# INDIGENOUS LAW NOTES:

Indigenous law is divided into the Private law side and the Public law side. The notes are structured according to the syllabus prescribed for the module, and the exam usually follows this order. The first topic discusses the nature of IL, in terms of the ways that it is and was different to Western Law and the influence of the modern laws on its development.
The Constitution had an impact on IL, and so please study the relevant sections mentioned, well.
Each of the headings to follow may be a question in the exam.

## Customary law as an expression of community values

Public participation in the process of adjudication resulted in the law also giving expression to the prevalent values or the general moral behavioural code of the community. As values changed in the course of time, so did the law. Conflict between legal and moral values was therefore unknown. The interests of the community were considered so important that, in the eyes of the law, the individual had no special part to play.
The individual did, however, have a role to play within the group within the family on the one hand and within the community on the other. Should a dispute arise between parties, usually family groups, the emphasis was not on which party was right and which party was wrong. The dispute affected the wider community, which meant that any decision had to take into account future relations between the parties within the community.
These relations were extremely important if the wider community was to enjoy harmony. The administration of justice did not concern legal justice as such, but the reconciliation of people.

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

The belief in ancestral spirits, and the belief in sorcery are the main supernatural beliefs in IL.
Each cultural group has its own conception of these but the **belief in ancestral spirits basically** means that after death a person continues to live in a spiritual world in basically the same way as he or she did on earth. Relations that existed on earth are continued in the spiritual world. The ancestral spirits maintain contact with their living relatives on earth from the spiritual world.
Ancestral spirits have an interest in the community living on earth and may make their wishes known to the living in various ways. It is believed that the rules for living, and the law, are derived from the ancestors and are protected by the ancestral spirits.
The ancestral spirits ensure that these rules are observed. Any disregard of, or divergence from, these rules for living may lead to punishment by the ancestral spirits.

EXAMPLES: misfortunes such as illness, drought, hail, floods and heat waves that are experienced are often interpreted as forms of supernatural punishment, even today.
These beliefs explain the law, and therefore also form a basis for the law. Thus the law has a supernatural origin and is therefore seldom questioned. It also results in the law appearing static and unchangeable: any change may be against the wishes of the ancestral spirits.
This all is also related to the belief that there are supernatural powers at work in the universe that may be used by a person for his or her own ends. People may use these supernatural powers to either work to the advantage or to the disadvantage of other people or their interests. Cases of sorcery always involve a person, that is, a "sorcerer", who uses these supernatural powers in order to harm others. It is in the interests of the community that the sorcerer be identified and removed from the community. Some form of supernatural process is often implemented to identify the sorcerer. Use is often made of extraordinary evidence to point out a sorcerer. Usually, the sorcerer is then killed or removed from the community – and his family as "a mamba gives birth to a mamba."

## SOME FEATURES OF CUSTOMARY LAW IN COMPARISON TO THE COMMON LAW

### Specialised and non-specialised systems of law:

Common-law rules are relatively specific. The role of judges is to find the relevant rule of law and apply it. Common-law rules are, for the most part, readily ascertainable from legislation, judicial precedents and textbooks. These legal systems may be called specialised legal systems. Customary law is a non-specialised legal system. It is largely unwritten and does not always have clear-cut, immutable rules. Customary law is generally known to the members of a particular cultural group and is enforceable between the members of this group. The rules of this system are not always cast in stone.

Differences between specialised and unspecialised legal systems: NB!

- Time
- Categorisation
- Governmental functions
- Polygyny (Marriages)
- Concrete versus abstract approach
- Group versus individual orientation
- The religious element
- Kinship

**Moments in time:**

In specialised legal systems, moments in time are often important. There are rules determining that action must be instituted before a certain time. Claims and even crimes become prescribed after a certain period of time. This is however different in customary law, as time plays a minimal role in determining when rights and duties come into existence. In indigenous law there is no strong emphasis on time.

**Categorisation:**

Specialised legal systems distinguish between categories institutions and concepts. Law is categorised into public and private law as well as the law of contract and delict. In customary law there is no rigid distinction between categories, institutions and concepts, for instance as between the concept of intent and negligence in criminal law. A person who is found guilty of a crime may sometime not be punished but ordered to restoration of a previous state, even apologise. There is no separate court procedures as there is no distinction between civil and criminal cases.

**Traditional authority courts and procedure:**

In specialised legal systems there are formal court structures, but in non-specialised legal systems there are no such structures. In non-specialised legal systems there are neither professional judges, nor legal practitioners. The principal dispute settlement bodies can hardly be called courts. Adult family members will ideally meet to discuss a dispute.

**Marriage and family:**

At common law, a marriage is a special contract between a man and a woman. In customary law, it is a union of two families. Representatives from both families will negotiate the marriage and come to an agreement about *labolo,* exchange gifts and participate in ceremonies. Ultimately, the wife is integrated in her husbands family, so much so that when he dies, she belongs to his family.

**Contract:**

In customary law, the head of the family usually concludes contracts on behalf of his family. He will even incur obligations under contracts entered into by members of his family with his consent. In common law, the contracting parties themselves acquire rights and incur liabilities.

**Concrete as opposed to abstract legal facts:**

Customary law is almost entirely based on the concrete performance of an act.
EG:

- A marriage is concluded n a manner that can be observed by all concerned. The bride is actually 'handed over' to the bridegroom's family.
- A contract of sale is dependant upon the physical, observable handing over of the price agreed upon in exchange for the article or goods purchased.
- If a man closes the door of his wife's hut in a certain way, he makes it known that he wishes to divorce her.

**Groups rather than individuals as legal persons:**

In specialised legal systems, individuals have rights and duties. Groups like companies and partnerships acquire a legal personality only in terms of legislation or by way of common-law precepts. In unspecialised systems, the group constitutes a legal entity. In customary law the family head is the representative of the legal unit, who can, *inter alia,* enter into contracts, acquire property and even incur liability for delicts committed by members of the family home. This distinction can be seen in numerous aspects including: marriages, contracts, criminal law, administrative law etc.

**The religious element:**

The strong religious element of customary law is based, on the belief that the law originates with the ancestors. Also, disregard of the law is punished by the ancestors because it is regarded as disrespect, neglect and contempt of the ancestors.
Reconciliation between the community and the ancestors is usually accomplished by slaughtering an animal and by having a communal meal – concrete proof the community has been cleansed and the ancestors are happy.
If important juristic acts are planned, the blessing of the ancestors is obtained by means of special rites.
The role of extraordinary evidence, for example in the pointing out or identification of sorcerers, is well known in customary law.

**Kinship:**

In many respects, kinship plays a dominant role in the legal life. Apart from the position of the household as a legal unit, the wider family circle, that is the family group, has extensive authority over its members. Since all the members participate in the authority of the family group, this authority is firm, yet benevolent and protective.
The position of women compares unfavourably with that of men.

**Constant change and development:**

All legal systems are in a constant process of change and development, although it is a more time-consuming process to develop specialised legal systems. African individuals and communities have, of course undergone a change as a result of modern social circumstances.

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**Similarities between specialised and unspecialised legal systems:**

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

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**Living and official versions of customary law:**

Living customary law has undergone considerable change as a result of the colonial environment.
Eg:

- It was not possible to maintain cohesion of the families and communities. Individuals automatically became autonomous.
- Women acquired a large measure of independence, they earned income and functioned independently creating a large number of female-headed households. Societies were no longer purely patrilineal.

Customary law has adapted to fit the circumstances
Eg:

- became acceptable for female family-heads to negotiate and receive *labolo.*
- A system of ultimogeniture developed. The reason for this is said to be that the eldest son would leave the family home and his ageing parents.

Living customary law, unlike official customary law, refers to the original customs and usages that are in a constant phase of evolvement. Communities change and so do their rules. The ideal situation would be to apply customary rules that are in accordance with the modern needs

of the particular group, and, in principle, living customary law should be applied. The courts have intimated that living customary law is preferred. It is virtually impossible to apply living law because it is not always readily ascertainable. It can be proved by expert evidence, but there is no comprehensive source. The official version is accessible and it does have merit because it is mostly a feasible synthesis of the living and official customary law.

It is impossible to apply living customary law across the board. The solution was that in appropriate cases it could be proved by expert evidence. In the meantime legislature has added to the official version of customary law by Acts recognising customary marriages, casting traditional leadership and governance in a new statutory mould and regulating certain aspects of the customary law of succession. In one judgement after another, the courts have, by virtue of the doctrine of *stare decisis,* cast what they perceive to be the living law in immutable case law or resolved what the law ought to be so as not to be in conflict with the precepts embodied in the Constitution.

**Conflicts between different systems of customary law:**

**Compatibility with the Constitution:**

The application of customary law is subject to the Constitution as a whole.

Section 9 of the Constitution is of particular significance because some customs and usages may be regarded as discriminatory.

(1) everyone is equal before the law and has the right to equal protection and benefit of the law.
(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
(3) The state may not unfairly discriminate directly or indirectly against anyone on one 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.
(4) No person may unfairly discriminate directly or indirectly against anyone on one more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination one ore more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

It may come as no surprise that Section 9 has been the object of most litigation in the area of customary law so far.

**Section 211 - NB**

1. The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.
2. A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.
3. The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

The implications of section 211(3):

- All courts must apply and therefore also recognise customary law.
- The recognition and application of customary law are subject to the Bill of Rights.
- The recognition and application of customary law are subject to legislation that specifically deals with this matter. This implies that only legislation aimed at amending customary law is relevant and not legislation in general.
- The courts determine when customary law is applicable. Courts have a discretion to decide whether customary law is applicable in a case. This discretion to be exercised in agreement with the general principles of 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 (sections 30 and 31), request that customary law be applied. This freedom of choice is not absolute, however: the choice of one person may, for example, not infringe the rights of another. Where rights have been derived from customary law, the courts are obliged to protect those rights, assuming that both parties reasonably expect to be subject to customary law.
Where an individual has the right, in terms of sections 30 and 31, to adhere to the culture of his or her own choice, means that there is a relation between the state and that particular individual, also means that the state is obliged to make it possible for that individual to adhere to the culture of his or her choice. The example of the individual and the state is dealing with the vertical application of a fundamental right, the right to culture. This right to culture does not impose any duties on the individual but it merely makes that individual entitled to that right.

If an individual exercises his or her right to culture, other individuals are obliged to respect this. Here, its 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.

**Sections 30 and 31 - NB**

Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.
This is derived from the right to participate in the culture of one's own choice.
"Culture" does not have a single or unambiguous meaning – it may be interpreted as including systems of personal law that are associated with specific cultures. It can be interpreted as including only the non-legal aspects of social life.
Other systems of personal law are given express recognition in the Constitution - the concept of "culture" mentioned in section 30 may well be interpreted as including customary law. Section 15(3)(a) provides as follows:

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

This section applies to Hindu and Islamic law, specifically the polygynous nature of marriage under these laws.
"Polygyny" refers to a system of marriage in which a man may be married to more than one wife at the same time.
S 15(3)(a) provides for legislation to be enacted that recognises marriages concluded under any tradition, or a system of religious, personal or family law. Section 15(3)(a) does not have the effect of granting recognition to such marriages. Thus the only type of polygynous marriage recognised in South Africa is the customary marriage entered into by the indigenous African peoples of South Africa.

S39(1) of the Constitution provides that:
(1) When interpreting the Bill of Rights, a court, tribunal or forum:
a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
b) must consider international law; and
c) may consider foreign law.

on this section, read with section 30, it may be argued that the state is obliged to apply and recognise customary law. Section 30, however, confers no express right to insist that customary law be applied. It simply provides that individuals have the right to take part in the culture of their

own choice. Thus 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.

S30 is given further force by section 31, which provides as follows:
(1) Persons belonging to a cultural, religious or linguistic com- munity may not be denied the right, with other members of that community –

a) to enjoy their culture, practise their religion and use their language; and
b) to form, join and maintain cultural, religious and linguistic association and other organs of civil society.

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

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

S31 upholds the right of a group of people to have and maintain a specific group identity. Group and individual rights 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.
An implication of sections 30 and 31 is the conversion of a freedom into a constitutional right. These sections refer expressly to “a right”. What is the difference between a constitutional freedom and a constitutional right? “Freedom” means that there is no regulation by the law. The individual may act according to his or her own choice and as he or she thinks fit. This means that freedom is subject to a right, because the bearer of a right may enforce that right. Rights demand a specific conduct, while freedoms allow choices.

**Customary law and the Bill of Rights**

Customary law has been accepted and recognised as part of the South African legal system.
Customary law must therefore be interpreted in the light of fundamental rights, and particularly in the light of the equality clause as contained in section 9.
Section 9 (3) provides that:
The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

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

A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.
By recognising customary law on the one hand and prohibiting discrimination on the other, the Constitution gave rise to a conflict between two opposing principles: namely the right of the individual to equal treatment and the right of the group to adhere to the culture of its choice.

***Conflict between customary law and the Bill of Rights is unavoidable****……*

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

The Constitution does not contain a clear answer to this question. There are, however, indications that fundamental rights have priority over customary law. These indications are the following:

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

It is accepted that the application of customary law is a constitutional right, and not merely a freedom, which means that customary law is equal in status to any of the other fundamental rights. If there's a conflict, the fundamental rights that are in conflict must be balanced against one another. The fundamental rights mentioned in the

Constitution are not arranged in a hierarchical order, that is, from more important to less important. The promotion and protection of one category of fundamental rights does not exempt the authority (state) from promoting and protecting another category of rights and may not lead to oppression of, or discrimination against, certain categories of people (e.g. women).

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. Maybe 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.

# PRIVATE INDIGENOUS LAW:

## THE LAW OF PERSONS:

### The Legal Subject in Indigenous Law

Originally, indigenous law recognised only a natural person as a legal subject, not a juristic person.

The juristic person was foreign to indigenous law. "Juristic person" refers to an association of persons, which, is regarded as a legal subject. So even though there are individual persons forming the association, each constituting a legal subject, the association itself is regarded as an independent legal subject and is called a "juristic person". Although the agnatic group is also an association of people, there was no question of two sets of legal powers.
In indigenous law, the agnatic group could therefore **not** be classified as a juristic person, since individual members did not have rights, powers and duties that were independent from the agnatic group.

The individual is thus the bearer of rights, power and duties. BUT always shared his rights, powers and duties with his agnatic group.
An individual's share in the right so the agnatic group depended on his or her status within the group (NB exam question, for 5 marks).

An individual's status within the agnatic group was influenced by factors such as: age, sex, marital status, legitimacy or illegitimacy of birth, adoption, disinheritance, family and house rank and mental state.
The head of the agnatic group held the highest rank within the group. Thus the head had certain powers distinguishing him from other members of the group.
He did not however form a separate entity from the group. He was like the group's "spokesman".

In modern law, emphasis falls on the individual person as a human being. He is thus the bearer of rights, powers and duties. Within the agnatic group, the individual is independent from the other members. The head of the group is regarded as the person in whom the group's rights are vested, to the exclusion of other members.

## Status

This is linked to a person's legal position or standing, and it is this status that determines the powers this person has. Legal capacity, contractual capacity and capacity to appear in court are NB competencies.

In early law, the individual shared his or her rights with the other members of the agnatic group.
His share in the rights depended on his or her status within the group. This status was influenced by factors such as family rank, house rank etc. Status may either give or deny the individual certain powers. For example, the family head must uphold his authority within the family, juveniles may not marry, in many communities, unmarried women may not have sexual intercourse and the feeble-minded may not succeed to positions of authority.

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

In modern indigenous law, a person's status is influenced by the specific age (18 years old) at which majority is attained.

In indigenous law, a distinction must be drawn between "status" and "rank".
"Status" determines the powers derived from objective law, while "rank" is just one factor, which may influence a person's status. Wives of a polygynist (a man with two or more wives) each have a particular rank, as does each of their houses, sometimes also according to the specific division within the household. The members of the agnatic group also each have a particular rank, according to the order of seniority within the group.

## Factors affecting status

1. **Age**

Age influences a person's accountability (does he know, legally, the difference between right and wrong, and if so, can he act in accordance?).

Originally, a person was neither a minor nor a major, because rights were shared among the **group**. Thus, a child was not considered accountable until he or she had reached the age of six years. A person could not marry until he or she had reached puberty. A boy who was considered mentally immature was not qualified to succeed to a position of status and was temporarily replaced by a deputy until he was mentally mature.

Nowadays, legislation states that certain people are majors, and these majors can acquire rights and duties independent from the agnatic group.

**In early indigenous law, minority and majority were unknown.**

Greater importance was attached to **physical development**. Puberty was strongly emphasized by some people by means of specific ceremonies, generally known as "initiation ceremonies". A person was considered marriageable once he or she had undergone these initial ceremonies. Such a person was then generally considered an adult. modern indigenous law, this position was amended drastically in that majority is now attained at a fixed age, namely 18.

And now individual members of the agnatic group can become majors, that is, they can obtain rights, powers and duties independent from those of the agnatic group.

## 2. Sex

Originally, status positions are limited to males only.
Women were not without any status at all. In early indigenous law, sex had an influence on a person's status. Only male persons could succeed to positions of status. A woman could thus never become a family head, nor could she succeed to general or house property.
The woman had status, although her powers were limited. For example, she had a reasonable degree of freedom in regard to the everyday use of house property. A man could not deal arbitrarily with house property either, and had to consult his wife in the house concerned. This consultation was not legally enforceable. A woman could call upon the wider family group if her husband dealt irresponsibly with house property.

In modern indigenous law, the position of the female (as a major) & the legal position of unmarried women compares favorably with that of males. It is still not possible for females to succeed to the position of family head.

In terms of s 9(3) of the Constitution the State may not discriminate unfairly against a person on the grounds of sex, among other factors. It can be expected that this section will have a drastic influence on the indigenous position of females.

## 3. Rank:

- **Family rank**

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

The nuclear family comprises a husband and wife and their children.
Males occupied a higher rank than females.

Within the context of the family a person's rank was determined by the principle of primogeniture.
The eldest son had a higher rank than brothers younger than himself, and younger brothers therefore ranked below their older brothers. The same principle applied to sisters.

The position of twins is:
Dependent on the group in question as the various groups differ in this regard, but one asks who is regarded to be the eldest and also the fact that they rank independently? Among some groups the first born of twins is regarded as the elder, while other groups regard the last born to be the oldest.

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

- **House rank**

Relates to a person's legal position within a nuclear family. The order of birth and gender are important factors influencing a person's status.
Polygynous marriage - each marriage establishes a separate family, the husband being the common spouse to all the families. This unit of families headed by one husband is known as a "household". The head of the agnatic group is the "family head". A number of related households or agnatic groups form a family group.

The various families within this unit each have a particular rank. In some cases, the rank of each family or house is determined by when it came in to being, that is, according to the order in which the man married the women. The wife, whom he married first, is then known as the "main wife". The rank of the children within such a household was determined by the rank of their mother's house. The children's rank in such a household is thus dependent on their mother's house rank.

In some cases, the main wife must come from a particular descent group, and should not be the wife that is married first. In these cases, the order of marriage is not decisive for the hierarchy.

# CUSTOMARY FAMILY LAW:

## Betrothal:
## (possible essay topic):

Betrothal is a legal act, which has specific consequences, & originally a betrothal comprised of an agreement between two family groups with regard to a future marriage between a male member of the one group and a female member of the other group.
This act has been described as a specific contract.
The elements of the contract are the agreement and performance or part performance by the man's group. This performance comprises the delivery of all or some of the marriage goods, plus other gifts, eg earnest cattle.

Not all indigenous groups recognise the betrothal as an independent legal act if the agreement and transfer of the woman to the man's group and the transfer of marriage goods (lobolo) takes place within a single ceremony, which stretches over a few days.
Today, the parties to the contract are individuals. They are the man, the girl and her father.
If the man is not a major, he has to be assisted by his father.
The betrothal agreement does **not** create an enforceable right or obligation to marry.
The agreement can be repudiated or terminated at any time without the aggrieved party being able to demand compensation on the grounds of breach of contract. The legal con- sequences of the termination of the betrothal agreement are restricted chiefly to the patrimonial aspects of the betrothal.

## Marriage negotiations:

In traditional customary law, marriage was a matter between two family groups and note merely a bond binding two parties. Betrothal was therefore mainly an agreement between two family groups. When you reached a consensus leads to a formal betrothal.

The *ukuthwala* custom is still popular. The woman is 'abducted' by the suitor or his friends to force her family to enter into a negotiation regarding the conclusion of a marriage. In most instances this is done with the woman's consent. There are three forms of *ukuthwala*

a) woman is aware of the intended abduction and there is therefore a collusion between the parties
b) where the families agree, but the woman is unaware
c) where neither the woman nor her family has prior knowledge of the abduction.

If a young man seduces the woman, a seduction head of cattle and, in appropriate circumstances, a pregnancy beast will be payable.

Although successful marriage negotiations usually result in a betrothal, an engagement is not a prerequisite for a valid marriage. Betrothals of infants and children are void *ab initio.* Betrothals can be either short or long. This is determined by agreement between the parties and is usually dependent on the period of time required by the man/his father to gather the *lobolo* cattle.

