the marriage partners, but also in the:
  - » preceding negotiations,
  - » the agreement,
  - » the transfer of the marriage goods and the ceremonies.

  Without their participation, the marriage cannot take place.

In indigenous criminal and procedural law group orientation is evident from:

One of the characteristics of indigenous law…..

- Unspecialised legal systems emphasise the group rather than the individual.
- The individual functions entirely within the context of the group.
- As far as criminal law is concerned, a whole family group can be punished for the crime of one of its members.
- In the case of sorcery, for instance, the whole family might be banished and even killed. Note that fines have to be paid by the group.

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(b) A concrete approach in customary law is evident from:

- a strong emphasis placed on real and visible things.
- rights to land are acquired in a visible, perceptible manner by
  - demarcating and indicating an area, and by
  - actually using the land and bringing it under cultivation.

In indigenous criminal and procedural law a concrete approach is evident from:

- When a person is charged with a crime – it is required…
  - to prove that the accused did indeed commit the crime
  - concrete evidence would be presented to the court (i.e. evidence that incriminated the accused).
  - In the case of stock theft, for example, a hide found in his possession would be regarded as concrete evidence that the accused did indeed steal and slaughter livestock.

_____ooo_____

(c) A magico-religious in customary law is evident from:

In indigenous criminal and procedural law a magico-religious approach is evident from:

Magico-religious conceptions and the law

- Belief in ancestral spirits
- Belief in sorcery

A strong religious focus based on the belief in ancestral spiritual powers.

Rules of Living – thus the Law – emanate from Ancestors

- Ancestral spirits ensure that these rules are observed and protected. Any disregard of, or deviation from, these rules will solicit their punishment.

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- Misfortunes such as illness, drought, hail, floods and heat waves will be bestowed as forms of supernatural punishment.
  - » Thus the law has a supernatural origin and seldom questioned.
  - » Secondly, law appears static & unchangeable: any change may offend the ancestral spirits.

Reconciliation with the ancestral spirits:

Reconciliation between the community and the ancestors is usually accomplished by the slaughtering of an animal and having a communal meal, especially in the case of crimes with a pollution effect.

_____ooo_____

(d) Indigenous government functions in customary law is evident from:

- Unspecialised legal systems do not, as a rule, draw this distinction.
- The **tribal chief** is, for instance, **not only** the law-maker and executive official, but **also** the judge-in-chief.
- Other specialised administrative officials are limited.
- A standing army and a police force are exceptional.
- The possibility of defective administration of justice and misrule under unspecialised legal systems was counterbalanced by:
  - ➢ the close relation between law & religion,
  - ➢ the public nature of the administration of justice &
  - ➢ the people's intimate knowledge of the legal system.

Discuss the relationship between ACL and magico-religious conceptions. (8)

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» ACL gives expression to the values of the community. In many instances, these values are based on conceptions of the supernatural world.

» In Africa, the belief in ancestral spirits and the belief in sorcery are very important..

Description of these beliefs: Common supernatural belief throughout Africa are the belief in: **ancestral spirits** & **sorcery**, with varying conceptions of the phenomena between cultural groups…

The belief in Ancestral Spirits:

Continuing spiritual life – after death – of **ancestral spirits** whom maintain contact with their living relatives on earth. Ancestral spirits have an interest in the community living on earth and may make their wishes known to the living in various ways.

The belief in sorcery:

This relates to the belief that supernatural powers are at work in the universe that may be used either to the advantage or to the disadvantage of people by a 'sorcerer'.

The latter - in interests of the community, is identified via supernatural process or extraordinary evidence and removed from the community.

The effect of magico-religious conceptions on the Law

Rules of Living – thus the Law – from Ancestors

Ancestral spirits ensure that these rules are observed and protected. Any disregard of, or deviation from, these rules will solicit their punishment.

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Misfortunes such as illness, drought, hail, floods and heat waves will be bestowed as forms of supernatural punishment.

» Thus the law has a supernatural origin and seldom questioned.

» Secondly, law appears static & unchangeable: any change may offend the ancestral spirits.

Magico-religious content:

» Concurrent hereto is a strong **religious element** of customary law is based on the belief that the law originates with the ancestors**.**

» Disregard hereof shows contempt for-, and is punished by-, the ancestors.

» When important juristic acts are planned, the blessing of the ancestors is obtained by means of special rites.

» Extraordinary evidence, ie: the pointing out or identification of sorcerers, is well known in customary law.

Briefly describe the the observance of Kinship. (5)

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

Kinship, similarly plays a dominant role in legal life. Consequently the wider family circle or family group has extensive authority over its members. Relevant hereto is the **Law of**

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Persons in the sense that it is the norm that the position of women compares unfavourably with that of men.

Marital unions within certain **degrees of kinship** are forbidden.

» **These restrictions vary from group to group.**

» Among **all groups** there is a **prohibition** on marriages between **ascendants and descendants** on the father's and mother's side, and between the children of the same mother and father.

» Among most **Nguni** groups these limitations cover a very wide range of kin.

➢ Marriage between people with the same family name *(isibongo, isiduko)* as that particular person, or the person's mother or father, is forbidden.

» Among the **Sotho-Tswana,** on the other hand, **preference is given** to marriage **within** a particular **degree of kinship**.

➢ Marriage **between cross-cousins** is particularly **encouraged.** This means marriage between a man and his mother's brothers' daughters or between a man and his father's sisters' daughters, are viewed as preferential marriages.

The Recognition of Customary Marriages Act 1998 maintains the prohibition of a customary marriage between persons related to each other within the prohibited degrees of kinship.

▫ Section 3(6) of the Act provides that the prohibition of a customary marriage between persons on account of their relationship by blood or affinity is determined by customary law.

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Characteristics of African Customary Law

1. Unwritten Nature of the law

- Originally not recorded in written legal sources
- Court procedures conducted orally
- Law transmitted orally from one generation to next – this was furthered by public participation of adult men in administration of justice
- Community had broad general knowledge of the law
- Important legal principles were expressed in legal maxims

2. Expression of community values of the law

- Moral behavioural code of the community
- As values changed so did the law
- Conflict between legal and moral values thus unknown
- Emphasis on reconciliation of the people
- Interests of community more important than interests of individual

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

General property

- is controlled by the family head, in consultation with the senior men and women of the agnatic group.

House property

- is controlled by the family head, in consultation with the wife and senior children.

Distinguish between general property, house property and personal property. Give examples to substantiate your answer.

General property… under original customary law

General property belongs to the household as a whole.

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

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General property includes the following:

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

On the death of the family head, the control of the general property passes to the head's general successor.

General property… under modern law

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

_____ooo_____

House property…

House property refers to the property that belongs to each separate house.

Among the **Tsonga,** who have not been influenced by the Zulu, house property is unknown.

Among all the other peoples, however, house property is known.

- House property is controlled by the head of the house, namely the husband. In most cases, the *husband is the head of various houses at the same time*.

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- In his disposal of house property he is *morally*, but not legally, *obliged to consult the wife* of the house *and the house successor*, if this person is already an adult.
- The wife has a reasonable degree of control over house property as far as daily household affairs are concerned. She decides, for instance, on what groceries to buy and is not expected to consult her husband about this.
- When property from one house is used to the benefit of another house, a debt relationship is created between the houses concerned. Such a debt has to be repaid at some time, although no action for repayment can be instituted in an indigenous court. The principle involved here is the one we referred to earlier on: 'an agnatic group cannot be divided against itself'.

House property includes the following:

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

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Protection of the House Property:

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

On the husband's death:

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

_____ooo_____

Personal or individual property

Maithufi defines personal property as**:**

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

Originally…

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

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Individual ownership is, however, acknowledged in modern indigenous law.

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

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

» Communal Land Rights Act 11 of 2004 - security of tenure i.r.o traditional land ownership..

» Which was previous granted by:

- permission to occupy
- quitrent
- deeds of grant &
- permits

» Which was inter-alia controlled by:

- The Black Administration Act 38 of 1927
- Land tenure proclamations
- Development Trust & Land Act
- Former homeland Laws
- Black Authorities Act
- Delegated laws

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- Communal Land Rights Act 11 of 2004 & finally…
- The Constitution 1996

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

Ownership – including the ownership of land *was only real right* known to customary law *which was not subject to any limitations* and still is the *most comprehensive real right which can be acquired over material things*. All other categories of real rights are limited.

Rights in things are known as 'real rights'.

There are various categories of real rights – including…

» ownership » servitudes » pledge » mortgage » quitrent tenure & » mineral rights.