**Consequences of betrothal:**

No enforceable rights are created by the betrothal agreement.

a) betrothal gifts: gifts are given as a symbol of the betrothal promise (eg: clothing, blankets and the so-called 'earnest cattle') right of ownership of these articles passes to the recipient (the woman or her father) upon delivery. If the engagement is terminated the gifts are not returned. Blameworthiness determines whether the gifts have to be returned (man blamed = gifts not returned, woman blamed = gifts are returned, terminated by agreement = gifts are returned to the giver or parties reach an agreement)
b) *Lobolo* handed over during the betrothal: *lobolo* can be delivered before the marriage. Custom sometimes prescribes the amount. Ownership over the *lobolo* property and any accrual of livestock becomes the property of the recipient, and outside KwaZulu-Natal, any accrual is not added to the original number. Giver bears the loss / deaths, during the betrothal but the recipient is obliged to report any loss of livestock. Upon termination of the engagement, all the *lobolo* gifts plus the accrual have to be returned regardless of whose fault it was.
c) KwaZulu-Natal: *Sisa* cattle: any cattle given before the marriage has been contracted is regarded as *sisa* cattle. The position is the same as in (b) above, except that any accrual forms part of the *lobolo.*

**Ways of terminating the engagement:**

(a) Mutual agreement: the parties will agree on what is to happen to the betrothal goods. A mutual agreement between the man and the woman to terminate the betrothal is unlikely. The reason for this is that, in modern indigenous law, the woman's father is also a party to the agreement. In original indigenous law, the family groups concerned, and not the man and the woman, had to agree to terminate the betrothal agreement
(b) Unilaterally – good reasons for the man (and his family) would be the indecent behaviour of the woman: breach of accepted norms of behaviour, the woman's immorality. Good reasons for the woman would be non-delivery of the agreed amount of *lobolo,* the man's continuous neglect of the woman or any other behaviour signifying the fact that he will be an unfit spouse. The woman alone decides

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

(c) Death of the man or woman – (their place is usually taken by a brother or sister with their co-operation)

**Consequences of termination:** legal consequences of the termination of a betrothal are related to the question of the disposal of the goods, which have **already been delivered** with the proposed marriage in mind.

***Upon death***

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

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

***By agreement***

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

***By unilateral termination***

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

# CUSTOMARY MARRIAGE:

Polygynous marriage affects indigenous family law in the following ways:

- There can be 2 or more families, which form an agnatic group.
- Legal relations within one family apply to all the families within the agnatic group.
- The families are bound to each other in relationships of rank by the husband - the common spouse.
- Multiple families require a property relations system so that property which belongs to one family may be distinguished from general property belonging to the whole group.
- Each family has rights and powers.
- The houses can therefore become contractually involved with each other. But they CAN'T oppose each other in a lawsuit. Reason for this is that the husband, as head of the family has the most powers, but he is head of all the houses at the same time - so he would be plaintiff for one house and defendant for another.
  The principle is that the agnatic group can't be divided against itself!

## Recognition of customary marriages

The act provides for monogamous and polygynous customary marriages that were concluded before as well as after the commencement of the Act. The Act retains the customary law requirements for customary marriages that were concluded before the commencement of the Act. In order to be recognised, monogamous and polygynous customary marriages concluded after the commencement of the Act must comply with the requirements of the Act. The requirements and consequences of these marriages are, similar to those that apply to civil marriages.

A customary marriage is defined as a 'marriage concluded in accordance with customary law'. Customary law is defined as the "customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples".

"The marriage must be negotiated and entered into or celebrated in accordance with customary law". During registration of the customary marriage, the husband has to make a declaration stating the traditional community's rules and customs in accordance with which the marriage has been concluded. The traditional leader or his delegate and the representatives of the different marriage parties have to make similar declarations. Were two white persons to conclude a marriage in this way without really sharing in this cultural lifestyle, they could encounter problems with the registration of the marriage, which could also query the validity of the marriage.

***The legal requirements for a traditional indigenous marriage***

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

The marriage negotiations & marriage were accompanied by various ceremonies and customs. These were not requirements but more culture. Non-fulfilment of absolute of requirements resulted in a juristic act being null and void - this means that there is no marriage despite the fact, for example, that all the ceremonies have been performed.
There is the absence of age requirements in marriage of this nature. Although some people recognised child betrothals, the marriage was not contracted before the parties intending to marry had reached adulthood. This stage in a person's life was accompanied by ceremonies, this stage coincided with puberty or sexual maturity.
In other cases, circumcision was an important part of the ceremonies. While these ceremonies varied in form and content from group to group, the consequence everywhere was recognition of adulthood.
An adult person was marriageable. If a person contracted a marital union before undergoing the initiation ceremonies, the marriage was valid. In this case it was important that the ceremonies were performed as soon as possible after the marriage.

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

**Consensus between the two family groups** - no marital union could take place, individual members of the group could not agree on behalf of the group. Ways to force the agreement:
**eg:** the man and the woman "elope", thus presenting their family groups with an accomplished fact. The Zulu know this custom as *ukubaleka* (to

flee). Another such custom is to "kidnap" the bride. The young man and his friends take her to his people, apparently against her will. This custom is known among the Nguni peoples as *ukuthwala* (to carry).

**The transfer of the bride** - the marriage is effected by the transfer of the bride to the man's family group. The transfer of the bride need not take place physically, but there must be a formality of some kind indicating this transfer. In most cases, the bride is brought by her people to the man's dwelling place, and specific ceremonies are carried out there. The bridegroom need not be personally present; this indicates that the transfer is indeed to his family group.
According to some groups, it is sufficient for the transfer if the bridegroom is allowed to sleep with the bride. It does not matter whether any ceremonies have been carried out, as long as the family groups concerned have agreed on the marriage. Its more correct to speak of transfer of guardianship over the woman, because the woman herself does **not have to be physically transferred**. It is, however, certain that there can be no question of a marriage until this transfer has taken place by agreement.

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

**Requirements for customary marriages concluded BEFORE 15th November 2000**

Codes of Zulu Law (in KZN),

(a) consent of the father of guardian of the intended wife (if she is a minor, which may not be withheld without good reason
(b) consent of the father or guardian of the prospective husband (if he is a minor)
(c) public declaration by the prospective wife to the official witness or witnesses at the wedding ceremony that she voluntarily submits to the marriage and that she give her consent thereto.

A customary marriage can be concluded without an agreement for the delivery of *lobolo*
According to Olivier, requirements outside Kwa-Zulu Natal are:

- the consent of the father or guardian of the man under certain circumstances
- the consent of the father or guarding of the woman
- the consent of the prospective husband
- the consent of the prospective wife
- the handing over of the woman to the family group of the man or to the man himself

- an agreement that *lobolo* will be delivered
- that there should be no existing civil marriage

Requirements outside KwaZulu-Natal in terms of Bekker:

1. Consent of the bride's guardian
2. Consent of the bride
3. Consent of the bridegroom
4. Delivery of marriage goods
5. Transfer of the bride

*We follow Olivier.*

**The position of marriage goods**
The two sources (Bekker and Olivier) differ in what they say about the requirement of marriage goods.
Bekker = payment of the marriage goods is required.
Olivier = that there is only a requirement to agree to deliver the marriage goods. UNISA = Olivier correct.
If actual payment is seen as one of the absolute requirements, this would mean that no union could be effected until all the marriage goods had been paid.
Partial payment is not payment, but the customs relating to the delivery of marriage goods which are found among some groups would never be able to satisfy the payment requirement immediately.
Eg. the *ukutheleka* custom & the custom among many Sotho groups that marriage goods may be delivered from the marriage goods obtained in the future for a daughter who may be born of the marriage.
If we accept what Olivier says, this requirement means that the delivery of marriage goods depends on both parties coming to an agreement. The only problem with this requirement is that some groups do not specifically enter into an agreement concerning the delivery of marriage goods. Among these groups, the quantity of marriage goods and the time of delivery are regulated by custom and are adhered to without entering into an agreement. In these cases, we could say that the requirement regarding marriage goods is one of the relative requirements of the contract between the parties. In other words, an express agreement regarding the marriage goods is not a requirement here.

**The consensual requirements**
The consent of the bridegroom's father or guardian is required only when the bridegroom is a minor.
The consent of the bride's father or guardian as a party to the agreement is required whether the bride is a minor or not. Where the bride's father or guardian has come to an agreement with the bridegroom concerning the marriage goods, he has also consented to the customary union.
In original indigenous law, the agreement to marry was between the family groups concerned, whereas in modern indigenous law, it is concluded by particular individuals.

In modern indigenous law, the bride's father or guardian is also a party to the agreement in addition to the bride and bridegroom. Thus, the possibility of a conflict of interests between the bride and her father or guardian is not excluded in modern circumstances. Remember, the bride's father or guardian only has a material interest in the relationship (the claim to *lobolo),* while the bride is one of the spouses.
Among some groups, the principal is that betrothal gifts are not returned. However, the position regarding marriage goods varies among the indigenous African peoples.

**Regarding the delivery or handing over the wife**

This is usually accompanied by ceremonies, couples could also agree to live together before the wedding. In *Mabuza,* the existence of a valid customary marriage was in dispute because of the wife's alleged non-integration into her husband's family according to the *ukumekeza* custom. The court found that the parties could agree to waive the *ukumekeza* requirement and that performance of these specific rituals is not an essential requirement. The integration of the wife into the husband's family runs like a golden thread through all customary marriages.

**Agreement that *lobolo* will be delivered:**

Agreement that *lobolo* will be delivered relates to the measure and not to the actual delivery of *lobolo*.

**Non-existence of a civil marriage:**

A person married according to civil rites cannot enter into a customary marriage. Parties to a customary marriage could freely conclude a civil marriage between themselves or with some other person.

The civil marriage simply dissolved the preceding customary marriage. *Nontobeko:* at the time of his death he was married to the plaintiff by customary rites. The customary marriage was registered in terms of the Natal Code of Zulu Law. The deceased was also married by civil rights to another woman. The civil marriage was contracted before the customary one, both women claimed for loss of maintenance. The court granted absolution from the instance on the basis that the legislature "did not intend to afford a person such as the present plaintiff a right to claim for loss of support. Any claimant who was a spouse to a civil marriage as well, be compensated by the Road Accident Fund.

A man was prohibited from contracting a customary marriage during the continuation of a civil marriage with another woman. The plaintiff's marriage to the deceased was therefore invalid, changes need to be made to the existing legislation.

**Requirements for customary marriages AFTER 15th November 2000**

Provided for in S3 of the RCMA:

(1) For a customary marriage entered into after the commencement of this Act to be valid -
   (a) The prospective spouses
      (i) Must both be over 18
      (ii) Must both consent to be married to each other under customary law.
   (b) The marriage must be celebrated in accordance with customary law.

**General:**

Each of the parties of the marriage has to be 18 or over, both must have consented to the customary marriage and the marriage has to be negotiated and entered into or celebrated in accordance with customary law.

Spouses married according to customary law precluded from concluding a civil marriage during the continuance of the customary marriage. This does not prevent a husband and wife who are married in terms of customary law marriage from converting their marriage into a civil marriage, however neither should be a partner in a subsisting marriage with another person. The Act further provides that if either of the spouses is a minor, both of the parents or the guardian of that spouse have to consent to the marriage. If the parents will not grant consent then consent can be obtained from the Commissioner of Child Welfare. Should the welfare also refuse to consent, the child can approach a competent court for permission.

If a minor child concludes a customary marriage without consent of a parent, guardian or appropriate person, the marriage is voidable and the provisions of section 24A of the marriage Act apply. This section provides that an application for annulment must be brought by a parent, guardian or minor personally. The application must be lodged with the High Court within the prescribed time limits set by the section. If the parents or guardian of a minor apply for annulment they must do so before the minor reaches the age of 18 and within 6 weeks after they have become aware of the existence of the marriage. The minor may also apply for an annulment at any time before 18 or within three months after having turned 18.

The Act does not alter the prohibition of a customary marriage between persons on account of their relationship by blood or affinity.

***Lobolo:***

*Lobolo* is defined as:

"..Property in cash or kind, whether known as *lobolo*, *bogadi*, or by any other name, which a prospective husband or the head of his family undertakes to give to the head of the prospective wife's family in consideration of a customary marriage"

There are different approaches to the size of *lobolo* and how it is determined. The size can be determined in the following ways:

(a) custom
(b) through negotiation procedures and agreement between parties
(c) unilaterally by the mans family
(d) among some Xhosa tribes, it is not agreed upon beforehand, but depends on the circumstances. *The ukutheleka* custom means that the wife's father is permitted to remove the wife and her children from time to time and 'impound' her. The husband has to deliver additional *lobolo* for their return. This process continues until the wife's family has received a reasonable amount of *lobolo* in this manner.

It is not certain whether the handing over of *lobolo* is an essential requirement for the validity of a customary marriage.

The institution of *lobolo* has traditionally been regarded by the various communities as an essential requirement for a customary marriage, it is not expressly provided for in the Recognition of Customary Marriages Act.

Dlamini – *Lobolo* is not an express requirement for a valid customary marriage implies that that *lobolo* in the customary marriage fulfils the same function as in a civil marriage. For a civil marriage, *lobolo* is not a necessity. Africans still regard *lobolo* as indispensable, even for a civil marriage.

Payment of *lobolo* transfers the authority that the family head has over his daughter to her husband, the status of the wife is therefore subject to a deep-rooted tradition of patriarchy. *Lobolo* is often regarded, especially by feminists as a way of reinforcing the authority of the husband over his wife.

The general rule is that payment of *ikhazi* is an essential requirement for entry into a customary marriage. Payment may be made to the bride's father (or guardian), because he is entitled to dispose of the cattle, or to the head of the household where she is residing at the time, because he has to hold the cattle until such time as he can hand them over to her father or guardian, which he is obliged to do.
Performance and counter-performance consist of the transfer of the marital guardianship (for the purpose of marriage) over a woman by her

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

Originally, the parties were the family groups of the man and the woman. Nowadays, the parties may even be specific individuals, namely the man, the girl and her father.

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

**Requirements for the lobolo contract:**

- Consent of the father or guardian of the bride-to-be. In a dispute, the following points may indicate whether a father has given his consent or not:
  - his acceptance or refusal of the lobolo cattle
  - his permission or refusal to allow the girl to stay with the man on the understanding that lobolo will be paid later
- Consent of the bride. In original indigenous law, her free consent was not necessary; in modern indigenous law, her free consent is a requirement.
- Consent of the bridegroom. Formerly, his consent was not necessarily required before negotiations for the marriage could commence. However, the former custom, according to which fathers consented on behalf of their children, is rejected in modern indigenous law for public policy reasons. The consent of the man and the girl are now absolute requirements.
- Transfer of the bride effects the marriage. The transfer need not be accompanied by ceremonies. The physical consummation of the marriage is not necessary and the bridegroom need not be present at the transfer of the bride.
- Transfer of the lobolo. Among some groups, all, or part of, the lobolo should be transferred before the bride is transferred. Among other groups it is customary that the lobolo be delivered after the bride has been transferred. Transfer is made to the bride's father or guardian, but it can also be made in the form of description and indication.
  Lobolo is a contract atypical to customary law. It can also be stipulated for a civil marriage.

Delivery of the marriage goods is not set as an absolute legal requirement. The time at which the marriage goods must be delivered varies. Some groups require that all the marriage goods be delivered

before transferring the bride. For these groups, it would not be wrong to recognise the delivery of marriage goods as an absolute legal requirement. Other groups, at least one beast or a portion of the marriage goods must be delivered before the bride is transferred, that is, part performance must be rendered. Some groups require that marriage goods for a woman be delivered from marriage goods received in the future from her daughter's marriage. In these cases, the marriage goods are delivered at least a generation later. The *ukutheleka* custom - the marriage goods are delivered in "instalments" after the wife has been transferred to her husband's group. The delivery of marriage goods cannot be regarded as an absolute requirement in these cases.

**The relationship between civil and customary marriages**

The Act regulates the relationship between customary and civil marriages - no spouse in a customary marriage shall be competent to enter into a marriage under the Marriage Act, 1961 during the subsistence of such customary marriage.

This does not, however, prevent a husband and a wife in a monogamous customary marriage from converting their marriage into a civil marriage. The Act states that a man and a woman between whom a customary marriage subsists are competent to contract a marriage with each other under the Marriage Act 25 of 1961, if neither of them is a spouse in a subsisting customary marriage with any other person.

The legislature's intention in enacting this proviso was to avert situations which existed previously.

Before 1998, where a person concluded a marriage to another by customary law and subsequently entered into a civil marriage with someone else, the said customary marriage was automatically dissolved and the woman and children automatically discarded. However, the material rights of the discarded wife were protected by section 22(7) of the Black Administration Act. Where a man who had married by civil rites married another woman by customary law, that subsequent marriage would be null and void. In this case, the wife in the void customary marriage enjoyed no protection under the law.

**Registration of a customary marriage:**

Failure to register a customary marriage does not, however, affect the validity of the marriage. Registration, therefore, merely provides proof that a customary marriage does indeed exist.

The spouses in a customary marriage have a duty to ensure that their marriage is registered. Either spouse may apply to the registering officer in the prescribed form for the registration of his or her customary marriage and he or she must furnish the registering officer with the prescribed information and any additional information which the registering officer may require in order to satisfy himself or herself of the existence of the marriage. A customary marriage entered into before the commencement of this Act, and which is not registered in terms of any

other law, must be registered within a period of 12 months after that commencement or within such longer period as the Minister may from time to time prescribe by notice in the *Gazette*. A customary marriage entered into after the commencement of this Act must be registered within a period of three months after the conclusion of the marriage or within such longer period as the Minister may from time to time prescribe by notice in the *Gazette*

Registration is not a requirement for a valid customary marriage!

**CONSEQUENCES OF CUSTOMARY MARRIAGES:**

**General Consequences:**

A new and separate unit comes into being, namely a family or house. 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.
Greater fidelity is expected from the wife than from the husband, since customary marriages are potentially polygynous.

The status of the man and woman changes. Traditional indigenous marriage and the customary union - the powers of the woman's group in respect of marital guardianship over her are transferred to the husband and his group.
Children born of these unions fall under the guardianship of their mother's husband and his family. In her own house, the wife enjoys a considerable degree of independence. She does have to consult her husband on important matters. The husband (family head) represents his unit in matters that are external to the family. He is responsible for order and discipline within the family and for its needs and interests.

Regarding the customary union outside KwaZulu-Natal, a wife in a customary union is under the guardianship of her husband. She becomes a minor and holds a position similar to that of her minor children.

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

**Personal consequences**
Each wife in a polygynous traditional indigenous marriage and customary union occupies a particular rank within the greater household. Her rank

influenced her status, her relationship with her husband's other houses and her children's rights to succession.

***The simple ranking system***
No married woman establishes a house. In this system, the woman whom a man marries first becomes his main wife. All other wives are ranked in the order of their marriage. The husband has control of the property of the group as a whole. At the husband's death, the eldest son of the main wife assumes control of the common property. The wives and children have a claim to maintenance from the common property. The household means are, therefore, not divided.

***The complex ranking system***
Where the household is divided into sections in some groups, and that found among other peoples in which the household is not divided into sections:
In some groups the household is usually divided into two, but sometimes three, sections. The first two women whom a man marries become the main wives of the two sections. All further wives are added to these sections as subordinate wives. The first wife is the main wife, and her house is the great house (indlunkulu).
The second wife forms the right-hand house (*iqadi-house).* All further wives are known as "rafters". They are added, in turn, to the great house and the right-hand house. This means, for example, that the third and fifth wives are added to the great house and the fourth and sixth wives to the right-hand house.
Each house forms a separate legal unit with its own property.
The *iqadi-house* is naturally subordinate to the main house of the relevant section. Mostly, once a wife's rank has been fixed, it cannot be altered. Sometimes though, a wife's rank can be changed. Such a change must take place publicly, and requires convincing evidence if it is disputed. The principle is that a wife's rank cannot be lowered.

**Among the Nguni groups, where a man marries a "seed-raiser" in substitution for a main wife who is infertile or has died or whose marriage has been dissolved, such a "seed-raiser" does not establish a new house. She forms part of the house of the woman for whom she has been substituted. Where the main wife has died or been divorced, the "seed-raiser" takes her place in all respects. A "seed-raiser's" position must be made public during her marriage ceremony. If this is not done, she establishes a house with a separate rank. A "seed-raiser" wife must be distinguished from an *igadi* wife. Every *igadi* wife has her own house estate**.

In some groups, the household is not divided into sections. The general rule is that the first woman married becomes the main wife. Where there is a preferential marriage, the wife in this case generally becomes the main wife, regardless of the order in which she was married. Among other groups, the main wife is the woman to whose marriage goods the man's

father has contributed. Besides the main wife, the rank of all the other wives is determined according to their order of marriage. Each wife establishes a separate house with its own property. The position of a "seed-bearer" wife is the same as among the Nguni.

**Relationships between husband and wife:**

The husband and wife have a mutual obligation to live together and a mutual duty to allow each other sexual intercourse.
The husband and wife have particular rights and duties regarding the care of the family. The husband must provide the family with the means of subsistence. In rural areas the means of subsistence formerly included a dwelling area and agricultural land as well as seed, stock and clothing. The wife had to care for the house, prepare food and cultivate food on the fields.
In a traditional indigenous marriage, the wife was under the guardianship of her husband. The wife in a customary union (outside KwaZulu-Natal) was also considered a minor and was under the guardianship of her husband. This provision was repealed by RCMA. The wife is no longer under the guardianship of her husband, but is now a major.

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

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

Re the customary section 6 of RCMA provides the following:
A wife in a customary marriage has, on the basis of equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity, including the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers she might have at customary law.

## PROPRIETARY CONSEQUENCES

### Marriages concluded before the commencement of the Act:

***Control over house property***

House property belongs to the husband, the wife of the house and their children. They all share in this property, and they each have a duty to contribute to the property.

The husband controls the property on behalf of the house, but in consultation with the wife and the older children.

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

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

***Relationships between houses***

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

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

Eg: Where a house has to repay a particular debt and does not have the necessary property to do so.

Where the property of one house is used as marriage goods for a son from another house. In such cases, a daughter from the latter house is usually appointed as the source from which the debt is to be repaid. This means that the marriage goods received for this daughter must be used to repay the debt.

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

The transfer of property from one house to another results in a debt relationship between the two houses. Sooner or later this debt must be repaid. The death of the family head does not extinguish his debt.

Originally, the house that initially supplied the property could not sue the other house (the debtor) in court for repayment of the debt. The family head would be the plaintiff and the defendant. The family head cannot simultaneously represent the one house as plaintiff and the other house as defendant. Maxim: **a household cannot be divided against itself**.

In modern indigenous law, however, the woman belonging to the house having the claim can initiate the claim against the family head or the other house.
Act 120 of 1998 contains no specific reference to arrangements regarding relations of debt between "houses" or wives. Unless such relations are provided for in a contract, we are of the opinion that customary law should apply to such relations of debt.

**Reform under the Recognition of Customary Marriages Act**
s7(1) of RCMA, the proprietary consequences of a customary marriage entered into before the commencement of the Act continue to be governed by customary law.
The position concerning polygynous marriages (i.e. the creation of separate houses with their own house property that is controlled by the husband) has been retained.
s7(2) provides that a monogamous customary marriage entered into after the commencement of the RCMA results in a family estate that is **in community of property and of profit and loss**, unless such consequences are specifically excluded in an antenuptial contract that regulates the matrimonial property system of the marriage.
The matrimonial property system determines exactly how the marriage affects the financial position of each marriage partner.

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

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

together with the furniture and appliances, amounted to approximately R40 000 each.
She consulted a legal adviser who brought an application to stay divorce proceedings pending the determination of unfair discrimination and constitutional validity. (The law differentiates between a customary marriage before and after the commencement of the Act).
Her concern was that her matrimonial property regime discriminates against her as she is a woman and African.
Her second argument was that the Recognition of Customary Marriages Act has come into existence since the court a quo's decision which now recognises the discriminatory nature of her marriage.
This was accepted in the regional court and on 11 September 2008 application was made to the CC for confirmation.

Moseneke examined sections 7(1) and 7(2) of the Recognition Act, which have the effect that marriages concluded prior to the enactment of the Recognition Act ("old" marriages) will continue to be governed by customary law, whilst those concluded after the enactment of the Recognition Act ("new" marriages) are to be marriages in community of property and of profit and loss, except where the parties agree otherwise. He also examined the codified customary law of marriage in KwaZulu-Natal, which subjects a woman married under customary law to the marital power of her husband, who is the exclusive owner and has control of all family property.

On 8 December 2008, Moseneke found these provisions to be self-evidently discriminatory on at least the one listed ground of gender. Only women in a customary marriage are subject to these unequal proprietary consequences. Because this discrimination is on a listed ground it is presumed to be unfair, and the burden fell on the respondents to justify the limitation on the equality right of women party to "old" marriages concluded under customary law.
Judge found that the respondents had failed to provide adequate justification for this unfair discrimination. He held that section 8(4)(a) of the Recognition Act, which gives a court granting a decree of divorce of a customary marriage the power to order how the assets of the customary marriage should be divided between the parties, is no answer to or justification for the unfair discrimination based on the listed ground of gender. This is because section 8(4)(a) of the RCMA does not cure the discrimination which a spouse in a customary marriage has to endure during the course of the marriage. The matrimonial proprietary system of customary law during the subsistence of a marriage, as codified in the Natal Code and the KwaZulu Act, patently limits the equality dictates of our Constitution and of the RCMA.

Judge confirmed the order of constitutional invalidity issued by the High Court and held that the following provisions are inconsistent with the Constitution and invalid:

1. Section 7(1) of the Recognition Act insofar as it provides that the proprietary consequences of a marriage entered into before the commencement of the Recognition Act continue to be governed by customary law.
2. Section 7(2) of the Recognition Act, insofar as it distinguishes between a customary marriage entered into after and before the commencement of the Recognition Act, by virtue of the inclusion of the words “entered into after the commencement of this Act”.
3. Section 20 of the KwaZulu Act on the Code of Zulu Law because it provides that during the course of a customary union the family head is the owner of and has control over all family property in the family home.
4. Section 20 of the Natal Code of Zulu Law because it provides that the family head is the owner of and has control over all family property in the family home.
5. Section 22 of the Natal Code of Zulu Law because it provides that the inmates of a kraal are in respect of all family matters under the control of and owe obedience to the family head.

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

The effect of the ruling in this case therefore is that the proprietary consequences of marriages entered into before and after the commencement of the Act now enjoy the same status as they are both in community of profit.

**Marriages concluded after the commencement of the Act:**

**A monogamous customary marriage:**

If a customary marriage is concluded and a spouse is not a party to any other existing customary marriage, the marriage is in community of property. Joint control of the communal estate, litigation by or against a spouse, compensation for non-patrimonial damages paid or recovered by a spouse, delictual liability of spouses and statutory protective measures that spouses can apply against each other.

**A polygynous customary marriage:**

A husband in an existing customary marriage, who wishes to conclude a further customary marriage with another woman after the commencement of the Act has to apply to the court to have a written contract approved which will regulate the future matrimonial property systems of his marriages. The court must terminate the matrimonial property system and effect a division of the matrimonial property. The court must ensure a fair division taking into account all relevant circumstances of the family groups which would be affected if the application is granted. The court also has the discretion to allow further amendments to the terms of the contract and grant the order subject to conditions as the court may deem just or refuse the application if the interests of the parties would be sufficiently protected by means of the proposed contract.

# Dissolution of customary marriages through divorce:

**Ways of dissolution**

***Dissolution by court action***

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

The customary union
In KwaZulu-Natal a customary union must be dissolved by a competent court. Previously the former Commissioner's Court was the proper court At present, any competent court has this power. In areas outside KwaZulu-Natal, the parties are not compelled to institute a court action

for the dissolution of a customary union. The parties may approach the court to decide on the return of the marriage goods (lobolo), and in so doing dissolve the customary union in an indirect way. The court of the chief was previously also competent to dissolve a customary union.
The action can be instituted by the husband. It is instituted against the wife's father for her return or, failing this, for the return of the marriage goods. The action can also be instituted by the wife and her father. The action is instituted for the "dissolution of the marriage" and for a declaration of forfeiture of marriage goods. An action in this form implies that the court can dissolve the customary union by way of a decision. The correct procedure should, instead, be that the court be approached for a declaration that the customary union has been dissolved as a result of the husband's conduct and for a declaration that he has forfeited the marriage goods that have been delivered.

The customary marriage
The RCMA now provides that the only competent authority to dissolve a customary marriage is a court, irrespective of where the spouses reside. In terms of this Act, the court is defined as a family court or a competent division of the High Court or a divorce court.

**Dissolution without the interference of the court**
Originally the traditional indigenous marriage was dissolved by the family groups concerned. This principle is recognised in modern indigenous law for customary unions in areas outside KwaZulu-Natal
* The marital union can be dissolved by mutual agreement between the parties involved. In this case there need not be particular grounds, and the agreement usually also provides for the consequences.
* The marital union can be dissolved on the husband's initiative, with or without good reason.
* The marital union can also be dissolved on the initiative of the wife and her father, with or without good reason.

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

**The traditional indigenous marriage**
In original indigenous law, the death of the husband or wife did not dissolve the traditional indigenous marriage as a matter of course. In many cases, depending on the circumstances, a relative was substituted for the deceased husband or wife.

**The customary union**
In modern indigenous law, the death of the wife terminates the customary union, although substitution is also possible. The house of the deceased wife continues to exist, however. If she has not given birth to a successor (son), her husband may marry a "seed-raiser" in her place.
The death of the husband does not dissolve the customary union. The "widow" remains a wife in the household. Should she still be able to bear children, a male relative, and among some groups a non-relative, could

procreate children for the deceased with her. This custom is generally known among the Nguni groups as *ukungena* (to enter).

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

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

**Possible substitution:**
Ukuvusa: - a man dies before he marries and conceives a successor.
Sororate: - a wife is substituted for by her sister.
Levirate: - a man, who is married, dies before a successor is born.
Ukuzalela: - this is not to procreate a successor but to procreate more children into the house.

**Grounds for divorce:**

***The position in original indigenous law***
In original indigenous law, the following grounds were generally recognised:

- Non-fulfilment by the wife of her child-bearing duties; substitution was possible here.
- Failure to deliver marriage goods; note, however, that the wife's group was usually very patient about this.
- Continual violation of conjugal fidelity by the wife, amounting to repudiation; attempts by the wife to prevent her husband from taking action against her adulterous lover; a single act of incest by the wife.
- Premarital pregnancy concealed from the husband; however, there was a duty on the husband to take immediate action once he became aware of the pregnancy.
- Neglect of mutual marital duties, including sexual intercourse.
- Expulsion of the wife by her husband, either directly or indirectly; repudiation by the husband required formal action – in most cases, the husband barred the entrance to the wife's house.
- Desertion by the wife with persistent, unfounded refusal to return; however, *ukutheleka* did not constitute desertion.
- Accusations of witchcraft by the husband against the wife were sufficient reason for the wife to leave her husband. This principle was subject to the fulfilment of two conditions, namely, if the

witchcraft was persistent (Mathupa) and was followed by a formal process of “smelling out” (visual, concrete)
- Impotence of the husband, although substitution was permissible in this case.

***The position in modern indigenous law***

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

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

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

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

Besides the above, 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***

Customary marriage can only be dissolved on the ground of the irretrievable breakdown of the marriage. 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.

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 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 Act, both the Mediation in Certain Divorce Matters Act 24 of 1987 and section 6 of the Divorce Act 70 of 1979 apply to the dissolution of a customary marriage. The relevant section of the Divorce Act deals with the interests and the wellbeing of minor and dependent children of divorcing spouses. The Mediation in Certain Divorce Matters Act regulates the appointment of family advocates and makes provision for family counsellors who help family advocates to draw up recommendations concerning the custody and control of minor children. The Recognition of Customary Marriages Act contains no reference to facts or circumstances, which may be indicative of the irretrievable breakdown of a customary marriage.
In terms of section 4(2) of the Divorce Act, the court may, in the case of civil marriages, accept as proof of the irretrievable breakdown of a marriage evidence that:

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

Proof of the existence of any of these situations creates a presumption that the marriage has irretrievably broken down.
The principle of irretrievable breakdown of a marriage is a vague concept which does not have a precise definition. The question of whether or not a particular marriage has irretrievably broken down is a matter to be decided by the court and therefore depends on the discretion of the court. However, the court's discretion is limited.

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The Mediation in Certain Divorce Matters Act regulates the appointment of family advocates and makes provision for family counsellors who help family advocates to draw up recommendations concerning the custody and control of minor children.
The Recognition of Customary Marriages Act contains no reference to facts or circumstances, which may be indicative of the irretrievable breakdown of a customary marriage.

**Jurisdiction:**
Dissolving a marriage can only be obtained from a high court, a family court or a divorce court.

## Consequences of divorce:

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

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

***The amount of blame on either side***
The party who is to blame forfeits the marriage goods. Should the husband dissolve the union with good reason, (where the wife is to blame) the marriage goods are usually returned.
Should the wife dissolve the union with good reason (where the husband is to blame) the marriage goods are not returned. Its 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***
Among most groups, the wife's group is allowed certain deductions should they have to return the marriage goods. Mostly, one beast is allowed as a deduction for every child the wife has borne - this does not refer to living children only, but to all children the wife has given birth to, as well as miscarried children (Mayeki). 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 (lobolo). If the husband has not delivered all the marriage goods upon the dissolution of the union, and if he was responsible for the breakdown of the marriage, he is indebted for the balance. Also, if the wife was responsible for the breakdown of the marriage and if, at the time of the dissolution of the marriage, the husband still had not delivered all the marriage goods, he is not indebted for the balance.
Should the parties fail to reach an agreement regarding the marriage goods, the court may be approached for a decision. Here, the court is **not asked to dissolve** the union. The union has already been dissolved, without the interference of the court. The court is merely being asked to **decide on the marriage goods.**

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

## The consequences of dissolution

### *Consequences for the husband and wife*

Given the polygynous nature of the customary marriage, the husband's status is not seriously affected should one of his marriages be dissolved. However, the wife's position changes drastically. She now becomes a divorced woman and is no longer under her husband's guardianship. In original indigenous law, she reverted to being under the guardianship of her agnatic group of birth.

A wife in a customary union also reverts to the guardianship of her father or his successor unless she is above the age of 18. Should she be older than 18 years, she is a major.

A wife's status as a major continues when she contracts a customary union. A wife in a customary marriage is therefore a major and remains a major on the dissolution of her marriage.

### *Consequences for the children*

Although the marital union has been dissolved, the wife's house is not dissolved.

Under original indigenous law, the children remained members of the house. Infants could accompany their mother to her people, but when they were older they usually had to return to their father's home.

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

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

In original indigenous law, a father had an absolute right to the custody and guardianship of any child born of the marriage.

The mother (except in KwaZulu-Natal) had no parental rights to the custody or guardianship of her children because she was not a party to the lobolo contract.
The court, as the upper guardian of all minors, adapted customary law in this respect by emphasising the best interests of the child as being decisive in every matter concerning the child. Also, equal powers of guardianship are given to both parents of a minor child.
In cases where the wife instituted action for custody of her children, she had to prove that the father was not a fit and proper person by reason of his ill-treatment or neglect, or that he lacked the necessary ability to care for them. Where very young children were involved, the court would generally award custody to their mother until they were able to live away from her without harmful results. If she was sued for custody by her husband, he had to prove that she was not a fit and proper caregiver for the children, and that she lived in unsuitable conditions which could endanger the physical or moral wellbeing of the children.
The court would also consider the effect it would have on the ancestral connection for the children if custody was given to someone other than the father's family. In African custom there are certain rituals that have to be performed on behalf of the child at different stages of his or her life by the paternal family to ensure that the child remains connected with the ancestors.

***Proprietary consequences***
The house, as a patrimonial unit, continued to exist after the dissolution of the marriage. The wife lost all the rights and powers she had in respect of house property. She could not claim maintenance from house property. In this regard, original indigenous law was recognised virtually in a virtually unchanged form.
The Recognition of Customary Marriages Act makes specific provision for maintenance and matrimonial estate sharing. In terms of section 8(4)(a) of the Act the court, when granting a decree for the dissolution of a customary marriage –

(a) has the powers contemplated in sections 7, 8, 9, and 10 of the Divorce Act and section 24(1) of the Matrimonial Property Act
(b) Section 9 of the Divorce Act deals with forfeiture of benefits and section 10 deals with the costs of the divorce action. For the purposes of this module, we will only deal with section 9. The underlying principle governing the forfeiture of patrimonial benefits is that: no person ought to benefit financially from a marriage which he (or she) has caused to fail. Forfeiture of benefits, therefore does not mean that a spouse loses his own assets, but merely that he loses the claim which he has to the assets of the other spouse.

Customary law also provides for "forfeiture of benefits"; this is expressed in the Northern Sotho maxim of *monna/mosadi o nkga le sa gagwe:* "**a man or woman who smells (stinks), smells with all that is his/hers".**
This means that divorce is effected by the abandonment by the wife and her family, of all the rights in the marriage, or by the forfeiture by the

husband and his family of all their rights. A court order in terms of section 9 of the Divorce Act for the forfeiture of patrimonial benefits of a customary marriage would therefore be in line with customary practice. In terms of section 8 of RCMA, a court must make an equitable order regarding polygynous marriages and must consider all relevant factors, including contracts, agreements or court orders, in terms of section 7(4) to 7(7) of the Divorce Act. Expectations and liabilities regarding the marriage goods *(lobolo)* should also be considered when determining the assets of the estate that is to be divided. The present practice among some groups is that these remain with the father (husband): he is obliged to help his sons give lobolo for their first wives, and he receives lobolo for his daughters when they marry. The court may also order that any person who, in the court's opinion, has a sufficient interest in the matter be joined in the proceedings.

# LAW OF PROPERTY:

Property law is that law dealing with ownership – acquisition thereof – of movable and immovable things as well as the law of possession – thus "real rights" in things. The only "real right" known to Indigenous law was that of ownership. Thus, concepts like mortgage; pledge; lien etc was foreign to original indigenous law.

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

## Categories of property:

***General property***

Belongs to the household as a whole. Controlled by the family head. He is not the personal owner of this property though. Each member of the household shares in the property according to his or her status within the group.

The family head exercises control on their behalf and in the interests of the group. In original law the tribal chief (traditional ruler) could transfer control to another male relative if there was gross mismanagement. The commissioner also had this power.
Now, this power is vested in the local magistrate.
Senior male relatives have a moral duty to restrain a prodigal family head.

General property includes the following:

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

When the family head dies, the control of the general property passes to the head's general successor. In modern Indigenous law, sometimes people 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).

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

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

House property includes the following:

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

The wife of a house can protect the house property in the case of her husband's prodigality. She can call on her husband's agnatic group and, today, she can also apply to the magistrate.
On the husband's death the control of the house property passes to the house successor. This successor is usually the wife's eldest son. This control over the house property, however, does not mean that the successor, as an individual, becomes the owner of the property to the exclusion of the other members of the house.

***Personal or individual property***
Defined 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, snuffboxes, necklaces or weapons, the rights in these personal things were vested in the group.

Individuals could not deal with such property as they pleased, but constantly had to consult with the other members of the agnatic group.

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

The position regarding movable property in original indigenous law was briefly as follows:
*movable property could either be house, general or personal property.*
*The content of ownership of movable property was the power to dispose of it at the owner's discretion.*

Ownership of movable property could be acquired as follows:

- By the appropriation of natural products such as wild animals, plant products, water from rivers or fountains and fish from rivers. The various groups might have specific rules governing the manner, place and time of appropriation; members of the local community could hunt, gather, dig, fish, fell, cut and pick within the communal area (taking into account public or seasonal limitations).
- By creation, cultivation or rearing, such as the manufacture of household articles from wood, hide or clay, the cultivation of various crops and the rearing of livestock.
- By transfer in terms of an agreement of exchange, sale, gift or service.

Ownership of movable property could not be acquired through prescription or through another's loss; an owner of strayed livestock or a lost article retained his rights of ownership.
Some groups had various rules regarding lost or strayed livestock, which were aimed mainly at restoring possession of such livestock to the owner.
Ownership of movable goods could be **terminated** by transfer, use and destruction

# CUSTOMARY LAW OF SUCCESSION AND INHERITANCE:

The customary law of succession is concerned with not merely with the inheritance of property but also with succession of the status of the deceased.

**There is a difference between these two concepts. Succession means the transfer of rights, duties, powers and privileges normally associated with ones status, whilst inheritance means the transfer of property.**
Inheritance is mainly concerned with the division of the assets of a deceased person among his or her heirs. The division can take place according to the provisions of a will (testament) – thus testate inheritance – or according to the rules of common law where there is no will – thus intestate inheritance.
The liabilities of the deceased are first set off against the assets, and the balance is then divided up. Should the liabilities exceed the assets, the heirs inherit nothing.

In the case of succession, there is, strictly speaking, no division of property. The successor takes the place of the deceased and gains control over the property and people over which the deceased had control. Furthermore, the successor succeeds not only to the assets of the estate, but also to its liabilities. Should the liabilities exceed the assets, the successor, in customary law, succeeds to these as well.

In the customary law of succession, the emphasis is not on the division of property but on the continuation of the status positions.
The successor steps into the place of the deceased and gains control over the property and people over which the deceased had control.
The successor succeeds not only the assets of the estate but also to its liabilities.
Should the liabilities exceed the assets, the successor in customary law, succeeds to these as well. In the case of common law succession, the liabilities of the deceased are first set off against the assets and the balance is divided amongst the heirs.
Should the liabilities exceed the assets, the heirs inherit nothing. There is no succession to the status of the deceased or anybody else.

Originally, the death of a family head had significant effect on control of the members of the family group and its property. The family head was succeeded by a general successor but at the same time there was also succession to the position as head of various houses. A distinction was made between a general successor and a successor in each house. The death of other members of the family had no effect on the control of the group and its property.

A family head could make certain allocations of property to houses and individuals and that his deathbed wishes should be respected.

**General Principles:**

(a) Succession to status positions takes place only when a family head dies. There is no question of succession where the family head is still alive. The death of other members of the family does not give rise to succession to their status (exception is pre-death dispositions)
(b) A distinction is made between general succession (general status) and special succession (succession to the position of head of the various houses of the deceased)
(c) Succession to status is limited largely to males, especially those of the patrilineage and as a general principle a man cannot be succeeded by a woman.
(d) Succession follows the rules of male primogeniture, which means that a man is succeeded by his first born son in a particular house
(e) Succession is a duty that cannot be relinquished or ceded
(f) Male descendants enjoy preference over male ascendants, male ascendants in turn enjoy preference over collateral male relatives (relatives in the lateral line)
(g) A successor could, on good grounds, be removed from the line of succession ('disinherited'). Such a step had serious consequences since the person so affected was ousted not only from the financial and emotional support of the family but also from the spiritual bond with the family ancestors.
(h) Originally, the successor, succeeded to the status of the deceased in respect of his control over people and the assets and liabilities of the family, which is universal succession. In Kwa-Zulu Natal, a successor is only liable for debts in respect of the estate and only to the extent of the assets to which he succeeds. Outside of Natal, a successor succeeds to the assets and debts of the deceased.

**General order of succession:**

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

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

Succession on death, primogeniture and succession by males in the male line of descent. A monogamous house has one wife, whereas a polygynous house has several wives and several houses.