The most comprehensive real right which can be acquired over material things is ownership.

In original indigenous law:

- the agnatic group, or the house as a subdivision of the agnatic group, was the bearer of rights and thus of real rights.
- rights in property were thus vested in the agnatic group.
- The head of the group exercises this right on behalf of, and in the interests of, the agnatic group.

In modern indigenous law:

- real rights can also be vested in individuals, particularly majors.

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Describe the order of succession among male children?

It sometimes happens that a deceased leaves no legitimate son of his own, but does have an illegitimate son or a son from a supporting marriage. In certain circumstances, such a child could succeed as heir.

Despite considerable variations among the different peoples, **the ranking order of sons for purposes of succession may be summed up as follows:**

(i) A ***legitimate son*** procreated by the man himself.

(ii) A married man's ***illegitimate son*** by a virgin, widow or divorced woman *for whom isondlo (maintenance) has been paid*.

(iii) ***Ngena* children** - procreated after the husbands death wife + brother / other ukungena

(iv) ***Adoptivi*** (adopted children) or ***adulterini*** (adulterous children) of the wife (unless the latter have been repudiated) according to the chronological order in which they became attached to the late husband's family.

(v) ***Sons of a widow*** who are *not born out of an ngena union*.

(vi) ***A premarital son of an unmarried woman*** or the extramarital son of a divorced woman for whom no *isondlo* has been paid. Here we are dealing with succession through a woman. *Such a son can succeed through his mother only if the deceased has no other male relatives*.

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Describe Indigenous principles of succession to traditional leadership?

In principle the ruler is a male, except for the Lobedu, where at present the ruler is invariably a female. Among some groups females may act temporarily as traditional leaders.

We may summarize the law of succession to traditional leadership as follows:

Succession to traditional leadership:

- is a **hereditary system** and
- the **position of the traditional leader** follows the **patrilineage (male line).**

Succession in the female line is the exception in Southern Africa, and is seen only in parts of Malawi and Mozambique and among the Wambo of Namibia.

The successor is the eldest son of the ruler by the tribal or main wife.

- The **tribal or main wife is often married specifically for this purpose** and the tribe contributes towards her marriage goods.
- The ruler cannot decide that he wishes to divorce her or that she will not bear the successor. **She is the tribal wife and her position is indisputable**.
  - **Among the Northern Sotho** she is known as:
    - ***setima mello*** *(extinguisher of fires),*
    - ***lebone*** *(lamp),*
    - ***mohumagadi*** *(wealthy woman) and*
    - ***mmasetshaba*** *(tribal mother).*
  - **Among most groups such a woman should meet specific requirements**. Among the Northern Sotho no woman other than the tribal wife can bear the successor.

    Substitution is possible, however.

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- **The other wives of the ruler occupy a particular position of rank**, and this ranking order has significance, especially in situations where an acting traditional leader or regent has to be appointed.
- **The sons of a ruler by his various wives retain the rank of their mothers**. Among some groups this ranking order is confirmed during the rites of circumcision.
- **The rules according to which younger full and half-brothers** of a successor **may succeed vary greatly among different groups**. Among the Northern Sotho such sons cannot succeed, but can only act as regents.
- **General recognition of *substitution of the ruler*** by the **institution** of the ***levirate*** and ***substitution of the tribal wife*** by the ***sororate* institution exists.**
  - ***Levirate is an institution*** of ***substitution*** *whereby the man has certain rights with regard to the sisters of his wife, if it appears that his wife is infertile, or the right to marry her sister after her death*; - or - ***complementation*** of the wife – i.e. in cases of infertility or other defect. *This is custom in terms of which a* ***specific defect is supplemented*** *without replacing the person who has the defect*.

    Once the defect has been complemented, the person standing in to make the defect good is under no obligation towards the husband's group.

    The rules in this connection differ markedly among the various groups, however in any dispute arising from this the principles of the community concerned should be duly taken into account.
  - ***Sorotate is an institution*** of ***substitution*** the husband which occurs where
    - the ***husband dies*** *before he can marry* **or**
    - *before he can marry the* ***tribal wife***

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Two customs apply in this respect being:

- ***the ukuvusa custom &***
- ***the ukungena custom***
  - » **With the *ukuvusa* custom** case ***children are raised on his behalf with a wife married after his death***, *usually to a relative, such as his younger brother*.
  - » **With the *ukungena* custom *substitution also occurs where the ruler dies without a son by the tribal wife***.

    Provided the wife is still fertile a son is raised on behalf of the deceased with his wife in terms of the *ukungena* custom and ***this son becomes the lawful successor.***

✶ **The well-known institution of the *sororate*** also applies in cases where:

- the tribal wife dies without a son - where she is substituted for by a relative - or -
- when the wife is childless - or -
- where she has borne no son during her fertile years.

In such a case her inability to bear a son is supplemented for by a relative, "supporting wife".

Once this "wife" bears a son as a successor, she does not have to stay with the husband's people. She can then even marry another man. *Among some people the childless wife or wife without a son is not supported in this way but a daughter-in-law (ngwetsi) is married for her as a tribal wife for the generation of her fictitious son.*

Children were then raised with the daughter-in-law i.t.o the institution of the ***levirate***

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State the principles of customary law of succession, and how succession differs from inheritance in a customary law context? [15]

NB: Potential for 2 separate questions.

(a) State the main principles of the customary law of succession. (10)

- Succession takes place only on the death of a predecessor; there is thus no question of succession while the family head is still alive.
- In original indigenous law, succession was related solely to status, but…
- In modern indigenous law does acknowledge the notion of the individual inheritance of property to some extent.
- In original indigenous law, there was no such thing as the total disposition of property by means of a will.
- In modern indigenous law, however, it is not uncommon for indigenous African people to dispose of their assets by means of a will.

A distinction is made between **general succession** and special or **house succession**.

- In original indigenous law, the successor succeeded to the deceased's assets and liabilities;
- In modern indigenous law, the position differs between groups.
  - » In **KwaZulu-Natal**, a successor succeeds to the assets of the estate and only marriage contracts (lobolo) debts
  - » In the **rest of South Africa**, a successor succeeds to the assets and **all** the debts of his predecessor.

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

(b) What is the difference between inheritance and succession? (5)

Inheritance involves the **division of the patrimony** of the deceased

- Inheritance is mainly concerned with the division of the assets of a deceased person among his or her heirs.
- The division can take place according to:
  - » **testate inheritance** - i.t.o the provisions of a will (testament) – or –
  - » **intestate inheritance** - i.t.o the rules of common law where there is no will.

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- The liabilities of the deceased are first set off against the assets. The balance is then divided up.
- Should the liabilities exceed the assets, the heirs inherit nothing.

_____ooo_____

Succession means '**step into the place of**' the deceased, thus **succession to the status, rights and duties** of the deceased.

- In succession, there is, strictly speaking, no division of property.
- The successor takes the place of the deceased and gains control over the property and people over which the deceased had control.
- Furthermore, the successor succeeds to the assets **and** liabilities of the estate.
- Should the liabilities exceed the assets, the successor, in customary law, succeeds thereto as well.

In original indigenous law,

- There was therefore a general successor as family had and a successor to each house, that is, a house successor.
- The death of other members of the agnatic group had no effect on the control of the group and its property. **[15]**

Discuss the implications which could follow if the principle of patrilineal succession be abolished? (10)

This concerns the arguments against the application of the equality clause in the Constitution to traditional political succession. You should be able to name the three most important arguments which can be raised against its abolition.

According to the principle of equality *there can be no argument that it is discriminatory that a chief's daughter cannot succeed if she is the first-born*.

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According to the principle of primogeniture *the first-born must succeed, regardless of whether they are male or female.*

The **discriminatory element** in the succession system **is** therefore the principle of **patrilineal succession**.

- This means that only males in the patrilineage can succeed.
- If a woman is allowed to succeed, it would mean that her children cannot succeed, as they are not members of the patrilineage.
- In a patrilineal system of *descent reckoning*, a daughter belongs to the patrilineage of her father, but her children belong to the patrilineage of her husband.

Limitations on the female head…

- A *female head cannot perform the political rites in honour of the ancestors*, as according to *belief these rituals can be performed only by male* members of *the male line of descent*.

- **Gender discrimination is not limited to succession to political offices.** If women would be allowed to succeed according to the African customary system of succession, *they must fulfil the functions of a successor*.
  - This means that they must support and maintain the members of the household and perform rituals during sickness and death.
  - This will bring about fundamental changes to the status of women, and indeed to the 'traditional' way of communal life.
- **It is not clear whether in this regard fundamental rights should be applied horizontally only**.

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- Even if horizontal application is assumed, strong arguments can be advanced against the application of the equality clause in the case of traditional political succession.
- **S211 & 212** of the ***Constitution make provision for the continued existence of traditional authorities***.
- ***If the principle of patrilineal (or agnatic) succession is abolished, it will mean that this authority is no longer traditional.***

Discuss the ACL **of succession to traditional leadership. Indicate to what extent the principles are recognised *in modern African customary law?*** **(25)**

Customary principles of succession to traditional Leadership

- In succession to traditional leadership - effectively - the ruler is a male, except for the Lobedu, where at present the ruler is invariably a female.
  - » In some groups females may act temporarily as traditional leaders.

We may summarise the law of succession to traditional leadership as follows:

- A **hereditary system** and the position of the traditional leader follows **patrilineage** (male line).
- Succession in the female line is the **exception** in Southern Africa, and is seen only in parts of Malawi and Mozambique and among the Wambo of Namibia.
- The successor is the **eldest son of the ruler** by the tribal or **main wife**.
  - » The tribal or main wife is often married specifically for this purpose and
  - » the tribe contributes towards her marriage goods.

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- » For example the ruler cannot decide that he wishes to divorce her or…
- » that she will not bear the successor.
- » **She is the tribal wife and her position is indisputable**.

- Among the Northern Sotho the tribal or main wife is known as: *setima* *mello* (extinguisher of fires), *lebone* (lamp), *mohumagadi* (wealthy woman) and *mmasetshaba* (tribal mother).

Among most groups such a woman should meet specific requirements.

- Among the Northern Sotho **ONLY the tribal wife can bear the successor**.
- Substitution is possible, however.
- The **other wives** of the ruler occupy a particular position of rank, and this ranking order has significance, especially in situations where an acting traditional leader or regent has to be appointed.
- **The sons of a ruler by his various wives retain the rank of their mothers**. Among some groups this ranking order is confirmed during the rites of circumcision.
- The rules according to which younger full and half-brothers of a successor may succeed vary greatly among different groups. Among the Northern Sotho such sons cannot succeed, but can only act as regents.

General recognition of **substitution of the ruler** by the institution of the ***levirate***

The Levirate Institution applies when the **married man dies** (including marriage to the tribal wife) **without a surviving male heir**. In such instance the wife - who is still fertile - may beget an heir conceived to a relative (normally a younger brother).

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- The variation hereof, known as the ***Ukungena Custom,*** pertains to the procreation of a first born son in lawful succession to a tribal ruler who dies without a son - begotten by the tribal wife - along the same rules. (*also referred to as Levirate*) [19]
- In unison, the ***Ukuvuza Custom*** refers to a type of vicarious union, where a lawful heir or responsible person, utilises property of his own or the deceased, *'to take a wife to resuscitate the estate of the deceased or to perpetuate his name & provide him with an heir'.*
- **Substitution of the tribal wife** by the ***sororate*** **institution** (institution whereby the man has certain rights inherent in marriage and the provision of lobolo to the family of his wife – which includes the responsibility to bare children - with regard to the sisters of his wife, if it appears that his wife is infertile, or the right to marry her sister after her death - or complementation of the wife (custom in terms of which a specific defect is supplemented without replacing the person who has the defect). *Once the defect has been complemented, the person standing in to make the defect good is under no obligation towards the husband's group.*
- The rules in this connection differ markedly among the various groups, however. In any dispute arising from this - the principles of the community concerned should be duly taken into account.
- **Substitution of the husband** occurs where the husband dies before he can marry or before he can marry the tribal wife, in which case children are raised on his behalf with a wife married after his death, usually to a relative, such as his younger brother. This is the ***ukuvusa*** **custom.**

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- **Substitution of the ruler also occurs where the ruler dies** without a son by the tribal wife. Provided the wife is still fertile a son is raised on behalf of the deceased with his wife in terms of the ***ukungena*** **custom** and ***this son becomes the lawful successor***.

- **Substitution of the tribal wife** occurs in those cases where she dies without a son, in which case she is substituted for by a relative. This is the well-known **institution of the *sororate***. Substitution may also occur when the wife is childless or where she has borne no son during her fertile years. *In such a case her inability to bear a son is supplemented for by a relative, 'supporting wife'*. Once this 'wife' bears a son as a successor, she does not have to stay with the husband's people. She can then even marry another man. *Among some people the childless wife or wife without a son is not supported in this way but a daughter-in-law (ngwetsi) is married for her as a tribal wife for the generation of her fictitious son*. Children were then raised with the daughter-in-law in terms of the institution of the *levirate*.

- ***Reform of the principles of succession:***
  - » *The case of Shilubana v Nwamitwa 2008 & 09*
  - » Challenges to some of the above-mentioned customary principles of succession to traditional leadership have recently been interpreted in courts
  - » **The Constitutional court held** that both the traditions and the present practice of the community had to be considered and that the spirit, purport and objects of the Bill of Rights have to be promoted.

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- The Court reasoned that the community had a right to develop its own laws and customs, and this right had to be respected where it is consistent with the continuing effective operation of the law and that the actions by the traditional authority reflected a valid change to customary law.
- This decisions indicates that the courts probably have done away with the principle of primogeniture that has been recognised under customary law as underlying the principles of succession to traditional leadership. Women can also be considered for succession in accordance with gender equality.

- Section 2(3)(c) of **Traditional Leadership and Governance Framework Amendment Act** 41 of 2004 'instructs' traditional authorities to: (c) seeking to progressively advance gender representation in the succession to traditional leadership positions - consistent with section 9(3) of the Constitution 1996 which among other things 'instructs' the right to gender equality.

- Section 211 & 212 of **the Constitution** clearly states that recognition of traditional leadership, acting according to customary law is subject to any applicable legislation and customs. Section 212 of the Constitution 'instructs' the creation of national & provincial legislation provide for a role for traditional leadership as an institution, customary law and the customs of communities observing a system of customary Law & the establishment of houses of traditional leaders & a national council of traditional leaders – all subject to the Supremacy of the Constitution 1996 – as reflected in section 2 of the act.

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- Section 39 (2) *provides that, in interpreting any law and applying and developing common and customary law, the courts must have due regard for the spirit, purport (purpose) and objects of the Bill of Rights*

Expain how Thabo's estate will devolve? (15)

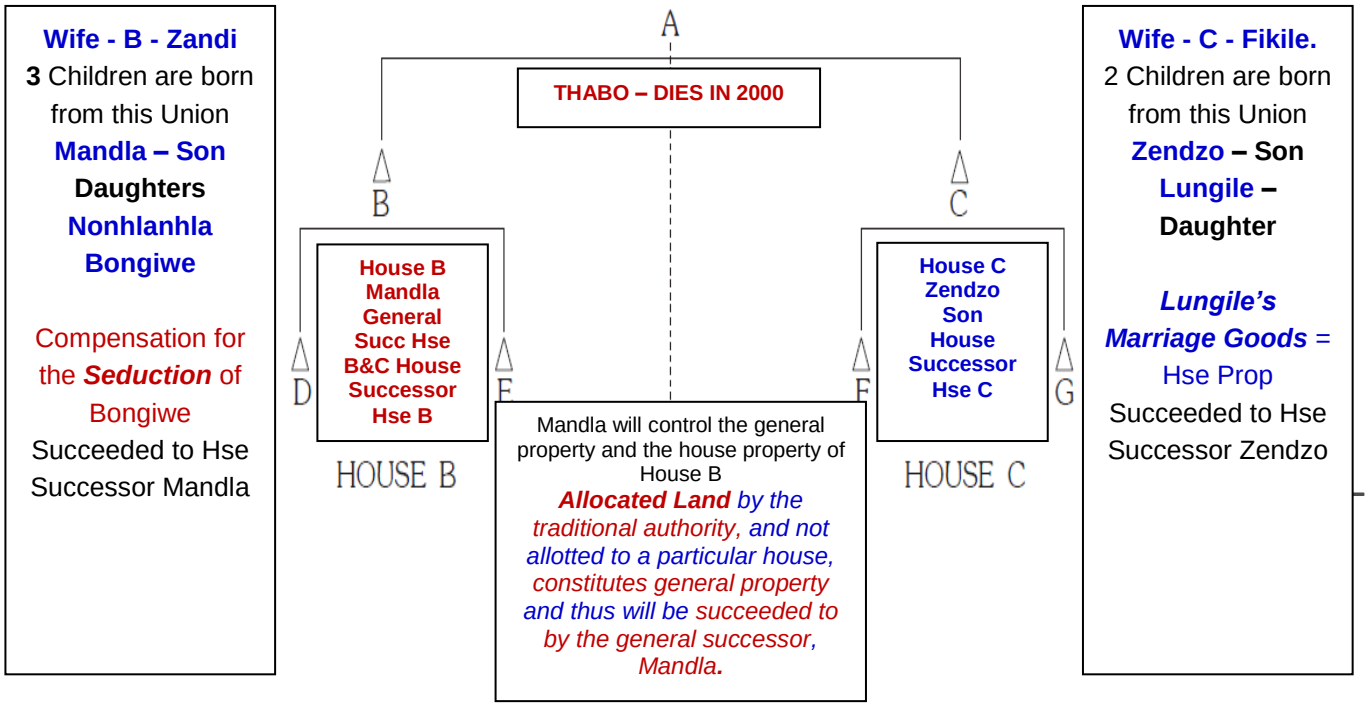
In 2000, Thabo (a family head) suffered a severe heart attack and died. He left behind two daughters, namely Nonhlanhla and Bongiwe, and a son named Mandla, all of whom were born from his first customary marriage to Zandi. He also left behind a son named Senzo and a daughter named Lungile, who were born from his second customary marriage to Fikile.