**Succession of a monogamous household:**

When a male dies, his eldest son or if he is deceased, his eldest son inherits. If the eldest son died without male descendants, the second son or his male descendants succeed, in their order of birth. Should the deceased die without male descendants, the deceased father succeeds. Should the deceased survive all his male descendants and his father, he is succeeded by his eldest brother or his eldest brothers male descendants according to the order of the houses. Should the deceased father, or deceased brothers have no male descendants to succeed, the grandfather of the deceased or one of his male descendants according to seniority succeeds to his status position. In the same manner, the deceased great-grandfather and his male descendants are considered.

**Succession of a polygynous household:**

The eldest son in each house succeeds in that particular house. If he is deceased, his male descendants are first and then his younger brothers and their descendants.
If a particular house has no male descendant a successor is obtained from the house next in rank.
We distinguish between those peoples who divide the household into sections and those who do not. In all cases, the eldest son in each house succeeds in that particular house.
If he is deceased, first all his male descendants are considered, and thereafter his younger brothers and their descendants. Should a particular house have no male descendant, a successor is obtained from the house next in rank.
Among peoples where the household is divided into sections, an attempt is first made to obtain a successor from the houses affiliated to the main house within a section before considering the next section for a successor.
In other words, if there is no male within a particular section who can succeed, the senior male successor in the other section succeeds in the section that does not have a successor.

**Order of succession among male children:**

If a deceased has no son in a particular house and during his lifetime, he transferred a younger son as successor from one of his senior houses to that house and where a deceased leaves no legitimate sons but does have an illegitimate son or a son from a supporting marriage, such a son can succeed under certain circumstances. The order of rank of sons with regard to succession can, in order of precedence be summarised as follows
(a) a legitimate son fathered by the deceased himself.
(b) A married mans illegitimate son with an unmarried or divorced woman for whom *isondlo* (maintenance) has been paid.

(c) Sons born out of an *ukungena* relationship
(d) Adopted children born from an adulterous relationship with the wife, unless she has been repudiated. An adopted child is excluded by a legitimate child. (The Zulu and Swazi groups do not recognise adopted children)
(e) Sons of a wife of the deceased who are not born from an *ukungena* relationship
(f) A premarital son of an unmarried woman or the extramarital son of a divorced woman for which no *isondlo* has been paid (this is an example of succession through a woman since such children are regarded to belong to the family of their mother and not to the family of the deceased)

**In *Bhe and Shibi* cases, the Intestate Succession Act has been extended to all persons in South Africa including those adhering to a system of customary law. As a result of this extension, no distinction will in future be made between legitimate and illegitimate children or between men and women!**

**General and special succession:**

General succession is concerned with control over the household and property of the general estate. Special succession is concerned with control over the constituent houses of a household and house property. The successor to the main house is in most cases at the same time also the general successor.

There may be one deceased but several successors. Succession deals with status and concomitant powers of control over people and property, each house successor succeeds to all the powers of the deceased in respect of the members and property of the house. The general successor obtains overall control over all the houses and to a certain extent, maintains the original unity of people and property.

**Powers and duties of the successor:**

Succession was originally of a universal nature. The successor acquired benefit and duties. When a family head died, his powers and duties passed to the general successor and to the house successors in more or less direct proportion to the rank of each house. Each house successor had duties, which included care and support for the members of the house, ensuring that debts were paid and collected and the provision of marriage goods for sons and he wedding outfits of daughters.

The general successors powers and duties of the house to which he succeeded were the same as those of the other houses successors. A general successor acted in place of the deceased family head and acquired control over the general property. He had the same powers and duties as his predecessor, but his authority over the various houses was

less than that of his predecessor. He was responsible for the general debts of the household and could also collect outstanding debts. He was also responsible for performing family rituals on behalf of family members, so he relied on the property of the general estate.

In Kwa-Zulu Natal, the successor is generally liable only for debts equivalent to the assets of the estate. The successor is, fully liable for *lobolo* debts contracted with another house to establish its own house (Ie, interhouse loans).
A successors liability for his predecessor's debts in areas outside Kwa-Zulu Natal, is that he is still liable for the debts even if there are not enough assets. In addition he is also liable for any *lobolo* debts which implies universal succession.

A successor is also liable for the delicts of the deceased. This liability is limited to cases where the action was instituted before the death of the deceased or where the deceased accepted liability during his lifetime. The successors liability is limited to the extent of the estate.

**Dispositions of property:**
**INTER VIVOS:**

Succession to status occurs only on the death of a family head, the order of succession followed fairly clear principles. A family head could, during his lifetime make certain allotments from general property which would remain valid after his death. Eg:

(a) allotment of property to a specific house or son. Such allotment is accompanied by certain formalities and need not occur only once
(b) linking of daughters to sons in a house as a means of providing for the marriage goods of these sons. The marriage goods received for a daughter are then used as marriage goods for the wife of her linking brother.
Such disposition must be accompanied by particular formalities (concrete)

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

- *Ukungena,* or the procreation of a successor for a deceased man by his widows.
- Disherison (disinheritance) as a means of eliminating a potential successor from the order of succession. Disherison requires special reasons and formalities which will not be discussed in this module.

A family head can dispose of personal property by means of a customary will. This must be done in a formal manner in the presence of senior members of the family.

**Division of personal property:**

Personal possessions (ie clothes, and various personal items such as pipes, tobacco, bags, jewellery etc) are usually put in the coffin. The division of this property varies significantly from group to group.

Personal property of unmarried persons usually reverts back to their parents and is often divided among their children and their brothers and sisters. Personal property of a married woman is usually divided among her children, daughters in particular and her sisters.

**Division of general and house property:**

General property includes (eg: agricultural implements, tractors and ploughs etc) and other property (eg: motor vehicles investments and money). Such property was to be used during the lifetime of the deceased to the benefit of all the members of the household, this principle applies after death, the property should be used for his funeral and to settle any debts there may be. The balance should be used to maintain the various units of the household and especially the wives and dependent children of the deceased.

House property includes (eg: house, land, fields animals, furniture cooking utensils and occasionally also money savings of the wife), this property is used to maintain the wife and her children after her husband's death. It is customary in some communities for the youngest brother to receive the house with furniture and cooking utensils as well as any fields for cultivation.

**Testamentary dispositions**

In original indigenous law, the total disposition of property by means of a will was unknown. Rights and duties were held by the agnatic group. The individual was not the bearer of rights and could not, therefore, dispose of the property of the agnatic group.

In modern indigenous law, however, wills are recognised. In addition, **on 1 January 1929, the Black Administration Act commenced.** Section 23 of this Act sought to regulate succession among the indigenous African people of South Africa - s23(1), (2) and (3) provided as follows:

1. All movable property belonging to a Black and allotted by him or accruing under Black law or custom to any woman with whom he lived in a customary marriage, or to any house, shall upon his death devolve and be administered under Black law and custom.
2. All land in a tribal settlement held in individual tenure upon quitrent conditions by a Black shall devolve upon his death upon one male person, to be determined in accordance with tables of succession to be prescribed under ss10.
3. All other property of whatsoever kind belonging to a Black shall be capable of being devised by will.

Thus, all movable property allocated to a house or a wife in a customary marriage was inherited according to the rules of original indigenous law and could not be bequeathed by means of a will.
All other property could be disposed of by means of a will.
Where the estate of a black person had been partially or totally bequeathed by a will it had to be administered in terms of the Administration of Estates Act.

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

**Intestate inheritance NB!!!!**

Until the Constitutional Court in the ***Bhe* c**ase declared sections 23 (1), (2) and (7) of the Black Administration Act, which regulated the inheritance of property by persons living under customary law unconstitutional, the estate of a black who died without a valid will devolved according to the rules contained in Government Notice R200.

Now, in terms of section 2(1) of the Reform of Customary Law of Succession and Regulation of Related Matters Act 2009 –
The estate of or part of the estate of any person who is subject to customary law who dies after the commencement of this Act and whose estate does not devolve in terms of that person's will, must devolve in

accordance with the law of intestate succession as regulated by the Intestate Succession Act, subject to subsection (2).

In the application of the Intestate Succession Act –
(a) where the person referred to in subsection(1) is survived by a spouse, as well as a descendant, such a spouse must inherit a child's portion of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed from time to time by the Minister, whichever is the greater;
(b) a woman, other than the spouse of the deceased, with whom he had entered into a union in accordance with customary law for the purpose of providing children for his spouse's house must, if she survives him, be regarded as a descendant of the deceased;
(c) if the deceased was a woman who was married to another woman under customary law for the purpose of providing children for the deceased's house, that other woman must, if she survives the deceased, be regarded as a descendant of the deceased.

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

**Facts:** Moseneke (the deceased) died intestate in October 1999. He was survived by his wife and four sons (the appellants). The deceased and appellants led what they called an urban lifestyle. The estate of the deceased had to be administered by a magistrate. The appellants were dissatisfied with the situation and expressed their concern to the Master saying that the differential treatment amounted to unfair discrimination on the ground of race. The matter was referred to the High Court for an order declaring that regulation 3(1) is unconstitutional and that the Master be instructed to administer the estate of the deceased. In terms of section 172(2)(3) of the Constitution the draft order was referred to the constitutional court for confirmation.
The court then proceeded to evaluate the constitutionality of section 23(7)(a) and regulation 3(1).

It held that both provisions impose differentiation on the grounds of race, ethnic origin and colour and as such constitute unfair discrimination as envisaged in terms of section 9 of the Constitution.
The court rejected the arguments of the Master and minister that the administration of intestate estates of Africans by magistrates was convenient and inexpensive and held that the justification for the differentiation is rooted in racial discrimination which severely assails the dignity of those concerned and undermines attempts to establish a fair and equitable system of public administration. This kind of benefit should not be linked to race and that it should be at the disposal of all people of limited means or who live far from urban areas where offices of the Master are located.
The respondent could, therefore, not discharge the onus of unfairness.
The court could also not find that the limitations posed by section 23(7) and regulation 3(1) were reasonable and justifiable in an open and democratic society based on equality, freedom and dignity.

**Held** that section 27(3) (a) and regulation 3(1) were inconsistent with the provisions of the Constitution and thus invalid.
The Judge, however, was faced with a problem.
The invalidation of section 23(7)(a) and regulation 3(1) with immediate effect would create practical problems. In order to solve the practical problems, he held as follows:

(a) The status quo with regard to transactions already completed in terms of section 23(7)(a) and regulation 3(1) should be upheld.
(b) African families who die intestate and whose estates are not governed by the principles of customary law have a choice to have the estates administered by the Master or the magistrate.

In order to reach the objective in (b), it was held that section 23(7) (a) was invalid from 6 December 2000. The declaration of invalidity in respect of regulation 3(1) was suspended for a period of **two years** in order to empower the Master to administer estates of Africans. Judge held that the word “shall” in regulation 3(1) must be replaced with the word “may” for a period of two years. In the interim magistrates have discretion to oversee the administration of certain estates of Africans.
It was also ordered that any interested person may approach the court for a variation of this order in the event of serious administrative or practical problems being experience.

Until it was declared unconstitutional in ***Zondi,*** Regulation 2 of Government Notice R200 prescribed how the estate of a deceased black should devolve in cases where section 23(1) and (2) of the Black Administration Act did not apply and where the deceased had left a valid will, even if the will did not dispose of all the assets in the estate.

This was because it distinguished, for the purposes of intestate succession, between the estate of a person who was a partner in a civil marriage (in terms of section 22(6) of the Black Administration Act) on the one hand, and the estate of a person who was a partner in a civil marriage in community of property or a marriage under an antenuptial contract on the other hand now the law throughout South Africa that illegitimacy is no longer a ground for excluding extramarital children of the deceased from sharing in his/her estate.

Facts: the deceased (SM Ngidi) died on 24 June 1995.
During his lifetime he was married to B Ngidi. In terms of the repealed Section 22(6) of the Black Administration Act the marriage was out of community of property and of profit and loss. At the time of deceased's death his wife was predeceased. They had no children.
However, although he was not involved in a customary marriage, two illegitimate children, namely the applicant (Zondi) and the fifth respondent survived him.
In terms of regulation 2(e) of Government Notice R200 the deceased estate had to be administered in terms of the customary law of inheritance. It was common cause that the deceased's brother was the customary heir and that the two illegitimate children were excluded from inheritance in terms of the customary law of succession.
The applicant applied for a declaratory order declaring regulation 2 unconstitutional.

**The administration of indigenous estates**
Testate estates are administrated according to the Administration of Estates Act.
House property and quitrent land are, however, excluded from testamentary disposition.
Intestate estates were previously administered under the regulation proclaimed in Government Notice R200. According to the decision of the court in the ***Bhe*** case all estates to be wound up after the date of the judgment (i.e. 15 October 2004) will now be administered according to the provisions of the Administration of Estates. The judgment in the *Bhe* case has had no effect on the intestate estates of blacks that were currently under administration at the time of the judgment. However, now section 2(1) of the Reform of the Customary Law of Succession and Regulation of Related Matters Act 1999 directs that all intestate estates of persons who are subject to customary law must devolve in accordance with the law of intestate succession as regulated by section 1 of the Intestate Succession Act.

**Challenges to section 23 of the Black Administration Act and the regulations promulgated:**
Recently, section 23 of the Black Administration Act (which affords statutory recognition to the principle of male primogeniture) and the regulations promulgated in terms of Government Notice R200 have been the subject of considerable debate and discussion in our courts. For

example, the principle of male primogeniture was unsuccessfully contested in the case of ***Mthembu*** in 2000.

Facts: This case is an appeal from TPD. In this case, T.J Letsela (deceased) died on August 1993, intestate when he was shot by someone. At death he was holder of a 99 year lease-hold title over immovable property. He lived on the property with the appellant and her two minor daughters, one of whom was Thembi Mthembu, who was born of a relationship between the deceased and the appellant. Deceased had no other kids except Thembi but was survived by his father (the 1st respondent) and his mother and three sisters.
His parents, together with one of their daughters and her kids, share the same house on the property with the appellant and her 2 daughters.

The Magistrate in Boksburg (the 2nd respondent) appointed the appellant (Mthembu) to administer the estate of the deceased. He said in a letter to the appellant's legal representatives that the deceased's estate was to devolve in terms of Black law and custom. The 2nd respondent (his dad) claimed that the property devolved on him due to the customary rules of succession.

The appellant brought an application to the TPD for an order declaring that the customary law rule of primogeniture and regulation 2 of the Regulations for the Administration and Distribution of the Estates of Deceased Blacks be made invalid due to being inconsistent with the Constitution of 1993. The judge dismissed the application but allowed the appeal.
The appellant alleged that she and the deceased entered into a customary marriage in Brakpan and she had received the 1st instalment of R900 towards her lobolla of R2000, signed by her brother. The balance was to be paid soon thereafter.
He died before this. The appellant thus claims to be his widow.
The 1st respondent denied that a customary union was ever entered into, alleging that certain essentials of a customary union were not satisfied.

The judge in court a quo could not resolve the dispute as to whether a customary union existed or not. Thus decided that Thembi was the deceased's illegitimate child. Council for appellant stated that Thembi is the only heir to the estate.

Law of succession in SA, IL is based on primogeniture. In monogamous household, the son of the family head is the heir, failing him, the eldest son's eldest male descendant.
Where the eldest son has dies before the family head without leaving a male child, the second son becomes the heir; if he has died leaving no male child, the 3rd son inherits and so on through the sons. Where the family head dies without male children his father succeeds.
Thus it follows that, whether Thembi is the deceased's legitimate child or not, being female, she does not qualify as heir to deceased estate. Women

don't generally inherit in customary law. When the family head dies his heir takes the position as family head and becomes the owner of all the property of the deceased, movable and immovable. He becomes liable for all the debts and assumes the deceased's position as guardian over the women and minor sons in the family.
The customary law of succession in terms of primogeniture has legislative recognition found in regulation 2 of the Regulations which states that if a Black dies leaving no valid will, his property should be distributed according to black law.

The Judge found that the rule of primogeniture is grossly discriminatory, against all women and girls and all black children who are not the eldest, by excluding them from intestate succession.
Thus this regulation discriminates in terms of s8 of the 1993 constitution (equality).

The council for appellant stated that Thembi would have succeeded intestate but for the fact that she was female.
The customary rule of primogeniture is offensive to public policy and natural justice as it's against the equality clause.

The judge a quo held that Thembi was not a victim of gender discrimination because any illegitimate child of the deceased would not have inherited. In casu, the judge felt the applicant was not married to the deceased, her child was thus illegitimate. Thembi had no right to inherit, just because she is not legitimate. Even an illegitimate male child would not have inherited, thus the court a quo found no gender discrimination.

According to the intestate inheritance rules in IL, the father of the deceased (the 1st respondent) acquired the right to claim ownership over the property upon the death of the deceased. Thembi had no right to succeed the deceased as heir. This is because she is an illegitimate child

In 2003, however, the applicants in ***Bhe,*** and the applicants in ***Charlotte Shibi*** successfully challenged both the constitutional validity of sections 23(10)(a), (c) and (e) of the *Black Administration Act* (including regulation 2(e) of Government Notice R200) and the principle of primogeniture.
Section 23(10) made provision for regulations to be enacted by the State President:

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

Both courts declared sections 23(10)(a), (c) and (e) of the Black Administration Act 38 of 1927 and regulation 2(e) to be invalid and unconstitutional.

The Cape High Court found that the applicants, namely N and A (the extramarital daughters of the deceased) were, in fact, the sole intestate heirs to the estate of their deceased father and the Pretoria High Court found Charlotte Shibi (the sister of the deceased) to be the sole intestate heir to the estate of her deceased brother. The intestate heirs in both these proceedings then made an application to the Constitutional Court in the case of *Bhe* for confirmation of the orders of the respective divisions of the High Court. Their applications were heard together by the Constitutional Court.

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

<u>The reasons given were that:</u>
The Act was manifestly racist in its purpose and effect. It discriminated on the grounds of race and colour. The combined effect of section 23 and the regulations was to put in place a succession scheme, which discriminated on the basis of race and colour applying only to African people.
The limitation that this scheme imposed on the right of African people to equality could hardly be said to be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The discrimination it perpetrated was an affront to the dignity of those that it governed. Section 23 was therefore inconsistent with the right to equality guaranteed in section 9(3) as well as the right to dignity protected by section 10 of the Constitution
As a result, the court confirmed the rulings of the court a *quo* that N, A and Charlotte were indeed the sole heirs to the respective deceased's estates.
<u>The court held that:</u>
The primogeniture rule as applied to the customary law of succession could not be reconciled with the current notions of equality and human dignity as contained in the Bill of Rights. The rule violated the equality rights of women and was an affront to their dignity. In denying extra-marital children the right to inherit from their deceased fathers, it also unfairly discriminated against them and infringed their right to dignity as well. The result was that the limitation it imposed on the rights of those subject to it was not reasonable and justifiable in an open and democratic society founded on the values of equality, human dignity and freedom.

The declaration of invalidity was made retrospective to 27 April 1994. Constitutional Court in the *Bhe* case finally brings the customary law of intestate succession into line with the values enshrined in the Constitution and eliminates the gender and birth inconsistencies prevalent in this system of law.

**Legal reform**

The Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009 - main aim of this Act is to modify the devolution of intestate property in relation to persons subject to customary law. The Act reaffirms that the Intestate Succession Act will be applicable to all estates. Section 2(1) of the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009 provides as follows: The estate of or part of the estate of any person who is subject to customary law who dies after the commencement of this Act and whose estate does not devolve in terms of that person's will, must devolve in accordance with the law of intestate succession as regulated by the Intestate Succession Act, subject to subsection (2).

This Act's purpose is to modify the customary law of succession so as to provide for the devolution of certain property in terms of the law of intestate succession; to clarify certain matters relating to the law of succession and the law of property in relation to persons subject to customary law and to amend certain laws in this regard and to provide for matters connected therewith.

This Act confirms the following amendments to Indigenous law of succession:

- All estates of persons subject to customary law which does not devolve in terms of a will, must devolve in accordance with Intestate Succession Act. (S2)
- A woman, other than a spouse, with whom the deceased had entered into a union in accordance with customary law for the purposes of providing children for his spouses house, must, if she survives him, be regarded as a descendant of the deceased (the substitute).
- The Act is to include every spouse and every woman. (S3)
- Where the intestate estate is not sufficient to provide each surviving spouse and woman referred to with the amount fixed by the Minister, the estate shall be divided equally between such spouses
- A child's portion: number of children (who have survived the deceased or predeceased the deceased but is survived by their descendants), plus the number of spouses and woman referred to.
- Property allotted to a woman – disposed of in terms of a will (S4)

# INDIGENOUS PUBLIC LAW:

## THE AFRICAN PROCESS OF NEGOTIATION:

### INDIGENOUS PROCESS OF NEGOTIATION WITH REGARD TO DISPUTES

In indigenous law, negotiation and mediation are aimed at RECONCILIATION between people and groups of people who have a dispute with each other.

There are 3 phases in the development of a dispute:

- Grievance or latent-conflict phase: event experienced by a party as harmful. Look at subjective judgment of the aggrieved party. Party can = Individual or group.
- Conflict phase: aggrieved party communicates the feeling of being wronged to the other party.
- Dispute phase: other party gets Involved in the dispute - i.e. by offering apologies or a denial.