His estate consisted of:

- marriage goods received for Lungile
- compensation in respect of the seduction of Bongiwe
- land which had been allocated to him by the traditional authority, and had not been allotted to a particular house

Thabo also had an outstanding debt to pay, namely additional cattle for his son Senzo's lobolo. **Expain how Thabo's estate will devolve**. **(15)**

Thabo - 2 wives, B - Zandi and C - Fikile. - Each marriage creates a separate house B & C



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Illustrate using a diagram, how customary law can be subdivided into different categories. (8)

<table>
<tr><td colspan="4">THE DIVISION OF CUSTOMARY LAW
The law is basically concerned with relations between individuals and groups and between a government and its subjects and may be divided into national and international law.</td></tr>
<tr><td colspan="3">NATIONAL LAW</td><td>INTERNATIONAL LAW</td></tr>
<tr><td colspan="3">Governs the relations between subjects and foreigners, as well as the relations between subjects and government within a certain state.</td><td>Governs the relations between states.</td></tr>
<tr><td colspan="2">PUBLIC LAW</td><td>PRIVATE LAW</td><td></td></tr>
<tr><td colspan="2">Indigenous constitutional and administrative law</td><td>The law of persons</td><td></td></tr>
<tr><td colspan="2">composition, powers and functions of the public organs of authority</td><td>Family law</td><td></td></tr>
<tr><td colspan="2">CUSTOMARY PUBLIC LAW
IN TRIBAL LAW</td><td>The law of things</td><td>LAW OF DIFFERENT TRIBES (TRIBAL LAW)</td></tr>
<tr><td colspan="2">Governs the relations between traditional authorities and subjects, and the tribe, and the relations between these authorities in the tribe.</td><td>The law of immaterial property</td><td>African ‘tribal’ independent ‘states’ authority : tribal chief, comprising tribes : under king or para-mount chief.</td></tr>
<tr><td colspan="2">Indigenous constitutional and administrative law</td><td>The law of obligations</td><td></td></tr>
<tr><td colspan="2">The indigenous adjudicatory organs and the law of procedure</td><td>The law of succession</td><td></td></tr>
<tr><td colspan="2">Indigenous criminal law</td><td>The nature of the law of personality</td><td></td></tr>
<tr><td>Substantive law</td><td>Adjective law</td><td>Unlawfulness</td><td>International Tribal Law</td></tr>
<tr><td>Norms & Sanctions</td><td>Procedure&Evidence</td><td>Infringement of a right</td><td>vs</td></tr>
<tr><td>Validity & Lawfulness</td><td>Rules of Evidence</td><td>Resulting in liability</td><td>Inter-tribal law</td></tr>
<tr><td>Approval/Punishment</td><td>Rules of Procedure</td><td>Delict</td><td>little is known</td></tr>
</table>

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Distinguish the Differences between specialised and unspecialised legal systems?

(a) Group v individual orientation

- Specialised – emphasis on individual
- Unspecialised – emphasis on group – individual functions within the context of the group
- Difference clearly reflected in the law – study this in guide.

(b) Concrete v Abstract approaches

- Unspecialised systems follow more concrete, real and visible approach.
- Specialised systems more abstract in nature * Examples

(c) Religious element

- Belief that law originates from ancestors
- Disregard of law punished by ancestors
- Blessing of ancestors obtained for important juristic acts
- Role of extraordinary evidence well known

(d) Categorisation

- Specialised – Sharp distinction between categories, institutions and concepts foreign to customary law
- Unspecialised – No distinction between civil and criminal cases etc.

(e) Kinship

Marriage between forbidden lines of relation is prohibited.

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(f) Polygyny

- **Men** are permitted to engage in polygynous marriages by taking more than one wife at the same time.

(g) Polyandry

- Polygyny is when – **in certain cases** - a **woman can** have a valid marriage with more than one man at the same time.

(h) Lack of formalities

- Unspecialised systems lack formalities
- Administration of justice informal
- Legal rules applied with flexibility
- Aim of court is reconciliation
- Emphasis on people in community rather than strict application of the rules
- Consultation

(i) Time

- No strong emphasis on time

(j) Governmental functions

- No clear distinction between judicial, executive and legislative powers of the state

---

1. What is meant by specialisation? Indicate the similarities between specialised and unspecialised legal systems. **(10)**

- **Specialisation** refers to the distinction & definition of certain functions or activities.
- **It implies the:**

  » separation, differentiation, division, distinction,

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» classification, delimitation, definition or individualisation in respect of:

- time, activity, functions, interests,
- duties, knowledge and conceptions,
- including the isolation or abstraction of ideas and concepts…. ***Myburgh***

Specialisation of a **legal system** relates to the:

- Complexity of the law in terms of origin, content and application - a clear distinction of certain functions or definition of activities pertinent to all facets of legal interaction & unambiguous and established rules of legal process and jurisprudence.
- Size of the population Larger the population & cultural diversity the greater the specialisation.
- Extent of cultural homogeneity (uniformity)
- Extent of cultural conformity (acculturation)

Similarities between specialised and unspecialised legal systems:

» the relations governed by law are the same…

- they comprise relations between organs of authority and subjects and
- relations among groups and individuals themselves.

» the means by which the law is transferred from one generation to another is basically the same.

» a transgression of the law and legal rules will have certain, specific consequences for the transgressors.

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Differences between specialised and unspecialised legal systems

(a) Group v individual orientation

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- Unspecialised – emphasis on group – individual functions within the context of the group
- Difference clearly reflected in the law – study this in guide.

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- Unspecialised systems follow more concrete, real and visible approach.
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- **Men** are permitted to engage in polygynous marriages by taking more than one wife at the same time.

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- Legal rules applied with flexibility
- Aim of court is reconciliation
- Emphasis on people in community rather than strict application of the rules
- Consultation

(i) Time

- No strong emphasis on time

(j) Governmental functions

- No clear distinction between judicial, executive and legislative powers of the state

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3x Discuss the differences between specialised and unspecialised legal systems with specific reference to indigenous private law Combine above & below

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

Specialisation, among other things, refers to:

» a clear distinction of certain functions or definition of activities pertinent to all facets of legal interaction, with

» clear, unambiguous and established rules of legal process and jurisprudence.

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Taking this into account, **indigenous legal systems** of **Africa** are **mainly 'unspecialised'**

Indigenous Private Law deals with a more specific scope which applies to **individual law relationships** and focuses more on issues affecting private individuals - including:

- of the law of persons (defining and governing status);
- family law (including guardianship);
- the law of things (real rights in movable and immovable things);
- the law of succession (provisions regarding deceased estates) and
- the law obligations (contract and delict).

Clearly the private law is much more relevant in common social organisation and governing the relations between the individual and community as well as individuals.

Focus on the interests of the group:

Practical indigenous private law dynamics show that **in ACL there is a far greater emphasis on the interests of the group**, rather than on the interests of the individual.

» The individual functions entirely within the concept of the group.

» Formal and informal systems of education - in indigenous law - encourages the individual to adapt to, and become sub-ordinate to, the interests of the group.

» The place and rank of the individual, it is impressed upon the individual to accept his or her place in the community from early childhood.

Magico-religious content:

» Concurrent hereto is a strong **religious element** of customary law is based on the belief that the law originates with the ancestors**.**

» Disregard hereof shows contempt for-, and is punished by-, the ancestors.

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» When important juristic acts are planned, the blessing of the ancestors is obtained by means of special rites.

» Extraordinary evidence, ie: the pointing out or identification of sorcerers, is well known in customary law.

Concrete vs Abstract approach to the law:

Pertaining to concrete or abstract approaches to law, **unspecialised legal systems follow a more concrete and visible approach**.

» The apparent and observable - established in visible acts ensures that legal intent and or accountability becomes concretely obvious.

» Taking what has been said into account it is clear that everyone knows and accepts his or her role in the community and that individual freedom plays a secondary role.

This social and legal dynamic are fundamental building blocks of indigenous law in general & indigenous private law in particular - including:

1. The strong individualisation of rights in western societies is almost **absent in indigenous law.**
2. The **rights of the group hold precedent** in indigenous and customary societies.
    - In the law of persons, marriage and family in customary law, marriage concerns family groups.
    - Both family groups participate not only in the choice of marriage partners but also in the preceding negotiations. They are also responsible for the agreement, the transfer of marriage goods, and the ceremony.

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- Without the participation of both family groups, the marriage simply cannot take place. It has to be borne in mind, that **the party is to effectively acquire rights** and duties **are in fact the households** of the bride and groom.
- The partners to the marriage are practically mere constituents of the greater family group.
- **Concrete expression of intent** as **characteristic of indigenous law**, requires that both the transfer of the bride and the marriage goods are **visibly and concretely transferred**. The bride is detached from her own group and incorporated into her husband's family group

3. **Concrete and visible evidence** approach of indigenous private law has the effect that many juristic acts and oral agreements are supplemented by a concrete action, eg: handing over of some object or performance.

a. Below are some **examples in law of this concrete evidentiary approach** of indigenous law being:

- in the **law of persons** & **family law** (defining and governing status)
  - in unspecialised legal systems, marriage is polygynous.
  - manner of closing a door of his wife's hut by a man, indicates intention to divorce her.
  - if a married woman spent a night in a hut with another man = evidence of adultery
- the **law of things** (property law) : the rights to land are secured by demarcating it in a concrete, visible and perceptible manner by indicating the area, and by actually using and bringing it under cultivation.

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- in the **law of things** (defining real rights in movable and immovable things):
  - the hide of a cow, who lived in the care of another person gets considered as evidence of the animals death
- the **law obligations** (contract and delict):
  - the parties are rather agnatic groups than individuals.
- the **law of succession** (provisions regarding deceased estates):
  - succession of tribal chiefs and headmen follows the patrilineal line and primogeniture.

4. **Categorisation of the law:** pp23

In specialised legal systems – There is a sharp distinction between categories, institutions and concepts foreign to customary law

In unspecialised legal systems – No distinction between civil and criminal cases etc.

A sharp distinction between categories of law, institutions & concepts is foreign to customary law. Hence it is often difficult to determine whether:

- authority in a family group with many members concerns private law only, **or** whether it also contains elements of public law.
- None or merely a vague distinction between categories of transgressions exists ie:
  - whether a transgression is **harmful to** the interests of the community (crimes),
  - or to the interests of family groups (delicts).
  - Thus - a distinction between crimes and delicts
- Due to **centricity of the family group** and the community we find that in customary law, theft of another person's property is mostly merely a delict, while stock theft is always a crime.

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- Furthermore, there is no distinction between civil and criminal cases, and there are also no separate court procedures for these cases.

5. **Kinship,** similarly plays a dominant role in legal life. Consequently the wider family circle or family group has extensive authority over its members. Relevant hereto is the **Law of Persons** in the sense that it is the norm that the position of women compares unfavourably with that of men.

6. **Unspecialised legal systems lack formalities.**

- There is a conscious effort to solve any dispute by reconciliation and consensus rather than by formal action.
- The emphasis, therefore, is on the people in the context of the community, and **not** on the strict application of legal rules.

7. **Time:** In unspecialised legal systems, there is no strong emphasis on the aspect of time.

- The fact that the marriage did take place is more important than the time of the event.

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Discuss the constitutional inconsistencies which have been brought about by the recognition of traditional leadership. (20)

In your answer refer to the following inconsistencies:
– democratic constitutional dispensation
– the principle of gender equality, including the argument against the application of this principle

Constitutional framework

The constitution of the Republic of South Africa 108 of 1996 **makes provision for - the continuation of traditional authorities in** ss181(1) & 211(1), **and by implication for traditional leaders**.

This section states the following:

- *'A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs;*
- *Section 211(1), provides that: `the institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution'.*

Constitutional inconsistencies

The inclusion of traditional leadership in a democratic constitutional dispensation, which is also included in the new Constitution which came into effect in 1997, leads to certain inconsistencies.

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- **The difference in degree** between traditional and modern governments, and the meaning of these differences, greatly depends on the various functions of the government and the level of government in which they are exercised.

- **Elections vs Hereditary Leadership:**

  In so far as the **legislative function** is concerned, a democracy implies, among other things, regular elections. This system of chosen leaders is in contrast to the traditional system of hereditary leadership.

Hereditary leadership:

(Problems in this regard and the way in which the traditional principle is manipulated and abused when striving towards political power is discussed below in lecture 4).

- **Male primogeniture:** Hereditary leadership is based on the principle of **male primogeniture (not elections),** *with due regard to the status of the main wife or tribal wife*.
- Even though these rules of succession are very much manipulated and abused, it is clear that **elections should not be a measuring-rod for succession to traditional office.**
- **Hereditary leadership** further implies that **the official holds office for life**, *in contrast to the fixed terms of office of elected leaders in a democratic system.*

Election of Leaders:

- We must also accept that the constitutional writers **consciously accepted that traditional leadership would be an exception** to the democratic principle of free elections.

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* The principle of elections has little effect on legislative powers at local-government level, as legislation never was an important characteristic of African customary law.
* **Traditional leaders** always had **unwritten and unlimited powers** to make **new 'laws'** for the community.
* **The emphasis fell** on the **maintenance** of existing law rather than on changes with a view to future developments.

Powers of Traditional Leaders under Democracy:

* **Representative Houses:** This inconsistency is brought sharply to the fore when we look at the new powers that were given to the traditional leaders on the provincial and national levels.
* At the **provincial level**, provision was made for a **House of Traditional Leaders** and
* a **Council for Traditional Leaders** at the **national level**.

Advisory Capacity: (s 212(2))…

* determines that these Bodies must advise the provincial and national legislatures respectively, and must make suggestions about matters concerning the traditional authorities and African customary law, as well as
* the traditions and customs of the traditional communities

Appointment vs Election to House / Council:

* At **provincial level**, traditional leaders are elected or appointed **by traditional authorities** to provincial houses, and
* on the **national level** they are **elected to the national council**.

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This process is also inconsistent with democratic principles, but is in accordance with the exception made in regard to the traditional style of government.

* **Limited Legislative Powers:** These new bodies have limited powers .They can make laws which are to be considered by the provincial and national legislature, but cannot make laws by themselves. In addition, they can insist on being consulted about matters of African customary law, but they can do little more than delay the legislative process if they do not agree with specific legislation.

* **Clash with Gender Equality:** Another inconsistency with the Constitution is the **clash with the equality clause (s 9(3)),** and **thus the African customary system of male succession**. With a few exceptions, women are not clothed with any public political function in terms of African customary law.

* **Exceptions:** The Lobedu of Modjadji do however have a woman as the chief, while the Venda and Swazi clothe the chief's mother or sister with important functions. According to the Swazi, the king's mother is the mirror image of the king. In other groups, women today can act as regents while the rightful successor is still too young, or for any other reason cannot succeed.

* **Patrilineal Succession:** According to the principle of equality there can be no argument that it is discriminatory that a chief's daughter cannot succeed if she is the first-born. According to the principle of primogeniture the first-born must succeed, regardless of whether they are male or female. The discriminatory element in the succession system is therefore the **principle of patrilineal succession**. This means that only males in the patrilineage can succeed.

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If a woman is allowed to succeed, it would mean that her children cannot succeed, as they are not members of the patrilineage. The question which arises in such circumstances is:

Who must succeed her? *In a patrilineal system of descent reckoning, a daughter belongs to the patrilineage of her father, but her children belong to the patrilineage of her husband*.