### Procedures which have been developed for handling disputes:

- Disregard - so grievance doesn't lead to conflict
- Avoidance - causes the aggrieved party to break off social ties and relations with the other party.
- Self help - aggrieved party acts unilaterally to settle dispute I.e. physical violence and sorcery.
- Negotiation - with view to reconciliation and restoring existing relationships.
- Mediation – 3rd party becomes involved in dispute as mediator - disputing parties subject themselves voluntarily to a mediator's decision. Arbitration - disputing parties agree to a 3rd party getting involved, and that the decision of the 3rd party will be binding and enforceable.
- Judicial adjudication - one/both parties appeal 2 court to settle the dispute.

Disregard, avoidance and self help involve one party
Negotiation involves two parties
Mediation, arbitration and judicial adjudication involve three parties

**Settlement of disputes WITHIN family groups:**

Head of family group is responsible for conduct of its members - he must make sure that disputes between the members are settled.
The procedure is negotiation with a view to RECONCILIATION.
Disputes are settled by the family head, assisted by adult members of the family.
The dispute is reported by the mother or senior female figure in the family - if she thinks people involved in the dispute can't settle it by themselves the matter is reported to the family head.
The family head then arranges meeting for adult members of the family to discuss the matter with the people involved in the dispute.
The meeting is held indoors as it is a private matter - family matters are seen as private matters not meant for eyes and ears of outsiders except neighbours. If a person mentions such matters to an outsider he is said to bring the "eyes" of other people in to the intimate affairs of the family (concrete).

If matter can't be solved within the family circle, senior relatives are invited to help. If matter still can't be solved, assistance of direct neighbours, who are often not relatives, are called in. Assistance of neighbours is often used before the wider family group - especially in urban areas as the family often lives far away and is therefore not readily available.
During the meetings the matter is discussed thoroughly with the object of finding a way of reconciliating the persons involved (concrete).

Strong emphasis on restoring relations between those involved in the dispute and between them and the other people present.
Women also take part in the meetings - sometimes procedure is conducted by a senior sister of the head of the family.

If meeting finds a solution - wrongdoer is reprimanded and asked to "wash the wrong" - chicken or goat will be slaughtered and eaten during meal shared by those present (today tea and biscuits are used) - this is a concrete visible way of showing that relations have been restored and that the disputing parties and the family group have been reconciled.

Disputes normally settled with the help of relatives. Disputing parties normally always accept the proposed solution. But if they don't accept the solution they have to take the matter to the local headman. The headman is the head of the lowest indigenous court - he settles disputes between Inhabitants of that particular ward.
The parties must be assisted by their relatives - but relatives often don't want to give such assistance.
In such an instance, the headman serves first as a mediator then makes a formal judicial decision.

**Settlement of disputes BETWEEN NON-RELATED family groups**

People involved in a dispute first try to settle it among themselves by means of negotiation.
If negotiations unsuccessful - matter taken to headman's court.

Distinguish between disputes:
- Between husband and wife
- Between other non-related family groups

**Between husband and wife:**

The matter is first discussed within husband's family circle. If no solution is found, the wife's family is invited to help.
If there is still no solution, this may lead to the termination of the marital relationship without the headman being involved, because in indigenous law, it is possible to dissolve indigenous marriage outside court.
But if there is reconciliation, a RECONCILIATORY MEAL is held offered by the party at fault (concrete).

**Between non-related family groups:**

The aggrieved person must first discuss matter within own family group.
If it is agreed upon that a wrong has been done - matter is reported to the family group of the wrongdoer.
The wronged group sends 2 or more members and sometimes a neighbour to report matter. This is referred to as "throwing the kierie".
The complaint is heard but not acted upon (concrete).
The wrongdoer's group then meets to investigate and discuss the complaint. If clear that a wrong has been done - the group sends representatives, sometimes and neighbours to the wronged party to offer its apologies. Goods are taken with to compensate any damage.
If the apology and damages are accepted the matter is solved.

If there is no reaction from wrongdoer's group - aggrieved group will "throw the kierie" again and ask "where have you buried us?" which means "why are you ignoring us?"
"Throwing the kierie" is repeated up to 4 times before the matter is taken to court - then it is said that "a cow has four teats".
From this procedure we see that a dispute must not be taken straight to court - persons involved must first try to bring about reconciliation themselves.
But if a case is taken directly to court and the wrongdoer is found guilty of the offence, court will also reprimand the group for not wanting to come to reconciliation - it is said that *the first blow of the stick (negotiation) does not hurt. It is the blow that comes later (the decision of the court) that hurts.*

Where there are negotiations between the family groups but they cannot come to an agreement, the headman is invited to help - he acts as a mediator.
If at any stage during the negotiations or mediation the parties come to an agreement - RECONCILIATORY MEAL is held - VISIBLE AND CONCRETE way of announcing that relations and harmony between the parties and also with the broader community have been restored.

**The indigenous Court Procedure**

We distinguish between chiefs and headman's court.
Only the chief's court formally recognized by legislation.
Chiefs court not a court of record.
In terms of indigenous law - headman's court is the lowest court and chief's court is the highest court.
Trial procedure in indigenous law is the same is for chiefs and headman's courts.
Court procedure for civil and criminal actions does not differ.
Tribal law - civil actions are instituted when agnatic group's rights have been infringed e.g. claims for seduction, adultery, dissolution of a marriage, damage to property.
Criminal actions instituted by traditional authority against offender e.g. contempt of the ruler, murder.
If one act amounts to a civil and a criminal action - both are dealt with in the same hearing e.g. assault and theft. (Different to our law).

**The lodgment procedure**:

**Civil case:**

Plaintiffs agnatic group try to negotiate with defendants agnatic group.
If negotiations didn't lead to agreement so plaintiffs group reported the matter to their headman.
If defendant and plaintiff live in same ward - headman sets date for trial and notifies the defendant.
If do not live in same ward – plaintiff's headman sends plaintiff's group together with representative of the ward 2 headman of the def to report the matter to him.
Headman of the defendant will then set a date.
General principle is that the case is tried in the court of the defendant's headman.
On day of hearing both parties and their witnesses must be present as a case can't be heard in the absence of one of the parties.
**Maxim = a case about water is heard with the pot at hand**
OR
**A pregnancy is decided on with the sleeping partner at hand.**

If a party can't be there and offered apologies - case is postponed.
If party absent without excuse - case is postponed and party is warned to be present when the case is heard again.
If party absent for a second time without an excuse - he will be brought to the court by messengers (umsila) and may also then be punished for contempt of court.

According to statutory court rules, civil case may be heard in a Chief's court in the absence of a party and he may even be sentenced in his absence. (We call this judgment by default)

In such case the party may not also be punished for contempt of court.

If a party is not happy with the decision of the headman's court - may ask for case to be referred to Chief's court
Dissatisfied party and representative of the headman's court then report the case to the Chief's court.
Headman's court may also refer a matter to the Chief's court if it is too complicated. At chiefs court there is usually a person who "receives" these cases and sets date for trial on the Chief's behalf.

**Criminal case:**

Agnatic group of the harmed person reports case to local headman.
(Exceptional cases - go straight to Chief's court).
Headman investigates the matter and reports to the chief.
If complaint is founded the chief sets date for trial and parties are notified.
Parties must make sure their witnesses are present on the day of the trial.
Criminal cases - the indigenous procedure applies to the extent that is not in conflict with public policy and natural justice - it was thus decided that a person may not be sentenced in his absence and a chief may not administer justice in a case in which he is the complainant himself.

**Trial procedure**

General principle is that the onus is on the accused to prove his innocence in court.
Indigenous court sessions held in public - no trials in camera (no public allowed in).
Court sessions open to members of the public and may be attended by any adult person, even strangers. Formally only men allowed but now also women. Any person present may participate in the procedure by posing questions to the parties and giving info to the court about the case.
General rule is that all parties must be present during trial - judgment by default was unknown (UNSPEC). Parties are given chance to state their side of the matter with no interruption.

Legal representation was unknown - but no one appeared in court without assistance, normally relatives.
Witnesses may not be related to the parties - neighbours are often the main witnesses in the case. WHY IS THIS UNSPECIALISED?

All proceedings were conducted orally and no written record of cases is kept. But today all chiefs' courts keep a record in which basic info in a case must be recorded. Legislation requires judgments of a Chief's court to be registered. Case must be reported in quadruplicate straight after the judgment - must contain names of the parties, particulars of the case and

the judgment. Report must be signed by or on behalf of the chief and 2 members of the court. Original report must be handed in at the local Magistrate court for registration and each party is given a copy of the report.

Today a Chief's court judgment must be registered in order to be valid and must be registered with a Magistrate within 2 months or else it lapses.
In Bhengu v Mpungose it was decided that the Court Rules place an administrative duty on a chief to submit the written judgment for registration. Failure to do so may lead to liability for the costs incurred by a party in order to implement the judgment, or for any damage suffered by a third party because of the Chief's failure to register the judgment.

The chief is Judge in council - and although he delivers the judgment he is guided by the opinions and advice of those present - judgment is usually a consensus of those present.

Court proceedings are fairly informal but do follow a pattern:

- Plaintiff or complainant states his side of the matter
- Reply of defendant or accused - a few questions will be asked by council and those present to clear up obscurities.
- Evidence of witness of plaintiff or complainant and witnesses are questioned by those present.
- Evidence of witness of defendant or accused heard and questioned, and plaintiff or complainant and defendant or accused may give further explanations or question each other
- Matter discussed by those present followed by views on the facts and the matter of the council members.
- Judgment then given - usually consensus so discussions may be lengthy.

Proceedings take place in orderly manner - people who misbehave are called to order and receive a warning, if they continue to misbehave they may be removed from court and fined summarily for contempt.

**No one is a judge in his own case - maxim = "an axe does not chop itself".** Case involving ward headman is heard by another ward headman or referred to the chief. Case involving a chief is heard by senior relative of the chief.

During a civil case the defendant may not institute a counterclaim against the plaintiff. **Maxims = "one debt is not heard by another" or "one debt is not settled by another" also "two doves cannot be followed at the same time" (a person can't concentrate on two things at once).**

Asylum was known - person affected by a court order could escape punishment by fleeing to a certain place - house of chief's mother.

Telling lies was not punishable but a person's evidence would be considered less reliable - MENDACITY
No oath was taken in court so perjury was also unknown.

**Prescription of a claim is unknown** - maxim = “a debt or case does not decay or expire”. But plaintiff must submit his claim without delay. There are 2 reasons for this:

1. Delay may make it more difficult for the plaintiff to prove the facts because witnesses may move or die. Plaintiff may also lose his action if he dies before action is instituted. If action already instituted, claim passes to his successor.
2. May harm other party through his delay - other party may i.e. be denied chance to examine the facts in good time

If plaintiff waits too long to institute action court may refuse to hear case - facts can no longer be established with certainty.

After case has been instituted it may be postponed indefinitely i.e. until an accused returns to the area.
Proceedings are inquisitorial - court tries to establish truth through questioning and cross-examination - *no evidence is excluded*.
Court must be satisfied that there is enough evidence to substantiate facts of the case and can also hold investigations where the offence took place.
Court may make use of extra-judicial methods of proof - pointing out by a diviner.

# TRADITIONAL AUTHORITY COURTS:

## Small claims courts:

The establishment of small claims courts was recommended by the Hoexter Commission to relieve the pressure on the magistrates' courts. It was hoped that they would obviate various difficulties: the high cost of engaging lawyers; delay in bringing cases before the courts; the psychological barriers many litigants experience when appearing in formal tribunals; and barriers caused by poverty, ignorance and feelings of alienation.
The Commission was of the opinion that small claims courts should operate in an informal manner; that they should attempt to reconcile the parties; and that the presiding officials should play a more active inquisitorial role.
The recommendations were translated into law by the Small Claims Courts Act 61 of 1984.
The jurisdiction of the courts is restricted to the hearing of small claims which, in terms of section 15(a) of the Act, are principally cases of action not exceeding an amount determined by the Minister from time to time in the *Government Gazette.* This amount is currently set at R15 000 in value.

Certain matters are specifically excluded from the jurisdiction of small claims courts: the dissolution of African customary-law marriages, actions for damages for seduction, and breach of promise to marry. All such claims must be heard in magistrates' courts, with the consequent disadvantages of higher costs and more formalities.
The officers presiding over these courts are advocates, attorneys or magistrates and they act as commissioners. Except in the case of minors or other persons lacking *locus standi,* no legal representation is permitted. The general rules of evidence are not applicable and questioning of witnesses may be on an *inquisitoria*l basis. According to the inquisitorial procedure, the court plays an active part in the investigation before it. This procedure is similar to the customary court procedure.

There is no requirement in the Small Claims Courts Act that the commissioners should be able to speak a Bantu language or that they should be proficient in African customary law.

## Magistrates courts:

The application of African customary law in the magistrate's court is regulated by section 1 of the Law of Evidence Amendment Act 45 of 1988.
The magistrate's court acts in two capacities:
* in the first capacity, the magistrate's court can be the court of first

instance, that is where a matter is first instituted in the magistrate's court.
* in its other capacity the magistrate's court is a court of appeal, when a matter is first instituted in the court of the traditional leader and is then taken to the magistrate's court on appeal.

The powers of a magistrate in respect of an appeal against a decision of a traditional leader in a dispute are governed by the Magistrates' Courts Act:

1. If a party appeals to a magistrate's court in terms of the provisions of the Black Administration Act, 1927, the said court may *confirm, alter or set aside* the judgment after hearing such evidence as may be tendered by the parties to the dispute, or as may be deemed desirable by the court.
2. A confirmation, alteration or setting aside in terms of subsection (1) shall be deemed to be a decision of a magistrate's court.

The magistrate, it appears, has no power to review the decision of the court of the traditional leader which was the subject of the appeal. However, the magistrate does have the power to review an administrative act of a traditional leader.
When a case is instituted in the magistrate's court as the court of first instance, the magistrate has a choice whether to apply common law or African customary law.
If the magistrate is hearing an appeal from the court of the traditional leader, the magistrate must apply African customary law since the court of the traditional leader can apply only such customary law.
The jurisdiction of the magistrate's court as the court of first instance and the jurisdiction of the court of a traditional leader may sometimes overlap with regard to a person, a cause of action, and sometimes an area. There is however, no certainty on the point whether principles such as *lis alibi pendes* (an objection that the same case is pending in another court) and res *iudicata* (a matter which has already been decided and is closed) may be applied in these circumstances
This appeal is not an appeal in the ordinary sense of the word, as this could involve a retrial.
A retrial means that the case, which was heard previously, is heard as though it had not been heard in the past. The overlapping of jurisdiction has at least two undesirable consequences:

- the first is the fact that a party has the opportunity to choose his own settlement forum. A plaintiff is entitled to make use of the court that will provide him or her with the most effective remedy, regardless of what prejudice it may cause the defendant.
- the second undesirable consequence is the possibility that an action instituted in the wrong court may have to be transferred to the correct forum, with the resultant loss of time and money

**Jurisdiction in civil matters**

The Minister may, in terms of Black Administration Act, empower a traditional leader, who is recognised or has been appointed, to hear and decide on civil claims between blacks.
A traditional leader who hears and decides civil claims constitutes a court and his finding is binding and becomes a *res iudicata* (the case is decided and thus closed), subject to the right of appeal to the magistrate's court.

A traditional leader may hear and decide civil cases which

- arise from African customary law
- are instituted by black people against black people residing within his area of jurisdiction

A traditional leader may not decide on any matter concerning nullity, divorce or separation in respect of a civil marriage between black people. This limitation is really unnecessary; as such actions do not arise from customary law.
In *Gqada v Lepheana* - a claim concerning lobolo in respect of a civil marriage is a claim which originates from African customary law.
Bekker questions this decision. In our opinion this decision has merit as at that stage the dissolution of the marriage has already been decided by the divorce court or Supreme Court so that the lobolo issue does not arise from the dissolution of a civil marriage. A traditional leader is empowered to decide on any lobolo claim arising from an African customary marriage.

A traditional leader's powers are limited to black people who reside in his area of jurisdiction. The criterion is thus not group membership or *domicilium* (a fixed or lawful home) but rather residence.
In Ex parte Minister of Native Affairs, the following definition of "resident" was given:

- A person can be domiciled in one place and temporarily reside in another place.
- A person can have more than one place of residence but can live only in one place at a time. A person must therefore prove before the court where he was residing when the summons was served.

The court did not give a comprehensive description of the word "reside". In determining a person's residence, there must be evidence that there are good grounds to regard such place as his regular residence at the time when the summons was served.
The procedure in the court of the traditional leader is the African customary law procedure.
Provision is made for an appeal to the local magistrate's court against a sentence imposed by a traditional leader.
There is, however, no right of appeal in respect of a claim for less than R10, unless the court of appeal certifies after a summary enquiry that the issue involves an important principle of law. The execution of the sentence of the traditional court is postponed until the appeal has been decided upon.

**Criminal courts of traditional leaders:**

The Minister can in terms of the Black Administration Act, empower traditional leaders and their deputies to try criminal offences.
There is a rebuttable presumption that a traditional leader has the proper powers to hear such a case (R *v Dumezweni ).*
A traditional leader is competent to hear any crime in accordance with common law; any crime in accordance with African customary law any statutory crime referred to by the Minister
A traditional leader's powers to hear and adjudicate on the above-mentioned classes of crimes are limited in the following way:

- His jurisdiction is limited to crimes committed between black people in an area which is under his control. The extent of his power is thus connected to residence, and not group membership.
- His jurisdiction is limited to black people.
- There are offences listed in Act which are excluded from the traditional leader's jurisdiction, for example: sedition; murder; culpable homicide; rape; robbery; assault with the intention to kill, to rape, to rob and to inflict grievous bodily harm; indecent assault; arson; bigamy; *crimen injuria;* abortion; abduction; every offence according to an Act on stock theft; sodomy; bestiality; bribery; specified forms of burglary; receipt of stolen goods with the knowledge that they are stolen; fraud; forgery;

In African customary law, civil and criminal matters are heard in a single suit. Although a traditional leader is not empowered to hear any matter in connection with arson for example, he may hear a dispute in connection with damage to property. In both common law and African customary law arson is merely a form of malicious damage to property. Damage to property is also a delict in African customary law.
A similar problem is encountered in connection with fraud, which a traditional leader may not hear, and theft, which he may hear, or in connection with kidnapping, which he cannot hear, and child-stealing, which he may hear
The procedure for a trial and the execution of a sentence of the court of the traditional leader are given in accordance with African customary law. Although there is no reference to the application of the rules of evidence, African customary rules of evidence are applicable.
Provision is made for an additional method of claiming for unpaid fines. If the traditional leader fails to recover a fine or part of the fine cannot be claimed, he may arrest the person concerned and, within 48 hours after the arrest, bring him or allow him to be brought before the magistrate's court which has the necessary jurisdiction (the district in which the trial took place). The magistrate before whom such a person is brought may order payment of the fine upon being satisfied that such a fine has been duly and lawfully imposed and is still unpaid, either wholly or partially. If the person fails to comply with the order immediately, the magistrate may sentence him to imprisonment for a period not exceeding three months.

In such a case the magistrate must issue a warrant for his detention. In this case the magistrate's action does not amount to a retrial, but is merely an inquiry into whether the traditional leader was empowered to try the offence and to impose a fine and why such a fine or part of it has not yet been paid.
Section 20(2) contains the following explicit provisions on the punishment, which a traditional leader may impose:

- He may not impose a punishment, which entails death, mutilation, grievous bodily harm or imprisonment. He may not impose a fine in excess of R40 or two head of large stock or ten head of small stock. Additionally, a traditional leader cannot impose corporal punishment, except in the case of unmarried males below the apparent age of 30 years. With one exception this limitation of punishment accords with section 11(2) of the 1996 Constitution. The exception is corporal punishment. This form of punishment is generally seen as being in conflict with fundamental rights

An accused may appeal against his conviction or any sentence imposed upon him to the magistrate's court having jurisdiction in the area in which the trial took place
These appeals are governed by Section 309A of the Criminal Procedure Act. The magistrate can either uphold the appeal and set aside the conviction and sentence or confirm or alter the conviction. Should the magistrate confirm or alter the conviction, he or she may either confirm the sentence and order its immediate satisfaction or set aside the sentence and in lieu thereof impose such other sentence as (in the magistrate's opinion) the traditional leader should have imposed. In this case a magistrate could, for example, not impose a fine in excess of R40 since this is the limit a traditional leader can impose. If there is no immediate compliance with the magistrate's sentence, the magistrate may impose a sentence of imprisonment for a period not exceeding three months. The magistrate may also set aside the sentence imposed by the traditional leader and in lieu thereof impose a sentence of imprisonment for a period not exceeding three months without the option of a fine. In terms of section 29A(1) of the Magistrates' Court Act, the court, when entertaining an appeal, may hear new evidence. This means that it would be more correct to describe the hearing as a retrial than an appeal.

In terms of the Magistrates' Courts Act the court, when entertaining an appeal, may hear new evidence. This means that it would be more correct to describe the hearing as a retrial than an appeal. Although provision is made in the Rules of Court for keeping a written record of the proceedings, this does not include a record of the evidence heard, and so it is quite possible that the court may consider new evidence (not heard in the court of the traditional leader). A copy of the written record must be delivered to a local magistrate within two months of the date of judgment, otherwise the judgment will lapse.

# INDIGENOUS LAW OF EVIDENCE:

The African customary law of evidence is based on custom and does not consist of formal rules (as in specialised systems). These are customs, rather than rules, that are observed, and disregarding or violating them does not constitute a contravention of the law. The African customary law of evidence is therefore fairly informal, and is based largely on reasonableness and effectiveness.
The court is interested in the merits of the case, and technical grounds for a judgment are therefore unknown.
Evidence in traditional court is given orally. These courts may also receive documentary evidence.
Two characteristics of the African customary law of evidence are its inquisitorial procedure (the court plays an active part in examining the parties and their witnesses in order to determine the "truth") and its free system of evidence (in principle, no evidence is excluded: all evidence is admissible, and is judged on its merits by the court

It is not compulsory to take the oath, therefore no perjury is punishable. It has been observed that in practice, witnesses are require to take an oath in the manner that is done in ordinary courts.

**Burden of proof and evidential burden**
The burden of proof determines which party loses the case if the court does not have sufficient grounds in order to make a finding on an issue of fact.
Such a situation is inconceivable in African customary law, because extrajudicial methods of proof are known. These extrajudicial methods of proof in African customary law have to do with referring the accused to a diviner (*inyanga)* in order to make a finding. In former times, this could also take the form of an ordeal, such as taking poison.

Indigenous law evidence is informal and free in nature, there is no reasoning concerning the burden of proof. The court decides, on the merits of the evidence, which rendering of the facts is true. If, in a certain case, it is difficult to come to a decision, the court may use extrajudicial means of proof, such as referring the party or parties to a traditional healer.

Evidential burden - 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. 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. All evidence is judged merely on its merits, and the court is not bound to technical rules of

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

In criminal cases, as well, the principle is that a party must prove its claims in court. Sometimes it is said that the onus (duty or responsibility) is on the accused to prove his or her innocence. This means that the accused is expected to submit evidence to the court that proves the charge to be unfounded. There is no prosecutor who submits evidence on behalf of the court. The court does play an active part in the process of questioning, however, and may even call witnesses to give evidence. **The principle that the case against the accused must be proved beyond reasonable doubt, as it exists in general law, is unknown in African customary law.**
No court case can end in an "absolution from the instance". In African customary law neither of the parties has the burden of proving their case. It is the court that ac- quires proof by playing an active part in the process of questioning so that it will be able to give judgment.

**Measure of proof**
The court plays an active part in the process of questioning and in evaluating evidential material. Any person present in court may submit evidence during the trial. The court is interested in the "truth", and for this reason all evidence is tested and weighed. In African customary law, unlike in the general law of evidence, the measure of a balance of probabilities does not apply in civil cases. In African customary law the principle of "beyond reasonable doubt" does not apply in criminal cases. The primary aim of a customary hearing is not to prove who is right and who is wrong: it is to determine the "truth" and to reconcile the parties with one another, as well as with the court and the community. Judgment is given by the court after all the parties and their witnesses have given their rendering of the case and the court has tested and weighed the validity of this evidence through the process of questioning.

Some say that the measure of a reasonable (fair) person applies. The court is interested in the "truth" as considered credible and convincing by the people in court on the basis of their experience. There is no specific test, such as that of a "reasonable man" or person. In African customary courts, parties are allowed to submit their complete version of the case in hand. No case is decided without everybody having been heard. Disallowance of a plaintiff's case before the defendant has been heard is unknown. For a party to institute legal proceedings without good (but unfounded) reasons is inconceivable. In a civil case, as you know, the claim is first argued by the respective family groups, and only after they have failed to reach agreement is the matter referred to the headman's court. By then the parties ought to know whether the case is founded or not.

**Evidential material and means**
Facts in dispute, that is, those facts about which the disputing parties differ, are proved in a customary court by means of evidence and questioning. Other evidential means include admissions, judicial notice and presumptions.

## ***EVIDENCE:***

Evidence is the oral statement made in court by a party or a witness, either voluntarily or in answer to a question. This is the most important form of evidential material in an African customary court, because a case is tried on the basis of evidence submitted to the court.

**Direct evidence**, namely evidence of a person who has seen or heard something directly, is the best form of evidence. Thus, the evidence of an eyewitness is considered important. It is also emphasised that a person who presumes or sees a potential wrong should preferably take along a witness. If, for example, a man sees his wife in dubious circumstances in the company of another man, he must get a witness to observe these circumstances as well. This is why a contract must be concluded in the presence of witnesses. However, direct evidence on its own is not enough proof, and is always considered together with other evidence.

**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.

**Circumstantial evidence** is used to supplement other evidence and other evidential material. From the evidence of a witness who saw the accused near the scene of an alleged crime at the moment of its commission, it can therefore be concluded that the person was involved in the crime. In such matters as seduction or adultery special value is attached to circumstantial evidence supporting the evidence of the girl or woman, since in such cases direct evidence is seldom available. Also, in such cases the evidence of one person may be accepted as sufficient evidence, provided that the other party cannot disprove this evidence.

**Concrete evidential** material has especially strong evidential value. A piece of clothing or some other personal belonging of an offender shown to the court has special evidential value since no person would entrust a personal belonging to a “stranger”, that is a non-relative, without a sound reason. This is a form of judicial notice and a presumption. (The court takes notice of the fact that because of ritual reasons a person does not voluntarily entrust his personal belongings to others. This also leads to the presumption that the person is involved in a wrongful deed or a crime.)
Concrete evidential material can include a piece of personal clothing such as a pair of men’s trousers or a personal belonging such as a kierie.

Sometimes a person caught in the act is also "marked" by giving him one or two blows on the body, preferably on the back, with a *kierie.* That person must then explain to the court how his property came to be in the possession of another, or how he was injured or wounded. Injuries on the back do not point to a case of assault, because then the person would have defended himself. Concrete evidential material together with other evidence is often decisive (considered sufficient proof).

**Evidence in previous cases** is also taken into consideration in settling later cases. Such evidence is not decisive, since each case is decided on its own merits.

The court itself may, through questioning or an inspection *in loco,* produce evidence, which can be considered together with other evidence. The members of the court council actively take part in questioning the parties and their witnesses. This is to evaluate the credibility of the persons involved. A member of the court council does not have to withdraw from the process just because he was an eyewitness in a particular case.

Also, any person present in court may submit further evidence to the court in support of the evidence given, or to query it, and may even question the parties and their witnesses. After a witness has given evidence and has been questioned, he or she may be recalled at any stage of the process to give further explanations if new evidence has come to light. The parties to a civil case may conduct their own questioning of the other parties and their witnesses. This is called an open system of questioning. A party or witness's refusal to answer a question will lead to an unfavourable conclusion, namely that the person is hiding something from the court.

**Judicial notice**

The court takes notice of known facts without requiring that proof be submitted. This is particularly true where the personal particulars of the parties are concerned. This also applies to matters known to the members of the court by virtue of their position in the administration of the traditional authority, such as where certain places are situated, and the boundaries of a certain area. The court also takes notice of cultural customs, such as that a person may not enter another person's hut in the other person's absence. Notice is also taken of animal behaviour, for instance that a cow will not reject her calf in the suckling stage.

**Admissions**

Civil cases are first discussed by the agnatic groups concerned. If this process does not lead to a settlement, the case is taken to the court of the headman. By that time there must be reasonable clarity about the facts in dispute. It is therefore not necessary for the court to ask the parties to admit certain facts.

In criminal cases, the case is usually investigated by the accuser's local headman and his councillors. If the accused admits all the facts, he is punished without a further hearing. If he admits certain facts and denies others, the facts that have been admitted are accepted as proven. If all

the facts against a party are admitted in the course of the case, judgment may be given. Admissions made by a party outside the court may be used as evidence in court.

**Presumptions**
Presumption is an assumption made by the court about a fact that has not been proven directly by evidence. The fact presumed is accepted by the court as correct until it is rebutted.
The following presumptions are known:

- The children of a married woman are the children of her husband.
- An adult is mentally sound, until there is evidence to the contrary.
- A person does not voluntarily entrust pieces of personal clothing to a stranger.
- A person does not voluntarily remain prostrate (i.e. lying with the face downwards) so that another person may hit him on the back.
- An action is instituted without delay. Plaintiffs who fail to institute an action therefore intend to harm their opponents.

A person who refuses to answer a question in court is withholding information from the court.

**Extraordinary evidential material**
In former times, the assistance of a traditional healer (inyanga) could be called in. If the facts of a case were difficult to prove, the court would send the parties, accompanied by two or more messengers of the court, to an inyanga. Today, members of the tribal police are used for this purpose. It is the task of the inyanga, by means of extrajudicial methods such as throwing the bones or other tests, to determine whether the accused is guilty of the charge against him or her. The finding of the *inyanga* is conveyed to the messengers. This can be done by shav- ing 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.

**Competence to give evidence or to testify**
The general principle is that all persons, except if insane or intoxicated (drunk), are competent to testify in an African customary court. Even a young child who can remember and relate an incident or who can identify persons can testify in court. Co-accused persons may also testify for or against one another. A person who is too intoxicated to testify is given time to sober up. In these circumstances, the case is usually postponed. A wife may testify for or against her husband, and the converse is also true: a husband may testify for or against his wife. The court will, however, weigh such evidence carefully. It must usually also be corroborated (confirmed) by other evidence.

Chiefs and headmen may not act as witnesses in a case. The same applies to members of the court council. However, they do not have to withdraw from a case merely because they know something about the case concerned. They must convey their evidence to the court. In former times, a chief was not allowed to testify in public. The chief usually testified in private to the chief councillor, who passed this information on to the court. When considering this procedure you must bear in mind that in African customary law no case is decided by an individual. The chief and the headman, together with the members of the court council, decide a case, so that the outcome of the case cannot be influenced by a certain individual's prior knowledge of the case.

**Giving evidence**

In a traditional court, evidence is not given under oath. Therefore, perjury (wilfully giving false evidence under oath) is unknown. No action is taken against a party or a witness who tells lies; if they do tell lies, it will merely harm their case. The parties to an action are responsible for seeing to it that their witnesses are present on the day of the trial. If a witness cannot attend the trial, the court may, on request, postpone the trial once. Alternatively, the court proceedings can continue without the witness until it appears that the particular witness is necessary, and then the case is postponed. Further, the court is free to call upon any person to testify if it is of the opinion that the person concerned has some information. If a party cannot attend, he or she must give reasons beforehand, and if these reasons are acceptable, the case will be postponed.

Today, the names of the plaintiff's witnesses are given to the headman when the case is reported. The defendant is then notified in writing of the case against him, and of the date of the trial. He is also asked to bring along his witnesses on that day.

In court, evidence is given orally in the presence of the parties concerned, and is subject to questioning. Each party and all the witnesses are given full opportunity to testify at their discretion to the court, without interruption. The court patiently listens to the evidence and will seldom call on a witness to confine his or her evidence strictly to the case in hand. If, however, a person states his case in a very long-winded manner, without being specific, he will be asked to get to the point. If he does not do so, it can harm his case. It is the court that determines the relevance of the evidence, with due allowance for all the facts of the matter as well as the motives of the witnesses. If it later appears that a person is wasting the court's time, he may be fined.

**The sentence / judgement:**

A feature of judgments by an African customary court is that each case is judged on its merits. The court is therefore not bound to previous judgments in comparable cases. The court comes to a decision after considering all the relevant information.

6In criminal cases, judgment may mean punishing the accused. This punishment can take the form of a reprimand, a warning, corporal

punishment, a fine, the attachment (seizure) of property, and in former times even banishment from the area.
In civil cases, judgment may mean rejecting or accepting the plaintiff's claim. If the plaintiff's claim is accepted, the defendant is usually asked to compensate for the plaintiff's damage.
Various factors are taken into account in determining the amount of compensation to be paid. If, for instance, the damage was done intentionally (i.e. in a purposeful and calculated manner), this is taken into account. In such a case the compensation is set for a higher amount than the damage that was actually done. The court may reject a plaintiff's claim if it is found to be unfounded or his attitude is found to be inflexible, and it may warn the plaintiff "not to waste the court's time with trivialities".
For certain offences, such as making an unmarried woman pregnant and adultery, there is, in most cases, a fixed amount of compensation. Although the court may amend (i.e. increase or decrease) this amount, it does not readily do so.

In cases where there is no fixed amount of compensation prescribed by tribal law, the court takes account of factors such as the status, the economic situation and the circumstances of the parties when the offence took place. An affluent person or a person of royal descent may therefore expect to pay a higher amount of compensation than other people. This is so because such people are expected to set an example to the community. Sometimes the court orders additional goods or money, other than damages, to be delivered. This may be called a court levy, or courts costs. It is called a levy because is former times no money was used.

The Sotho-speaking groups refer to this levy as mangangahlaa. 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. 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 were given. The animal was slaughtered for the members of the court, and then eaten in a meal shared by them and the litigants. In this way any trace of disagreement that still existed 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 was caused.

In criminal cases the fine that is imposed sometimes includes mangangahlaa. It is usually used for the food served to the members of the council and the accused.

**Execution of a sentence or judgment in African customary law.**

Unless it is being taken on appeal, the judgment of an indigenous court must be executed. The compensation or the fine, whatever 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 the judgment was given.

In the case of compensation, the successful party is notified that the goods or livestock may be fetched. Sometimes this party then gives part of the goods or livestock to the court, to be used to serve food to its members. In former times, members of a traditional court were not rewarded for their services.

Also, in former times, if a person refused or neglected to pay the fine or compensation owing within a reasonable time, the indigenous court ordered that the person's property be confiscated. In such a case force could be used to confiscate the property. Some groups had a special messenger (known as umsila) 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). 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 arrange with the court to pay the judgment goods in instalments.

In former times, sentences in the form of corporal punishment and banishment were enforced directly after the court session. Today a sentence by an African customary court may be enforced only if no notice of appeal was received within 30 days after registration of the judgment with the local magistrate's court.

If the property to be confiscated is situated outside the area of jurisdiction of an African customary court, application must be made to the clerk of the magistrate's court for execution of the sentence or judgment. Also, 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. However, no more goods may be seized than are stipulated in the judgment.

Section 20(5) of the Black Administration Act 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.

# INDIGENOUS CRIMINAL LAW

THE ACT AS AN ELEMENT OF CRIME

A crime is a human act that is in conflict with interests of the community, that can be blamed on the perpetrator, and for which the perpetrator may be punished by the community.

**Elements of a crime**:

Human act - positive act or omission
Act must be unlawful
Possible to blame the act on the perpetrator
Community must believe the act should be punished (group!)

Act may be harmful to private person and community at the same time - i.e. In respect of assault the victim is injured and the community is harmed because human relationships are destroyed - perpetrator will be punished and asked to give victim something to "heal the wounds", thus in indigenous law distinction is made between crime and delict.

**Difference between a crime and a delict**:

**Parties that are harmed** = crime - community. Delict - individuals or groups.
**Property that is affected** = crime - public property. Delict - individual or group property.
**Procedure involved** = crime - matter tried in court in first instance. Delict- mediation between parties first.
**Punishment or compensation that is granted** = crime - offender is punished. Delict - offender ordered to pay damages.

Where one act constitutes a crime and a delict there are no separate actions -punishment and compensation are ordered in the same process. Infringement of communal interests can be in the form of pollution of the community. E.g.: "offences of the blood" - assault and homicide. Incest and sometimes contempt of the ruler are also seen as defiling.
Punishment and a meal of purification and conciliation are ordered (concrete way of reconciling offenders with the community).
"a crime does not perish, only meat does" - prescription of a crime not known in indigenous law, therefore the action) - will not lapse in the course of time.

**The act**

Only conscious human acts amount to a crime.
Turning over while asleep and hurting someone is an unconscious act and will therefore not constitute a crime.
E.g. where absolute force is used to make someone commit a crime (holding a knife to a person's throat)
The act must cause harm - in indigenous law attempt to commit a crime which doesn't result in harm and is not punishable.
Acts of animals do not constitute crimes - person who instigates a dog to bite some one uses the dog as an instrument.
A crime may be in the form of an omission - failure to execute order of the ruler.
But it isn't a person's duty to prevent a crime.

**Cause and effect: the problem of causality**.

If A stabs B and B dies immediately from the wound - A definitely caused B's death.

More difficult to determine cause of death when different events and people are involved.

In indigenous law there is no theory of causation - people know from general experience that a certain act causes a particular effect.
Therefore the criterion = experience of the community.
Every act that constitutes an indispensable condition for a particular state of affairs is considered a cause.

**E.g. A is hit over the head by B with a kierrie then dies after being chased in the hot sun for some time by C and D:**

A's death is considered to have been caused by B as people know from general experience that a person does not just die from being chased in the sun.
If A was not hit over the head before being chased he probably wouldn't have died. Thus, the blow with the kierrie is the indispensable condition for this state of affairs.

In cases of poisoning the poisoning itself is not automatically taken to be the cause of death, even where the dosage is lethal.
It is believed that there is a possibility that the poison won't be effective and most people will try to prevent such things from happening to them.
Poisoning will only be seen as the cause of death after all other possibilities have been excluded.

It is accepted that an omission may bring about a particular effect - person who fails to prevent a vicious dog from attacking another person

is the cause of the effect because of his failure. The failure is the omission.

**More than one perpetrator and co-liability**

In indigenous law there is a distinction between co-perpetrators and accomplices.
Co-perpetrators = persons participating in the crime
Accomplices = persons assisting another person who committed a crime.

If a person orders or persuades another to commit a crime he is considered to be participating and is punishable.
It does not matter whether the perpetrators are equally involved - a person standing guard while another commits a crime is also punishable as a perpetrator.

Conscious collaboration is required - must know that a crime is being committed.
Person who intentionally helps others to commit a crime is punishable as an accomplice. - does some thing which furthers the commission of a crime.
Person who intentionally helps a criminal evade liability e.g. by hiding the criminal is guilty of a separate crime. In indigenous law it is sometimes referred to as "hiding the robber", in our law it is referred to as an accessory after the fact

The head of the agnatic group is liable for the conduct of its members – co-liability.
Agnatic group has certain rights and duties and is therefore liable for the crimes of its members - maxims:

- **"if the herd boys in the veld are bitten it will affect their elders at home";**
- **"a cow is brought to ruin by her calf";**
- **"a child that steals gets his father in to trouble"**

Group member incurs liability and is punished, and if there is a fine it must be paid by the group. Maxim: "the big wolf has no guilt; the guilt is brought on by the little wolves".

# UNLAWFULNESS, GUILT AND PUNISHMENT AS ELEMENTS OF A CRIME

## Unlawfulness

In indigenous law - act only considered unlawful if it is in conflict with the interests of the community.
Certain factors may exclude unlawfulness.
It is unlawful to kill but not if it is in self defence.
These factors are known as grounds of justification.

Grounds of justification known in indigenous law:

1. **Defence:**

A person may forcibly defend himself or his property or another person or their property against an unlawful attack without being criminally liable.
Only as much force as is necessary may be used.
Justified against an attack, which has begun or is threatening to begin.
Person being attacked need not flee 2 avoid attack.
To flee may be humiliating e.g. in the case of an attack by a child.
Attacker may be killed if there is no other way to avoid the attack.

2. **Necessity**:

E.g. breaking in to a person's home to extinguish a fire and save his property.
Killing a sorcerer could be seen as an act out of necessity as a sorcerer is a constant unknown threat to the community - therefore not punishable.

3. **Self-help**:

A rapist, abductor, thief or adulterer caught in the act may be assaulted and sometimes even killed.
Exclusion of unlawfulness is based on self-help in order to obtain satisfaction.
Assault after the offence is not allowed as vengeance does not exclude unlawfulness.

4. **Executing an official order**:

Executing order from indigenous ruler, eg. by seizing the property of a judgment debtor is not an unlawful act.

5. **Impossibility**:

Impossibility to execute an order excludes unlawfulness.
Person who has to attend a headman's court session is not guilty of contempt if at that moment he was summoned to the ruler.

He may not choose what he wishes to do - ruler takes precedence over other duties.

6. **Consent**:

If a group has consented to a certain act and it causes injury to a person unlawfulness is excluded
Medicine specialist who gives medicine with the consent of the patient's agnatic group is not liable for harm resulting from that act.

7. **Institutional action**:

Recognized cultural institutions i.e. stick and kierrie fights excludes unlawfulness.
If the boys are injured during these fights it will not constitute assault.
Same applies to injuries sustained in initiation ceremonies.

8. **Disciplinary powers**:

I.e. any adult who catches a child committing an offence has the power to chastise the child regardless of the relationship between them.
Initiation master also has the power of chastisement during initiation ceremonies.

**Guilt**

Indigenous law - the act must be accompanied by guilt.
Guilt = intention or negligence.

For most crimes in indigenous law intention is required. E.g. murder and rape

There is negligence in cases where official discipline has not been adhered to and culpable homicide.
Negligence means not to act like an ordinary man or woman.
In indigenous law there is no strict distinction between intention and negligence - rather what is looked at is if the act caused that particular effect.

In indigenous law a small child and an insane person are not criminally liable.
**It is said that a child's "brain is still to weak" and an insane person "is not a whole person and his actions are like an injury caused by a tree trunk"** - they do not have the mental ability to judge their actions.
No fixed age at which a child could be held criminally liable - it would be a consideration whether a certain boy was just herding goats or if he was already herding cattle (former times).

Also in former times a person who had not undergone initiation ceremonies was not considered a mature person - therefore not fully criminally liable whatever his age.

Intoxicated or other drugged condition does not exclude criminal liability and is also not a mitigating factor if the accused is responsible for his condition.
If the accused, while so intoxicated, was made to commit a crime the intoxicated state and the fact that he was made to commit the crime are considered mitigating factors.

Supernatural causes i.e. sorcery do not exclude criminal liability - but in terms of indigenous law, a belief in sorcery together with the fear that the sorcery performed by the victim may endanger a person or the whole community may be regarded as a mitigating factor.