* **Matrilineal Succession:** With Modjadji we have the situation that a woman can be succeeded only by her daughter, and that she is not allowed to marry formally, so that her children will indeed belong to her line of descent. In this case, we deal with reverse discrimination (only women), and with the further problem that she is not allowed to marry formally.

* **Ancestoral Rites:** Another problem is that a female head cannot perform the political rites in honour of the ancestors, as *according to belief these rituals can be performed only by male members of the male line of descent.*

* **Effect of Succession based on Gender Equality:** If women would be allowed to succeed according to the African customary system of succession, they **must fulfil the functions** of a successor.

This means, among other things, that they must **support and maintain** the members of the household and **perform rituals** during sickness and death.

This will bring about fundamental changes to the status of women, and indeed to the 'traditional' way of communal life.

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* **Constitutional Principles:**

- **Firstly:** we must determine what is meant by 'unreasonable discrimination' as found in section 9(3). Does it mean 'unreasonable' in an abstract sense, or `unreasonable' in a particular sense? Can a specific position be seen as being unreasonable if it is generally accepted and is underwritten by a cultural tradition?

- **Secondly:** the provisions of section 36 may be applicable.

  S36(2) states, among other things, that an indigenous legal rule does not limit the fundamental rights in the Constitution, 'except as determined in ss(1) or any other determination of the Constitution'.

  S211 and 212 of the Constitution make provision for the continued existence of traditional authorities. If the principle of patrilineal (or agnatic) succession is abolished, it will mean that this authority is no longer traditional.

* **Thirdly:** it can be argued that the political background that resulted in the chapter on traditional authorities (ch12) in the Constitution cannot be ignored if a decision is made on the application and interpretation of this chapter.

  The traditional leaders were specifically persuaded to support the Constitution and the new political dispensation on condition that the traditional government will be protected.

  It will be highly unjust if the Constitution is later interpreted in such a manner which ignores this understanding.

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Discuss the relevance of public policy and natural justice in the application of customary law. (10)

To answer this question, you need to discuss what is meant by these two principles, when these principles were applied, and whether, in the light of the Constitution, they are still relevant today.

S1 of the Law of Evidence Amendment Act 45 of 1988 still applies today, providing for the judicial notice of law of foreign states and of indigenous law, reads as follows:

Any court may take judicial notice of the law of a foreign state and of indigenous law in so far as such law can be ascertained readily and with sufficient certainty:

Provided that indigenous law shall not be opposed to the principles of public policy or natural justice;

Provided further that it shall not be lawful for any court to declare that the custom of lobolo or bogadi or other similar custom is repugnant to such principles.

The conditions set by this section imply…

(ii) Any court **may take judicial notice** of **ascertainable** law of a **foreign state & indigenous law**

(iii) Indigenous law must not be opposed to the **principles of public policy or natural** justice.

(iv) A **court may not declare** that **lobolo or other similar customs** are **opposed to such principles**. ('opposed to the principles of public policy or natural justice' = *contra bonos mores*)

Thus - prior to the Constitution… indigenous law…

- enjoyed only limited recognition
- could be applied by all courts

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- could be amended or repealed by legislation
- could not be opposed to the principles of public policy and natural justice.

The condition that Indigenous law must not be opposed to the principles of public policy or natural justice is aimed primarily at preventing the enforcement of those rules of indigenous law that conflict with Western moral standards.

The principles of public policy and natural justice are not synonymous with the fundamental rights contained in the Bill of Rights. **Nor should these principles be used to avoid the serious questions about the constitutional validity of customary law.**

S211(3) of the Constitution **is explicit** in that the application of **customary law is subject to the Bill of Rights, implying that these principles are no longer necessary.**

Bennett (*Human rights* 60) is also of the opinion that this condition must be seen as part of the colonial past, and regarded as being of historical significance only.

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

Discuss this principle, and its implications. Indicate the contradictions contained in this principle, and discuss how these contradictions may be resolved.

Section 211 - Recognition (of customary law)… reads as follows:

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

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

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

Section 211 gives clear and unambiguous recognition to customary law.

- Recognition is also expressed indirectly in various other provisions of the Constitution.
- The Constitution contains a Bill of Rights (Chapter 2, s7-39) - and -
- All law, including customary law, is subject to this chapter (s8 (1). pp29

The implication & effect of this section 211:

section 211(1)… The recognition and application of customary law are subject to the Constitution & Bill of Rights.

section 211(2)… The recognition & application of customary law are subject to legislation that specifically deals with it.

This implies: only legislation aimed at amending customary law is relevant and not legislation in general.

section 211(3)… All courts must apply and therefore also recognise customary law... thus:

- The courts determine when customary law is applicable.
- Courts have discretion to decide whether customary law is applicable in a particular case.
- This discretion should be exercised in agreement with the general principles of choice of law.

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- i.r.o the **choice of law** - where it is not clear whether customary law is applicable, a party can, by appealing to the right of choice of culture (s 30&31), request that customary law be applied.
- **Where rights have been derived from customary law**, the courts are obliged to protect those rights, assuming that both parties reasonably expect to be subject to customary law.
- Another approach would be to consider who has a duty in terms of the particular legal relationship.
- **The rights of one person creates a responsibility for another.**
- **This freedom of choice is not absolute, however:**
  - **the choice of one person may, for example, not infringe the rights of another.**
  - Where rights have been derived from customary law, the courts are obliged to protect those rights, assuming that both parties reasonably expect to be subject to customary law.
- Another approach would be to consider who has a duty in terms of the particular legal relationship.
- At this stage, it should be remembered that a right leads to certain responsibilities, that is, **the right of one person creates a responsibility (duty) for another**.
  - For instance, where an individual has the right, in terms of s30 (language & culture) and 31 (cultural, religious and linguistic community) - to adhere to the culture of his or her own choice - means:
    - that there is a relation between the state and that particular individual; - and –

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- that the state is obliged to make it possible for that individual to adhere to the culture of his or her choice.
  - This is **vertical application of a fundamental right**, namely **the right to culture.**
  - This right to culture does not impose any duties on the individual, however; it merely **makes that individual entitled to that right.** pp30
  - If an individual exercises his or her right to culture, however, **other individuals are obliged to respect this**.
- In this example, we are dealing with the **horizontal application** of fundamental rights between individuals (or groups of individuals).
- In this instance the horizontal application of the right to culture therefore also creates responsibilities for individuals.

- **Section 1 of the Law of Evidence Amendment Act 45 of 1988** provides that courts may take judicial notice of indigenous law, provided that indigenous law is not in conflict with the principles of *'public policy and natural justice'* to prevent conflict with indigenous law & western moral standards.

- **The principles of public policy and natural justice are not synonymous with the fundamental rights** contained in the Bill of Rights.
- Nor should these principles be used to avoid the serious questions about the constitutional validity of customary law.

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- Section 211(3) is explicit in that the application of customary law is subject to the Bill of Rights implying that these principles are no longer necessary.
- Bennett (*Human rights* 60) is also of the opinion that this condition must be seen as part of the colonial past, & regarded as being of historical significance only.

(a) Principles of customary law and fundamental rights often conflict. Give an example of how such conflict can occur and *indicate the provisions in the constitution providing for the fundamental rights which may conflict with customary law*? (6)

The Constitution does not contain a clear answer.

The priority of Fundamental Rights

There are, indications that fundamental rights have priority over customary law, being:

- **s2** provides that the **Constitution is the supreme law**
- **s8(1)** provides that the **Bill of Rights is applicable to all legislation**, thus incl customary law
- **s36(2)** provides that **no fundamental rights will be limited by any law**, except under s36(1)
- **s39(1)** requires the courts to **promote the values** that underlie an open and democratic society based on human dignity, equality and freedom in interpreting the Bill of Rights
- **s39 (2)** provides that, in **interpreting any law** & **applying and developing common & customary law**, the courts must have due regard for the spirit, purpose and objects of the Bill of Rights

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- **s36 (1)** which **allows the rights in the Bill of Rights to be limited by 'law of general application'** (including customary law), provided that such limitation is reasonable and justifiable in an open and democratic society

(b) Does the Constitution provide solutions to the conflict between customary law & the BOR? (2)

Judicial revision of customary law

- **It is the responsibility of the Constitutional Court and the High Courts to resolve any conflict between customary law and fundamental rights**.
  - **The Constitutional Court:**
    - **may, in the last instance**, decide on cases regarding the interpretation, protection and enforcement of the Constitution.
    - **has specific authority** to remedy any alleged or threatening violation of fundamental rights and to
    - **adjudicate the constitutional validity** of any Act (legislation).
  - **The High Courts** also have jurisdiction over any alleged or threatening violation of fundamental rights. They may also: investigate the validity of any statute, except Acts of the national Parliament (section 169).
  - **The other courts,** such as magistrates' courts and courts of traditional leaders, are obliged to refer all constitutional matters to the High Courts.