## Punishment:

**Forms originally recognized**:

1. Death penalty
2. Banishment
3. Confiscation of property
4. Removal of the offender to an appointed area within the communal territory.
5. Fines
6. Corporal punishment
7. Compulsory labour
8. Warning after having been found guilty

Imprisonment was unknown.
Punishment may be increased, by combining the abovementioned forms.
Banishment and death sentence often combined with confiscation of property.

Mitigating factors lessened punishment i.e. youth and provocation.
Aggravating circumstances increased the punishment i.e. repeated perpetration of the crimes and perpetration of the crime within the victim's dwelling.
Indigenous courts may still impose punishment in terms of indigenous law but there are limitations: no punishment resulting in death, mutilation or bodily harm, including corporal punishment.
Indigenous court may not sentence to imprisonment.

Today, an African customary court may still impose punishment in accordance with African customary law, but with the following limitations:

- no punishment resulting in death, mutilation or bodily harm, including corporal punishment.
- The maximum fine that may be imposed has also been limited - an African customary court may not sentence to imprisonment.

An African customary court may not sentence any person to imprisonment.
In former times a common method of executing a judgment was to detain a convicted person until the imposed fine had been paid by his relatives.

## CONTEMPT OF THE RULER, ASSAULT AND RAPE

### Contempt of the ruler

Any act of a subject which intentionally rejects, disregards, opposes or disputes the authority of a ruler constitutes a crime.
Rejection of the authority of the traditional leader, national assembly or representative of the ruler i.e. headman or messenger also constitutes a crime.

Acts which were punishable as contempt NB:

- Explicitly rejecting ruler's authority
- Unlawfully calling and holding a tribal meeting
- Usurping a headman ship
- Conspiring to usurp ruler's position
- Encouraging subjects to divide the traditional authority and establish an independent traditional authority.
- Encouraging subjects to leave the tribal area and join another ruler.
- Rejecting the authority of a headman
- Adultery with the tribal wife.

Contempt requires intent as a form of guilt.
A stranger visiting the area does not have allegiance with the ruler and cannot commit this crime.

Formerly the crime was punished by:

- Banishment - because of the **maxim: "contempt of the ruler means to leave".**
- Death penalty where the contempt was serious together with confiscation of property.
- A fine
- Corporal punishment.

But now the constitutional court has abolished corporal punishment and the death penalty.

Today traditional leaders do not have authority to banish subjects - only valid form of punishment = fine.

**Assault**

Unlawfully and intentionally hurting another person's body.
Particularly associated with blood and bodily injury.
An attack causing an open wound is regarded as assault.
The belief is that human blood belongs to the ruler.
To injure someone until the blood flows has a polluting effect on the community the pollution must be compensated for by a reconciliatory meal between the assailant the victim and members of the court, - assailant must provide the animal to be slaughtered.
Where there is no blood or bodily injury the attack cannot be seen as assault - no matter how serious.
The attack can be indirect i.e. instigating a dog to attack some one - there must be blood or bodily injury.
Intention and unlawfulness are required.
Bodily injury by negligence does not constitute assault.

**Grounds of justification in cases of assault**:

- Defence
- Executing an official order
- Discipline
- Participation in stick and kierie fights
- Initiation ceremonies.

Victim and assailant may settle the matter before it is taken to court – therefore assault also contains elements of a delict.
If there is settlement in such a case it means there is no punishment under indigenous law.
This doesn't mean that the assault does not constitute a crime – but interests of the community are satisfied because relations have been restored – the harmony which exists can be seen as public satisfaction.
Punishment in assault cases is decided by the court – normally a fine, corporal punishment or both.

Mitigating circumstance = provocation.
Aggravating circumstance = use of a dangerous weapon.

Court gives part of the judgment goods to the complainant to "heal the wound" (satisfaction).
Sometimes the court would order that the victim could injure the assailant in a similar way (punishment and satisfaction).
Today the assailant is ordered to pay the victim medical costs - therefore there is an element of compensation in cases of assault.

**Rape**

When a man uses violence to force a woman to have sex with him without being married to him.
Sex with girl who is not sexually mature is punishable as rape even if there is no violence.
Only a man can commit rape.
Violence is a requirement - woman must offer resistance unless she is threatened.
In some groups if it is proven that the woman was thrown to the ground, constrained, and her clothes were torn, while she was offering resistance in any way, these are sufficient grounds for rape - but she must have reported the matter to the head of her family immediately.
Other groups require penetration for rape to have taken place otherwise it is regarded as assault.

The individual cannot consent to harming the rights of her group - therefore consent cannot be used as a defence in the case of rape.

Rape = unlawful and intentional harm to the woman's body and honour.

At the same time it also harms the honour of the agnatic group.
Formerly rape was punished with the death penalty especially if it was the wife of the traditional leader. Corporal punishment, fines or both were also known.

If a person caught a rapist in the act with his wife, daughter or sister could give him a severe thrashing and not be punished.
There have been cases where a rapist was killed and the killer was not punished - maxim: “a dog is killed where it copulates”. The killing and the thrashing were seen as lawful forms of self-help, which excluded unlawfulness. The infringement of the agnatic group’s guardianship was also compensated for - thus the killing or the thrashing can be seen as forms of satisfaction.

# TRADITIONAL LEADERSHIP AND GOVERNANCE:

## Traditional Leadership:

The term “traditional” is derived from the word “tradition”.
The term “tradition” is generally used to refer to the transfer of culture from one generation to the next, and includes the repeated transfer of ideas, cultures, material objects and behaviour among people that is necessary in order for them to survive within a group.

The term “tradition” is also used in a popular sense, and then the meaning is less neutral than when it is used in the sense of cultural transmission.
One meaning refers to tradition as that which has stood for many years and continues unchanged. For example, behaviour that has remained for many years and has been transferred from generation to generation can be described as “traditional”.

Tradition can also have a subjective meaning, for example with reference to the traditional inviolability (sacredness) of marriage, or the traditional value of freedom of speech.
It can also have a negative meaning when it refers to the conservatism or backwardness of people. Think of references to traditional (backward) societies, traditional (inadequate) medicine and traditional (backward) law.
The term “tradition” and its derivations therefore have conflicting and ambiguous connotations
The understanding of traditional leadership refers to a cultural institution (indigenous leadership) which has been handed down from generation to generation.
The Traditional Leadership and Governance Framework Act 41 of 2003 refers to “traditional leadership” as the “customary institutions or structures as recognised, utilised or practised by traditional communities”.
According to section 211(1), “the institution, status and role of traditional leader- ship, according to customary law, are recognised, subject to the Constitution”.
The inclusion of traditional leadership in a democratic constitutional dispensation, which is also included in the new Constitution which came into effect in 1997, leads to certain inconsistencies.
The differences in degree between traditional and modern governments, and the meaning of these differences, greatly depends on the various functions of the government and the levels of government at which the functions are exercised.
In so far as the legislative function is concerned, a democracy implies, among other things, regular elections. This system of chosen leaders is in contrast to the traditional system of hereditary leadership. Hereditary leadership is based on the principle of **male primogeniture**, with due regard to the status of the main wife or tribal wife.

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
Traditional leaders have always had unwritten and unlimited powers to make new "law" for the community. The emphasis has fallen on the maintenance of existing law rather than on changes with a view to future developments
This inconsistency is seen clearly when we look at the new powers that were given to the traditional leaders at the provincial and national levels. Provision was made for a House of Traditional Leaders at the provincial level and a Council for Traditional Leaders at the national level. These bodies must advise the provincial and national legislatures respectively, and must make suggestions about matters concerning the traditional authorities and African customary law, as well as the traditions and customs of the traditional communities.
At provincial level, traditional leaders are elected or appointed by traditional authorities to provincial houses, and at the national level they are elected to the national council. This process is also inconsistent with democratic principles, but is in accordance with the exception made in regard to the traditional style of government. These new bodies have limited powers. They can make laws, which are then considered by the provincial and national legislature, but cannot legislate independently.

Another inconsistency with the Constitution is the clash between the equality clause (s 9(3)) and the African customary system of male succession. With a few exceptions, women are not clothed with any public political function in terms of African customary law.
The Lobedu of Modjadji do however have a woman as the chief, while the Venda and Swazi clothe the chief's mother or sister with important functions. According to the Swazi, the king's mother is the mirror image of the king. In other groups, women today can act as regents while the rightful successor is still too young, or cannot succeed for any other reason.
According to the principle of equality there can be no argument that the traditional principle that a chief's daughter cannot succeed if she is the first-born is discriminatory. According to the principle of primogeniture the first-born must succeed, regardless of whether they are male or female.
The discriminatory element in the succession system is therefore the principle of patrilineal succession. This means that only males in the patrilineage can succeed.
If a woman is allowed to succeed, it would mean that her children cannot succeed, as they are not members of the patrilineage. The question which arises in such circumstances is: Who should succeed her? In a patrilineal system of descent calculation, a daughter belongs to the patrilineage of her father, but her children belong to the patrilineage of her husband.
Another problem is that a female head cannot perform the political rites in honour of the ancestors, as according to belief these rituals can be performed only by male members of the male line of descent.

With Modjadji we have the situation that a woman can be succeeded only by her daughter, and that she is not allowed to marry formally, so that her children will indeed belong to her line of descent. In this case, we are dealing with reverse discrimination (only women), and with the further problem that she is not allowed to marry formally.
Gender discrimination is not limited to succession to political offices. It also affects the succession system of ordinary people, if the prohibition against gender discrimination is to be applied consistently.
If women were to be allowed to succeed according to the African customary system of succession, they would have to fulfil the functions of a successor. This means, among other things, that they would have to support and maintain the members of the household and perform rituals during sickness and death. This would bring about fundamental changes in the status of women, and indeed in the "traditional" way of communal life.
It is however not yet clear in this regard whether the chapter on fundamental rights should be applied only horizontally. Even if horizontal application is assumed, strong arguments can be advanced against the application of the equality clause in the case of traditional political succession.
First, we must determine what is meant by "unreasonable discrimination" as found in section 9(3). Secondly, the provisions of section 36 may be applicable. Section 36(2) states that an indigenous legal rule does not limit the fundamental rights in the Constitution, "except as determined in subsection (1) or any other determination of the Constitution".
Sections 211 and 212 of the Constitution make provision for the continued existence of traditional authorities. If the principle of patrilineal (or agnatic) succession is abolished, it will mean that this authority is no longer traditional. Thirdly, it can be argued that the political background that resulted in the chapter on traditional authorities (ch 12) in the Constitution cannot be ignored if a decision is made on the application and interpretation of this chapter. The traditional leaders were specifically persuaded to support the Constitution and the new political dispensation on condition that the traditional form of government would be protected. It would be highly unjust if the Constitution were later interpreted in a manner that ignores this understanding.

**The traditional Leader:**

(a) Attaining a position of authority:
The head of the community is normally the most senior male member of the ruling lineage. His position as central authority figure in the community is determined by his ranking in the line of descent within the ruling lineage and is passed on to his successor in accordance with the rules of succession observed by the community concerned. These rules prescribe that the traditional leader's successor should be the oldest son. The chieftainship is born, the seniority principle is a primary consideration and is

usually decisive, but the successor is subject to thorough deliberation and consultation among senior members of the ruling lineage who are responsible for designating the effective successor. In most cases, the essential condition for the succession to the traditional leadership is that the potential successor should have been born to a particular woman, namely the principal wife, the wife or mother of the community. It is customary for a traditional leader to marry the daughter of another traditional leader, this is not an absolute requirement. If such a marriage is not possible, a woman belonging to one of the senior lines of descent within the community may be selected as principal wife. In some communities, the traditional leader's lineage (royal family) is duty-bound to provide the marriage goods for his bride on behalf of the community has a whole.

Adulthood is regarded as a prerequisite for the traditional leadership. Among certain communities, the principal wife may be married only after death of the traditional leader while, among other, the rightful heir to the throne has the right to marry the principal wife while his father is still alive.

(b) Replacement and regency:
Should the principal wife be barren or bear only daughters, a supplementary wife may be requested in accordance with the sororate. This practice ensures that the traditional leader will have a successor and that this successor will be born into the principal house as the supplementary wife is affiliated to the principal house. The *nhlantswa / mupfula rhumbi* bears the successor on behalf of the barren principal wife.

Should it happen that neither the principal wife nor the supplementary wife give birth to a boy, the traditional leadership will go to the eldest son of the late traditional leaders second wife in the ranking of women. Normally the ranking of wives is determined by the order in which they were married.
When a supplementary wife is married, this ranking is disturbed, since the supplementary wife is always ranked directly after the wife for whom she was married. Hence, all other women will then shift to one position lower in the order of ranking.

Should the successor die before his father, the status as traditional leader will eventually go to the oldest son of the late successor, provided the royal family approves this sons mother as principal wife. If the successor dies without any descendants with his principal wife, two options remain
- to procreate a son with his principal wife in accordance with the levirate practice. It is a prime requisite that the procreator be the younger brother of the deceased successor or a close patrilineal relative of the deceased or his late successor as the new successor.

- Designate the younger brother of the late successor as the new successor

The argument mostly advanced against the succession of women, where a woman marries, the traditional title will divest from the right royal family and vest in foreign hands, as a result bringing with it foreign rule and that women, should bear children who will succeed in the place of their father. The belief is that when a man delivers *lobolo* and married a woman, her procreative being is transferred to her husbands community.

(c) Fulfilment of function:
The position of traditional leader is due to his descent, his ability to maintain that position depends on how well he fulfils his function and obligations. If he neglects his duty, he may experience several problems and he will lose authority and prestige.

**Bodies advising the traditional leader:**

(a) Private (family) council:
Composition:
The private council is no formal body and has no formal composition. The number of members varies in accordance with the traditional leaders wishes, depending on the nature of the advise he requires. Members are the traditional leader's fathers brothers, his own brothers and a number of trusted confidants. The council as a whole is the advisory body.

Functions: the private council may be described as the body that rules from behind the scenes. It may be regarded as the policy-making body within the community. It concerns itself with all matters relating to the political and judicial organisation of the community.

(b) Traditional Council:
Composition:
The traditional council is a closed council with a formal composition. All ward heads are automatically entitled to seats on this council, as are all the members of the family council on the grounds that they represent the ruling family. With the approval of the council, the traditional leader may co-opt additional members on account of their special insight into community affairs. They are usually drawn from the traditional leaders own private councillors, or those who served his predecessor in that capacity.

Functions:

All important community matters must be laid before the traditional council. The private / family council will already have formed an opinion on the matter in hand. When it is discussed in the traditional council, these members have the task of convincing in the council as a whole that this opinion is the correct one (the traditional council is not restricted to discussing matters laid before it by the family council). A wide variety of matters may be discussed by the council eg: actions of the traditional leaders, new community legislation, the levying of taxes, land utilisation, the control of cattle.

(c) Court Council:
Composition:
The court of the traditional leader is closely related to the person and status of the traditional leader and to those of his family. The traditional leader is primarily bound to fulfil judicial duties. Senior members of his patrilineage are co-responsible. Judicial duties fall mainly on those who live near the royal village and on the elderly men and others who have some knowledge of the indigenous law. These men are appointed for this purpose and must therefore be present.

Functions:
Originally the court of the traditional leader was the highest court of appeal in any rural community. Although this court is known as the traditional leaders court, it is in fact the court of the community. At present, it is also the only community court which enjoys government recognition, and which has judicial authority in both civil and criminal (limited) matters.

(d) Community Assembly:
Composition:
Originally the community assembly played a more prominent role than today. All the adult men in the community are entitled to attend community assemblies.

Functions:
The community assembly is summoned only when the traditional council wishes to make a public announcement concerning its decisions. Such announcements can include things related to the levying of taxes, land utilisation, the control of cattle, the appointment and dismissal of ward heads, the administration of justice and the moving of the community.

The traditional state must be seen as people in a cultural context who comprise an autonomous jural community, this a political community with its own juristic life. There are 3 factors which play a role in the establishment and structure of jural community being, genealogical,

religious and territorial. The state comprised a hierarchy of jural communities, the empire, the federation of tribes, the tribe, the district or section, the town and town wards and the ward.
Head of the comprehensive jural community exercised judicial, executive and legislative functions of government.

Thus a jural community must have:

- Own territory, boundaries of comprehensive jural community clearly demarcated with reference to graphical features. i.e., rivers. Boundaries of subordinate jural communities not clearly demarcated. Control by subordinate jural communities over their territories is subject to the authority of the comprehensive jural community.
- Own house, there must be interaction between members of the jural community.
- Own public law authority which represents jural community against outside communities and exercise authority within the community.

**Recognition and functions of traditional leaders:**

**Powers, functions and duties:**

The powers, functions and duties prescribed by Proclamation include the following

(a) to further the interests of the community
(b) to develop and improve territory
(c) to maintain law and order in the territory
(d) to further the exercise of all acts and regulations in his area in respect of:
    - Public health
    - Tax
    - Registration of births and deaths
    - Prevention of animal diseases
    - Land use and land administration

The Black Authorities Act granted recognition to the indigenous organs of authority.

A traditional authority was composed of the traditional leader and a number of council members. The council members could be nominated by the traditional leader or they could be elected, to the degree that the local indigenous law makes provision for this. Provision was also made for regional and territorial authorities.
According to Section 4, the powers functions and duties of traditional authority included the following

(a) managing the affairs of the tribe
(b) assistance and guidance to the traditional leader in the exercise of his duties
(c) in general, exercising powers and performing activities and duties which are within the presidents direction and fall within the scope of the traditional tribal management or powers that the president may grant.

# Traditional Leadership and Governance Framework:

Traditional Leadership and Governance Framework Act provides a framework and norms and standards on traditional leadership and governance.

The objectives of the Act:

(a) to set out a national framework and norms and standards that will define the place and role of traditional leadership within the new system of democratic governance
(b) to transform the institution in line with constitutional imperatives
(c) to restore the integrity and legitimacy of the institution of traditional leadership in line with customary law and practices.

## Traditional Communities:

A community may be recognised as a traditional community if it:

(a) is subject to a system of traditional leadership in terms of that community's customs and
(b) observes a system of customary law

The recognition is to be done by the premier of a province in accordance with provincial legislation and after consultation with the provincial house of traditional leaders, the community concerned and the king / queen, if any, under whose authority the community will fall.

The community must transform and adapt the relevant customary law and customs so as to comply with the relevant provisions contained in the Bill of Rights by:

(a) preventing unfair discrimination
(b) promoting equality
(c) seeking to progressively advance gender representation in the succession to traditional leadership positions.

## Recognition of kingships and queenships:

A group of traditional communities may be recognised as a kingship or queenship. One of the senior traditional leaders who has a higher status than the others must be recognised as king or queen, the group must regard themselves as a distinct group and it must have a system of traditional leadership at a kingship or queenship level.

## Recognition of principal traditional communities:

With the introduction of principal traditional communities there would therefore be three levels:

(a) traditional communities
(b) principal traditional communities

(c) kingships and queenships

**Establishment and recognition of traditional councils:**

A council is to be established for each of the three levels of the principal traditional communities. The first is a traditional council in respect of a traditional community. The membership of a traditional council is specific in that at least a third must be women and overall the members must comprise

(a) traditional leaders and members of the traditional community
(b) other members of the traditional community who are democratically elected for a term of five years

**Establishment and recognition of kingships or queenships councils:**

Establishment of a council is entrusted to the president. At least a third of the members must be women, provided that if an insufficient number are available the minister may determine a lower threshold.

(a) 60% of traditional leaders
(b) 40% of the members elected democratically

**Functions of traditional councils:**

Six of these functions enjoin the councils to contribute towards, participate in and promote development in one form or another. Most of the functions are aimed at supporting municipalities and other government organs, only two are inherent functions, namely:

(a) administering the affairs of the traditional community in accordance with custom and traditional
(b) performing the functions conferred by customary law, customs and statutory law consistent with the Constitution.
(c) Assisting the king or queen in performing customary functions in relation to the recognition of senior traditional leaders where applicable
(d) Mediating disputes between senior traditional leaderships falling within the jurisdiction of the kingship or queenship
(e) Promoting unity between traditional communities falling under the jurisdiction of the kingship or queenship
(f) Assisting the king or queen in performing his / her roles and functions conferred upon him or her by the president in terms of the regulations issued under section 9 (5)

**Recognition of traditional leadership positions:**

There are four leadership positions

(a) kingship / queenship
(b) principal traditional leadership
(c) senior traditional leadership
(d) headmanship

to that may be added:

(e) regents
(f) acting traditional leaders
(g) deputy traditional leaders

The actual appointments of kings and queens are done by the president and in the case of principal and senior traditional leaders, headmen, headwomen and regents the premier of the relevant province.

A queen, king or principal leader, senior traditional leader, headman or headwoman may appoint a deputy to act in his / her stead. This appointment may be made when any of them:

(a) becomes a full-time member of the a municipal council
(b) is elected as a member of a provincial legislature
(c) is elected as a member of the National Assembly
(d) is appointed as a permanent delegate in the National Council of provinces
(e) is elected to or appointed in a full time position in any house of traditional leaders

**Withdrawal of recognition of traditional communities**

In terms of section 7 the withdrawal of the recognition of a community as a traditional community must be done by the Premier of a province in accordance with the applicable provincial legislation. This is done where the community requests the removal, government is requested to review the position or where two or more recognized communities are merged into a single mass.

**House of traditional leaders:**

The houses of traditional leaders in the Republic of South Africa are:

(a) A National house of traditional leaders and provincial houses of traditional leaders as provided for in Sec 212(2)(a) of the Constitution; and
(b) Local houses of traditional leaders established in accordance with the principles set out in Sec 17.