- **Any party to an action may**
  - **query the constitutional validity of any rule of customary law** on the grounds of its harmful effect on that particular party.

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Enforcement of Fundamental Rights:

In terms of **Section 38**, this **right may also be enforced by:**

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

In any specific case, a rule is presumed to be constitutionally valid… thus -

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

The amendment of customary law by statute

The Constitution enables Parliament to fulfil this duty in the furtherance of Fundamental Rights – including:

- the amendment of customary law by statute
- the amendment of other discriminatory laws - and -
- the creation of statutory bodies such as:

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- » Human Rights Commission - s184 - promotion or contravention of human rights
- » Commission for Gender Equality - s187 - legislation affecting the status of women.

Legislation may originate from two sources:

- The national Parliament and the Provincial legislature.
  - » **Provincial legislatures** have limited powers. This is because provincial legislation is subject to parliamentary legislation, and because provincial legislators have jurisdiction only in certain cases.
  - » **Provincial legislatures**, however, do have **concurrent jurisdiction** with the national Parliament **in matters that concern customary law** (Schedule 4, Part A).
- The fact that provincial legislation may be applied only in that particular province (s104 (1)) could lead to a conflict between the principles of territoriality and personal law.
- This may be explained as follows: a person living in KwaZulu-Natal is subject to the laws of that province. If that person moves to another province, he or she will be subject to the laws of the new province, even if those laws conflict with his or her personal rights.

(c) List and briefly discuss the provisions in the Constitution that Indicate which of the two conflicting principles has priority over the other. See page 33 of the study guide. **(12)**

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The main point of conflict concerns:

(i) **the right of the individual to equal treatment**

(ii) as opposed to **the right of the group to adhere to the culture of its choice.**

- **Customary Law** has been **accepted and recognised** as part of the SA legal system.
- **The other 'parts'** of the South African legal system are:
  - » statute law (legislation),
  - » common law and
  - » case law (court decisions).

  Customary law, like common law, is subject to the Bill of Rights.

Customary law must therefore be interpreted in the light of these so-called **fundamental rights,** and particularly in the light of the **equality clause** as contained in section 9.

Section 9 (3) provides that:

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

- This limitation on discrimination implies that any legal relationship regulated by customary law is subject to the Bill of Rights.

Section 8(2) provides as follows: A provision of the **Bill of Rights binds a natural or a juristic person** if, & to the extent that, it applies, taking into account the nature of the right & the nature of any duty imposed by the right.

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

Conflict between customary law and the Bill of Rights is unavoidable:

(i) **Male primogeniture**

» The principle of **male primogeniture** (whereby the eldest son of the family head is the heir upon the death of the family head) **is inherent in African culture and customary law,** but obviously discriminates against women.

(ii) **Individual vs Group Rights:**

» Further, the **Bill of Rights** emphasises **individual rights**, whereas in **customary law** the emphasis is on the **group**, the community, and the individual in the context of the community.

(iii) **Rights vs Duties:**

» Another difference is that the Bill of Rights emphasises **rights,** as its name implies, whereas customary law emphasises **duties**.

There are, indications that fundamental rights have priority over customary law, being:

- **s2** provides that the **Constitution is the supreme law**
- **s8(1)** provides that the **Bill of Rights is applicable to all legislation**, thus incl customary law

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- **s36 (1)** which **allows the rights in the Bill of Rights to be limited by 'law of general application'** (including customary law), provided that such limitation is reasonable and justifiable in an open and democratic society.

If it is accepted that the **application of customary** law is a **constitutional right,** and not **merely a freedom,** it means that **customary law is equal in status** to any of the other **fundamental rights.**

- **In the event of conflict** - the fundamental rights that are in conflict must be balanced against one another.
- The fundamental rights mentioned in the Constitution are **not arranged in a hierarchical** order, that is, from more important to less important.
- **Fundamental Rights are equally promotable**: The promotion and protection of one category of fundamental rights does not exempt the authority (state) from promoting and protecting another category of rights and **may not lead to oppression of, or discrimination against, certain categories of people** (e.g. women).

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It appears that **conflicts** between customary law and the bill of fundamental rights **cannot be solved through the Constitution alone**: other means outside the Constitution should also be looked at.

- One could, for instance, consider the social implications of enforcing a fundamental right upon a certain cultural group or examining the origin of certain legal conflicts to decide which matters are more important and more urgent than others.
- In this way suitable techniques for solving the problem could be identified.

(d) Apart from the constitutional provisions what other means can be employed to resolve this conflict?

Judicial revision of customary law

- **It is the responsibility of the Constitutional Court and the High Courts to resolve any conflict between customary law and fundamental rights**.
  - **The Constitutional Court:**
    - » **may, in the last instance**, decide on cases regarding the interpretation, protection and enforcement of the Constitution.
    - » **has specific authority** to remedy any alleged or threatening violation of fundamental rights and to
    - » **adjudicate the constitutional validity** of any Act (legislation).
  - **The High Courts** also have jurisdiction over any alleged or threatening violation of fundamental rights. They may also:
    - » investigate the validity of any statute, except Acts of the national Parliament (section 169).

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- **The other courts,** such as magistrates' courts and courts of traditional leaders, are obliged to refer all constitutional matters to the High Courts.

- **Any party to an action may**
  - **query the constitutional validity of any rule of customary law** on the grounds of its harmful effect on that particular party.

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In any specific case, a rule is presumed to be constitutionally valid… thus -

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

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The amendment of customary law by statute

The Constitution enables Parliament to fulfil this duty in the furtherance of Fundamental Rights – including:

- the amendment of customary law by statute
- the amendment of other discriminatory laws - and -
- the creation of statutory bodies such as:
  - » Human Rights Commission - s184 - promotion or contravention of human rights
  - » Commission for Gender Equality - s187 - legislation affecting the status of women.

Discuss the implications of ss 30 & 31 of the Constitution for the recognition of customary law. (15)

Provide a new approach to indigenous law. Evaluate this statement?

Sections 30 and 31 provide for a new approach to customary law. Indicate what this approach is, and state the implications of this approach. Explain the difference between a 'constitutional freedom' and a 'constitutional right'.

Sections 30 & 31 of the Constitution form the basis of a **new approach to customary law** and determine that - i.t.o s30 (language & culture) & 31 (cultural, religious and linguistic community rights) an individual has the right to adhere to the culture of his or her own choice.

Section 30 provides as follows:

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

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Customary Law thus recognised in s30 i.t.o the right to participate in the culture of one's own choice.

The concept of 'culture'

» does not have a single or unambiguous meaning and may be interpreted as:

- systems of personal law (i.e. rights regarding the person, anywhere in the world) that are associated with specific cultures - or –
- may also be interpreted as - only the non-legal aspects of social life.

» other systems of personal law are recognised in the Constitution thus:

- the concept of 'culture' in s30 may well be interpreted as including customary law.

Section 15(3)(a) provides as follows: (Freedom of religion, belief and opinion)

(3) (a) This section **does not prevent** legislation recognising-

(i) **marriages** concluded under any tradition, or a system of religious, personal or family law; or

(ii) systems of personal and family law under any tradition, or adhered to by persons professing a **particular religion**. **pp31**

This section finds application i.r.o customary marriages including Hindu and Islamic law, specifically the polygynous nature of marriage under these laws.

'Polygyny' - refers to a system of marriage in which a man may be married to more than one wife at the same time.

'Polyandry' refers to a system of marriage in which a woman may be married to more than one husband at the same time. **Polygyny and polyandry are forms of polygamy.**

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NB: Please note that section 15(3)(a) merely provides for **legislation to be enacted that recognises** marriages concluded under any tradition, or a system of religious, personal or family law.

The section **does not have** the effect of granting recognition to such marriages.

Consequently, the only type of polygynous marriage recognised in South Africa (i.e. by specific legislation and at the time of writing this study guide), is the customary marriage entered into by the indigenous African peoples of South Africa.

Section 39(1) of the Constitution provides that:

When interpreting the Bill of Rights, a court, tribunal or forum:

a. must **promote** the values that underlie an open and democratic society based on human dignity, equality and freedom;
b. must consider **international law**; and
c. may consider **foreign law**.

I.t.o this section, read with section 30, it may be argued that the state is obliged to apply and recognise customary law.

Section 30, however, **confers no express right** to insist that customary law be applied.

» It simply provides that individuals have the right to take part in the culture of their own choice. Literally, this means that individuals may demand access to a cultural group and may take part in the activities of that group.

» A right to apply customary law would, however, impose a duty on the state to maintain African culture.

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

Section 31 of the Constitution:

Persons belonging to a cultural, religious or linguistic community **may not be denied the right**, with other members of that community – to…

(a) enjoy their culture, practise their religion and use their language; and

(b) form, join & maintain cultural, religious & linguistic & other organs of civil society.

In terms of section 31, the state has two duties, namely: pp32

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

Section 31 upholds another aspect of the right to culture:

- the right of a group of people to have and maintain a specific **group identity**.
- Group and individual rights are thus symbiotic in nature (i.e. they depend on each other). The individual right to adhere to a culture of choice assumes the existence of a cultural group or community, and this community must exist before the individual can have any rights in it.
- It may therefore be argued that a person's right to the application of customary law in a certain instance is vested in membership of a group. This group must be recognised by the state before the individual can enforce his or her right.

The difference between Freedom & Rights

- Another implication of sect 30 and 31 is **the conversion of a freedom into a constitutional right.**

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- **These sections refer expressly to 'a right'.**

- This raises the following question: **What is the difference between a constitutional freedom and a constitutional right?**

  'Freedom' means: that there is no regulation by the law. The individual may act according to his or her own choice and as he or she thinks fit. **This means that freedom is subject to a right**.

  'Right' means: that the bearer of a right may enforce that right.

  Rights demand a specific conduct, while freedoms allow choices.

List and discuss the provisions of the constitution that indicate which of the conflicting principles have priority over the other. ***(5)***

There are, indications that fundamental rights have priority over customary law, being:

- **s2** provides that the **Constitution is the supreme law**
- **s8(1)** provides that the **Bill of Rights is applicable to all legislation**, thus incl customary law
- **s36(2)** provides that **no fundamental rights will be limited by any law**, except under s36(1)
- **s39(1)** requires the courts to **promote the values** that underlie an open and democratic society based on human dignity, equality and freedom in interpreting the Bill of Rights
- **s39 (2)** provides that, in **interpreting any law** & **applying and developing common & customary law**, the courts must have due regard for the spirit, purpose and objects of the Bill of Rights

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- **s36 (1)** which **allows the rights in the Bill of Rights to be limited by 'law of general application'** (including customary law), provided that such limitation is reasonable and justifiable in an open and democratic society

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(1) Consider the following hypothetical scenario:

> * *Zwai (a male aged 26) and Puleng (a female aged 23) want to enter into a customary marriage.*
> * *According to the law and custom of both Zwai and Puleng, Zwai has to deliver lobolo to Puleng's family. Puleng, however, refuses to marry in terms of a lobolo agreement and appeals to section 9 of the Constitution of the Republic of South Africa, 1996.*

(a) In this case, what specific constitutional rights are in conflict?

- The individual right to practice the culture of one's choice (i.e. s30 of the Constitution, 1996).
- The group right to practice the culture of one's choice (i.e. s31 of the Constitution.
- The right to equality (i.e. s 9 of the Constitution).

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(2) The *ukuzalela* custom is practised when a married woman is unable to procreate a successor. (5)

The statement is **false**. In *Tekeka v Ciyana* (1902 NHC 13) it is stated that ***ukuzalela*** **is practised where a deceased man has left a successor**. During the successor's youth, the family council control the increase of the deceased's estate. This can be done by giving the deceased's wives in ***ukungena*** **unions or by marrying a wife for the deceased**. *The children of such a union would then belong to the deceased. These children cannot, however, succeed the deceased.*

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- The ***ukuzalela*** is therefore a unique custom and is practised when a deceased man leaves a successor and is survived by a wife, who is still capable of bearing further children.
- The deceased's wife or wives would engage in ***'legitimate intercourse with an approved (male) relative*** of the deceased for the ***sole purpose of procreating more children for the house***

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(7) What was the basic argument that was advanced by the Master and the Minister in support of s23(2) & reg3(1) in the Moseneke case? How did the court respond to this argument? (10)

Until the Constitutional Court in the case of *Moseneke v The Master of the High Court* 2001 declared ss (7) of s23 of the Black Administration Act unconstitutional, the Master of the High Court who administered all the estates belonging to deceased persons who were not Africans, as well as testate estates of Africans, had no powers with regard to the administration of an intestate estate of a deceased African.

Such an estate had to be administered in terms of regulation 3(1) of Government Notice R200 of 1987 by the local magistrate of the area where the deceased lived.

The constitutionality of both section 23(7) (a) and regulation 3(1) was contested and they were found to be unconstitutional and therefore invalid.

Until the **Constitutional Court in *the Bhe case*** declared sections 23 (1), (2) and (7) of the Black Administration Act 38 of 1927, which regulated the inheritance of property by persons living under customary law – unconstitutional…

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the estate of a black who died without a valid will devolved according to the rules contained in Government Notice R200 of 1987.

- The **Constitutionality** of both **s23(7)** of the **Black Administration Act** and **reg3(1)** of **Government Notice R200 of 1987** was **contested** in the Moseneke case.
- The court found that section 23(7) and regulation 3(1) impose differentiation on the grounds of race, ethnic origin and colour and as such **constitute unfair discrimination** as **envisaged** in terms of **s9** of the **Constitution** and furthermore, that the **limitations posed by the relevant legislative provisions** were not ' reasonable and justifiable in an open and democratic society based on equality, freedom and dignity'.
- Accordingly it was held that **both provisions were inconsistent with the provisions of the Constitution and thus invalid**.

However, i.t.o. reach a just and equitable order it was held that ;

(a) s23(7)(a) of the Act is invalid with immediate effect

(b) The status quo with regard to estates already completed in terms of section 23(7)(a) of the Act and regulation 3(1) should be upheld

(c) The declaration of invalidity `in respect of regulation 3(1) is suspended for two years.

NB: The order of the court in this case is said to have brought considerable changes to the winding up and administration of intestate Black estates that devolve in terms of the common law.

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Discuss the provisions and principles stated according to the Traditional Leadership and Governance Framework Act 41 of 2003 for the appointment of all categories of traditional leaders in South Africa. (15)

Discuss the provisions and principles stated according to the **Traditional Recognition of a King or a Queen:**

In terms of section 9(2)(a) & (b) of the *Traditional Leadership and Governance Framework Act 41 of 2003*, the **President** must, subject to subsection (3), recognise a person so identified in terms of paragraph (a)(1) as a **King** or a **Queen**.

This is done by way of-

(a) a notice in the Government Gazette recognising the person identified as King or Queen; and

(b) issuing a certificate of recognition to the identified person

_____ooo_____

Recognition of senior traditional leaders, headmen, and headwomen

The recognition of **senior traditional leaders, headmen, and headwomen** according to section 11 of the Act, is done by the **Premier of each province** by-

(a) a notice in the Provincial Gazette recognising the person so identified

(b) issuing a certificate of recognition to the identified person; and

(c) informing the relevant House of Traditional Leaders of the recognition of the senior traditional leader, headman or headwoman

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If any dispute i.r.o appointment or recognition…

The Act provides that should there be any evidence or an allegation that the identification of a person as a traditional leader *was not done* in accordance with African **customary law, customs or processes,** the President or the Premier of that particular province, as the case may be, may-

(a) refer the matter to the National House of Traditional Leaders

(in the case of a King or a Queen).

(b) refuse to issue a certificate of recognition; and

(c) must refer the matter back to the royal family for reconsideration and resolution where the certificate of recognition has been refused.

Who has the legal power to appoint a traditional leader in law? 2x

The power to appoint traditional leaders, which power was vested in the supreme chieftaincy, was assigned to the Governor-General by the Black Administration Act of 1927.

This power was later re-assigned to the President of South Africa in 1961 and then to the homeland governments upon the attainment of self-government status, and to the TBVC states upon gaining independence.

Outside the former self-governing territories and "independent" TBVC states traditional leaders were still being appointed by the South African President.

In 1994 the power to appoint traditional leaders was assigned to the Premier of the respective provinces or the delegated MEC.

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