**National House of Traditional Leaders:**

The house consists of three senior traditional leaders elected by each provincial house. Where a provincial house has not been established the following scenarios are foreseen:

- there may be more than three traditional councils performing functions of a local house. In that event the chairpersons of the councils must from among themselves elect three representatives to the House.

- There may be only three or less traditional councils performing functions of a local house. In such event the chairpersons of the councils are *ex officio* members of the House.
- There may be one or more local houses in which event the senior traditional leaders in the province must from among themselves elect three representatives to the House.

At least a third of the members must be women.

The powers and duties of the House include:

(a) it must cooperate with the provincial house of traditional leaders, to promote the following
EG: The role of traditional leadership with a democratic constitutional dispensation, nation building, peace, stability and cohesiveness of communities.

(b) it must enhance co-operation between the House and various provincial houses with a view to addressing matters of common interest

(c) it may investigate and make available information on traditional leadership, traditional communities, customary law and customs

(d) It must be consulted on national government development programmes that affect traditional communities.

**Local houses of traditional leaders:**

The functions of a local house are as follows:

(a) the house must advise the district municipality on metropolitan municipality in question on:

- matters pertaining to customary law, customs, traditional leadership and the traditional communities within the district municipality or metropolitan municipality
- the development of planning frameworks that impact on traditional communities
- the development of by-laws that impact on traditional communities

(b) the house must participate in local programmes that have the development of rural communities as an object

(c) The house must participate in local initiatives that are aimed at monitoring, reviewing or evaluating government programmes in rural communities.

Where a local house of traditional leaders cannot be established, the functions of a local house are performed by the *traditional* council within the district municipality or metropolitan municipality concerned.

# Indigenous principles of succession to traditional leadership:

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

It is a hereditary system and the position of the traditional leader follows the patrilineage (male line).
Succession in the female line is the exception in Southern Africa. The successor is the eldest son of the ruler by the tribal or main wife. The tribal or main wife is often married specifically for this purpose and the tribe contributes towards her marriage goods. For example the ruler cannot decide that he wishes to divorce her or that she will not bear the successor. She is the tribal wife and her position is indisputable. Among most groups such a woman should meet specific requirements. Among the Northern Sotho, no woman other than the tribal wife can bear the successor. Substitution is possible, however.

The other wives of the ruler occupy a particular position of rank, and this ranking order has significance, especially in situations where an acting traditional leader or regent has to be appointed.
The sons of a ruler by his various wives retain the rank of their mothers. Among some groups this ranking order is confirmed during the rites of circumcision.
The rules according to which younger full and half brothers of a successor may succeed vary greatly among different groups.
Among the Northern Sotho, such sons cannot succeed, but can only act as regents.
General recognition of substitution of the ruler by the institution of the *levirate* and substitution of the tribal wife by the *sororate* institution (institution whereby the man has certain rights with regard to the sisters of his wife, if it appears that his wife is infertile, or the right to marry her sister after her death) or complementation of the wife (custom in terms of which a specific defect is supplemented without replacing the person who has the defect). Once the defect has been complemented, the person standing in to make the defect good is under no obligation towards the husband's group. Substitution of the husband occurs where the husband dies before he can marry or before he can marry the tribal wife, in which case children are raised on his behalf with a wife married after his death, usually to a relative, such as his younger brother. This is the *ukuvusa* custom.
Substitution also occurs where the ruler dies without a son by the tribal wife. Provided the wife is still fertile a son is raised on behalf of the deceased with his wife in terms of the *ukungena* custom and this son becomes the lawful successor.
Substitution of the tribal wife occurs in those cases where she dies without a son, in which case she is substituted for by a relative.

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

Challenges to some of the above-mentioned customary principles of succession to traditional leadership have recently been interpreted in courts. The principle of patriarchy, which advocates for males only to be considered for succession to positions of traditional leadership was challenged in the case of ***Shilubana:***
The case concerned the constitutional validity of the principle of male primogeniture that governed succession to chieftainship. The senior traditional leader of the Valoyi traditional community died in 1968 without a male heir. As a result of the application of the principle of male primogeniture governing the customary laws of succession, his daughter, S, was not considered for the position even though she was not only her father's eldest child, but his only child. He was instead succeeded by his younger brother, R.

In the course of 1996 and 1997, the Royal family of the Valoyi community passed resolutions, which were later approved by the royal council and the tribal council, to the effect that S would succeed him, since in the new Constitutional era, women are equal to men. Her succession was approved by the provincial government.
However, following the death of R in 2001, N interdicted S's installation and challenged her succession, claiming that the tribal authorities had acted unlawfully and that he, as R's eldest son, was entitled to succeed his father. N subsequently sought a declaratory order in the Pretoria High Court to the effect that he is the rightful successor to R. Both the High Court and the Supreme Court of Appeal ruled in his favour, reasoning that even if traditions and customary law of the Valoyi currently permit women to succeed as
N, as the eldest child of R, was entitled to succeed him. S appealed to the Constitutional Court against the judgment and order of the Supreme Court of Appeal.

S claimed that the Royal family had acted well within their powers in amending customary law when they restored the traditional leadership to the house from which it had been removed on the basis of gender discrimination. N argued on the other hand that according to Valoyi customary law the eldest son of the previous traditional leader was the

successor in title; and the appointment of S as traditional leader was grossly irregular and void as the traditional institutions had acted *ultra vires* in identifying someone else instead of the heir.

The Constitutional court held that both the traditions and the present practice of the community had to be considered and that the spirit, purport and objects of the Bill of Rights have to be promoted. The Court reasoned that the community had a right to develop its own laws and customs, and this right had to be respected where it is consistent with the continuing effective operation of the law and that the actions by the traditional authority reflected a valid change to customary law which resulted in S's succession to traditional leadership. Consequently, N did not have a right to the traditional leadership under the customary law of the Valoyi traditional community.

With regard to the primogeniture principle, it would seem that in public law the eldest child (male or female) of a Hosi has a claim to succeed his / her parent in that position. If such a child is a female she can still claim that position even though it was given to her nearest male relative due to unfair gender discrimination some decades ago during the long years of colonisation and apartheid.

**Legislative measures governing succession to traditional leadership**

Originally each tribe, and more particularly the ruling family, decided on succession. The question of succession arose when a ruler died and a successor to him had to be appointed.
Originally a ruler could not relinquish his office or be relieved of it since he held his office on the grounds of his genealogical position within the ruling family. The Northern Sotho express this principle in the following maxim: *kgosi ke kgosi ka madi a bogosi* (a *kgosi is kgosi* through the blood of chieftainship).

The following situations may arise on the death of the ruler:

- There is a suitable successor and succession can take place without delay.
- No successor has yet been born or the successor according to the rules of succession is either not suitable or not competent to succeed. In such a case a person has to be appointed to act as a regent until such time as a lawful successor is in a position to succeed.

Over time the original power of the ruling family and the tribe to decide on a successor has been subjected to the recognition of the successor by the state authority.
At present the provinces are vested with the power to recognise and appoint traditional leaders. In addition to this the provincial legislature is not bound by the local law of succession of a particular tribe. Tribes are

usually permitted to nominate a person according to tribal law for institution and recognition as chief.

In terms of section 9(2)(a) & (b) of the Traditional Leadership and Governance Framework Act 41 of 2003, the President must, subject to subsection (3), recognise a person so identified in terms of paragraph (a)(1) as a King or a Queen. This is done by way of

a) a notice in the *Government Gazette* recognising the person identified as King or Queen, and
b) the issuing of a certificate of recognition to the identified person

Senior traditional leaders, headmen and headwomen are recognised in accordance with section 11 of the Act by the Premier of each province by

a) placing a notice in the *Provincial Gazette* recognising the person so identified
b) issuing a certificate of recognition to the identified person
c) informing the relevant House of Traditional Leaders of the recognition of the senior traditional leader, headman or headwoman

The Act provides that should there be any evidence or an allegation that the identification of a person as a traditional leader was not done in accordance with African customary law, customs or processes, the President or the Premier of that particular province, as the case may be –

- may refer the matter to the National House of Traditional Leaders (in the case of a King or a Queen)
- may refuse to issue a certificate of recognition must refer the matter back to the royal family for reconsideration and resolution where the certificate of recognition has been refused

The Act also provides for the removal from office of senior traditional leaders, headmen and headwomen on the following grounds:

a) conviction of an offence carrying a sentence of imprisonment of more than 12 months without the option of a fine
b) physical incapacity or mental infirmity which, based on acceptable medical evidence, makes it impossible for that senior traditional leader, head- man or headwoman to function as such
c) wrongful appointment or recognition, or
d) a transgression of a customary rule or principle that warrants removal

Where the successor to the position of King, Queen, senior traditional leader, headman or headwoman identified in terms of section 9 or 11 is still regarded as a minor in terms of applicable customary law or customs,

a) the royal family concerned must within a reasonable time
    i. identify a regent to assume leadership on behalf of the minor,

ii. through the relevant authority structure, inform the Premier of the province concerned of the particulars of the person identified as regent and the reasons for the identification of that person, and

b) the Premier concerned must with due regard to applicable customary law or customs and subject to subsections (2) and (3) recognise the regent identified by the royal family in accordance with provincial legislation.

A royal family may, in accordance with provincial legislation, under certain circumstances identify a suitable person to act as a King, Queen, senior traditional leader, headman or headwoman, as the case may be. Deputy traditional leaders are also recognised in terms of section 15 of the Act to act on behalf of traditional leaders in their absence. Their appointment and removal is regulated by provincial legislation. When such appointments are made the traditional leader is required to inform the President of the appointments.

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**SUMMARY OF THE SHILUBANA CASE:**

**Shilubana and Others v Sidwell Nwamitwa:**

Constitutional Court handed down judgment in the appeal by Ms Shilubana against a judgment and order of the Supreme Court of Appeal. The appeal concerned a dispute between Ms Shilubana and Mr Nwamitwa over the right to succeed Mr Nwamitwa's father, Richard Nwamitwa, as Hosi (Chief) of the Valoyi traditional community in Limpopo.

In 1968 Ms Shilubana's father, Hosi Fofoza Nwamitwa, died without a male heir. Because customary law at the time did not permit a woman to become Hosi, Ms Shilubana did not succeed him as Hosi although she was his eldest child. Hosi Fofoza was instead succeeded by his brother, Richard Nwamitwa. During 1996 and 1997 the traditional authorities of the Valoyi community passed resolutions deciding that Ms Shilubana would succeed Hosi Richard, since in the new constitutional era women were equal to men. Her succession was approved by the provincial government. However, following the death of Hosi Richard in 2001, Mr Nwamitwa interdicted Ms Shilubana's installation and challenged her succession, claiming that the tribal authorities had acted unlawfully and that he, as Hosi Richard's eldest son, was entitled to succeed his father.

Mr Nwamitwa subsequently sought a declaration in the Pretoria High Court that he is the rightful successor to Hosi Richard. Both the Pretoria High Court and the Supreme Court of Appeal ruled in favour of Mr Nwamitwa.

Van der Westhuizen J, writing for a unanimous Court, held that the High Court and the Supreme Court of Appeal failed to acknowledge the power of the traditional authorities to develop customary law. In seeking to determine customary law, courts must consider the past practice of the community. Section 211(2) of the Constitution however requires courts to respect the right of traditional communities to develop their own law. Courts, after receiving evidence from the parties of the present practice of traditional communities, must acknowledge developments if they have occurred. Finally, courts must balance the need for flexibility and the imperative to facilitate development against the value of legal certainty and respect for vested rights. Relevant factors for this balancing test include the nature of the law in question, in particular the implications of the change on constitutional and other legal rights, the process by which the alleged change occurred or is occurring, and the vulnerability of parties affected by the law.

Applying this test, the Court found that the succession to the leadership of the Valoyi had operated in the past according to the principle of male primogeniture. However, the traditional authorities had the authority to develop customary law. They did so in accordance with the constitutional right to equality. The value of recognising the development by a traditional community of its own law in accordance with the Constitution was not outweighed by the need for legal certainty or the protection of rights. The change in customary law did not create legal uncertainty and Mr Nwamitwa did not have a vested right to be Hosi.

The Court concluded that the traditional authorities had the authority to develop their customary law under the Constitution and that Mr Nwamitwa did not have a right to be declared Hosi. The appeal was upheld.

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**Problems in connection with succession**

At present it is no longer possible for tribes to divide in order to solve a succession dispute, merely because unallocated land is no longer available. In modern times parties within the ruling family even call upon the High Court to solve their disputes. However, a decision by a court seldom succeeds in solving a problem of succession, with the result that internal disputes regarding traditional leadership became a chronic problem that could last generations.

The following are some of the causes of succession disputes:

- The traditional leader tries to divorce the tribal wife without the cooperation of the ruling family. The tribal wife is not actually the wife of the traditional leader. He cannot, therefore, divorce her at will. In modern times the problem may intensify where a civil marriage is involved. There are examples of cases of a traditional leader being married to his tribal wife in a civil marriage and later on marrying further wives according to customary law. In many of these cases the position of the tribal wife was disputed and it is for this reason that the argument has been advanced that the tribal wife should not be married by means of a civil marriage.
- In modern times it sometimes happens that the traditional leader marries a wife in a civil marriage without the cooperation of the ruling family or against their wishes. This wife is then the only wife and is sometimes even regarded as tribal wife, although in terms of customary law she is not.
- The appointment of the tribal wife or another wife of the traditional leader as a regent. The appointment of a wife to act temporarily as traditional leader is now a fairly common occurrence. Some of the problems in this connection result from situations
    - where the tribal wife associates with “unacceptable males”
    - where she refuses to cooperate with the ruling family
    - where a wife who is not the tribal wife tries to usurp the traditional leadership for her son
    - where the tribal wife is opposed by the deceased chief’s brothers and half brothers
- The ranking of the traditional leader’s wives often gives rise to disputes. In many cases the tribal wife’s position is disputed by descendants of a wife who was married before the tribal wife was married.
- A temporary lack of a tribal wife also eventually leads to serious problems, since the wife who temporarily took over the functions of the tribal wife often claims the status of tribal wife afterwards.

The biological paternity of the successor is often disputed despite the fact that it is generally accepted that a married woman cannot give birth to an illegitimate child, for the child is child of the cattle (marriage goods) Witchcraft also often leads to accusations against the tribal wife in order to exclude the rightful successor. – “a mamba gives birth to a mamba.”

Substitution, in particular of the wife, but sometimes also of the husband, occasionally leads to the rightful successor's claim being questioned at a later stage. In such cases the man or woman who acted as the substitute claims the privileges of the man or woman for whom they were substituted.

**Court's interpretation of succession disputes**

The incidence of succession disputes in respect of traditional leaders indicates that the office of traditional leadership in rural areas is still of significance. As the traditional leader reigns with the assistance of the ruling family and not as an individual and this family has to appoint a successor, any serious dissent within the family has implications for efficient administration and the administration of justice at the tribal level. In most cases any succession dispute results in a split in the ruling family, which is reflected at the tribal level. In the interests of efficient administration it is therefore necessary that any succession dispute be solved as soon as possible and this requires cognisance and application of the local law of succession.

**Resolution of succession disputes and Commission on Traditional Leadership Disputes and Claims**

Whenever a dispute concerning customary law or customs arises within a traditional community, or between traditional communities or other customary institutions on matters arising out of the implementation of Act, members of such a community and traditional leaders within the traditional community or customary institution concerned must seek to resolve the dispute internally and in accordance with customs. If the dispute cannot be resolved internally, it must be referred to the relevant provincial house of traditional leaders, which house must seek to resolve the dispute in accordance with internal rules and procedures. If the provincial house of traditional leaders is unable to resolve the dispute, the dispute must be referred to the Premier of the province concerned, who must resolve the dispute after having consulted –

1. the parties to the dispute, and
2. the provincial house of traditional leaders concerned.

Traditional Leadership Disputes and Claims. This Commission may decide on any traditional leadership dispute and claims arising in any province. The commission can investigate several traditional leadership issues, including those that relate to disputes concerning succession to traditional leadership.

The commission must consider and apply customary law and the customs of the relevant traditional community at the time the events occurred when considering a dispute or a claim. In particular, when the claim considered by the commission is in respect of a kingship, or senior traditional leadership or headmanship, the commission is required to be guided, among other things, by the customary norms relevant to either the establishment of a kingship or senior traditional leadership or headmanship.

# CONSTITUTIONAL & ADMINISTRATIVE LAW

The indigenous state:

**Characteristics:**

Should be seen as a jural community (political unit with own juristic life).

**A jural community**:

- **Own territory**: boundaries of comprehensive jural community clearly demarcated with reference to topographical features i.e. rivers etc. boundaries of subordinate jural communities not clearly demarcated. Control by subordinate jural communities over their territories is subject to the authority of the comprehensive jural community.
- **Own household**: interaction between members of the jural community.
- **Own public law authority**: represent jural community against outside communities and exercise authority within the community.

**3 factors which play a role in the establishment and structure of jural community**:

Genealogical
Religious
Territorial

The state comprised a hierarchy of jural communities: the empire, the federation of tribes, the tribe, the district or section, the town and town wards and the ward.
Simplest indigenous structure of the state = the tribe which was comprised of wards
The organ of authority of the comprehensive jural community exercised control over the territory and its occupants.
Constituent jural communities were subject to the authority which was the next highest (due to the hierarchical structure).
Components of the wards were kinship units and did not form jural communities.
Head of the comprehensive jural community exercised judicial, executive and legislative functions of government (unspecialized - powers were not separated).
But lower organs of authority only had executive and jural functions - no legislative function.

**The ruler**

In principle head of state = man. But in some groups they were women.
Patrilineal succession was applied in general.
Successor was not specifically trained during his life time.
Sometimes there were customs in respect of choice of the main wife to bear the successor.

Previously the indigenous ruler only had a public capacity - but he could not do as he wished with public property.
If he exceeded his powers his actions would be invalid.
If he continued with illegal actions the citizens could refuse to obey him or even leave the area – "ruler of pumpkins".
Head of state was assisted in his governmental functions by various councils.

## THE INDIGENOUS ADMINISTRATIVE ACT NBNBNBNB!

**Validity requirements**

Indigenous administrative act refers to an action of an administrative organ e.g. chief or ward head.
Such acts create legal rules for subjects and authoritative bodies - act in conflict with these rules constitute a crime.

Administrative determination = act whereby legal relations are created, amended or abrogated e.g. allocation or refusal of residential and agricultural land.

**Determinations can be divided into**:

- General determinations: general legal relations are created, amended or abrogated - valid in respect of all subjects. An example of this is the traditional leader's decision or determination to reserve a particular area as grazing land for a specified time. This decision is valid for all subjects. This must be made known in public so the whole chiefdom can take notice, for example at a public assembly. If someone successfully opposes a general determination it falls away in respect of all subjects.

- Particular determinations: creates, amends or terminates particular legal relations, for example the allocation of a residential site to a particular family or the removal of a particular family from one place to another. This applies to a particular subject and must be conveyed by personal notification – orally to the person concerned by the ruler's messenger.

**The author**

The ruler is the author of the determination.
The ruler can institute or revoke a valid determination only if administrative power is exercised in accordance with valid legal rules.
The ruler may not create new laws or acts - traditional authority does this.
When ruler exercises his discretion which affects rights or powers of subjects he must collaborate with the traditional authority.
Administrative determination is only valid in the area of the traditional authority.
An instruction which addresses a person who lives outside of that territory cannot be enforced.

**The form of the act**

**Requirements of an administrative determination are related to**:

1. Announcement of it.
2. The content.
3. Correct procedures.

Determination is not valid if it does not come to the attention of the person to whom it relates.
Content of the determination must be clear and understandable e.g. order for removal must clearly state who must be removed, when, where to, and why.

**The purpose of the act**

Purpose of all administrative actions is to further the public interest, but there is also a particular objective for every action.
If an authorized action is directed towards an unauthorized purpose the action is invalid e.g. ruler wishes to remove a family so he can give the land to his friend.

**Consequences of the act**

Administrative act must be reasonable - requirements for reasonableness:

Consequences and effect of the act must be possible.
Rights and freedoms of subjects must not be exceedingly burdened by the exercise of discretion.
There must be no discrimination between individuals or groups except where law permits it.

Ruler's order that subjects must work for free in the interest of the community was held to be reasonable - but he may not make unreasonable distinction between age regiments.

No compensation is payable in respect of orders for removal but suitable land must be allotted else where, they must be allowed to remove all building material, and be allowed a reasonable time to harvest crops.

**Control over traditional leader's administrative actions**

General form of control = advice of the different councils.
Basis of this control is expressed by the maxim: “a kgosi is a kgosi thanks to people” - ruler must act in accordance with the will of the people.
Previously different councils advised the ruler but now the traditional authority does this. Any adult male tribal member can discuss the actions of the traditional leader during meeting of the tribal assembly.
In indigenous there are remedies for subjects who have been wronged by the administrative action of the ruler:

**Mediation**

Any objection to administrative action of the ruler must go before the private council for mediation this council exercises most control over the ruler's actions and makes sure that the ruling family rules with the ruler as the mouthpiece only.

Aggrieved subject complains to member of the council who then consults the ruler. If he finds the ruler acted wrongly he can reprimand him and make him offer pardon to the subject - cattle can be delivered by way of reconciliation.
Council can also act on its own against the wrongful action of the ruler.

E.g. of complaints lodged against ruler's actions: corporal punishment to women, mismanagement of tribal funds, and refusal to award residential land to a subject.

**Judicial control according to indigenous law**

Court action isn't available to a subject to oppose an administrative action as the ruler will be judge and accused in the same case.
But the subject can raise the invalidity of the action as a defence in a criminal suit.

**Internal review according to common law**

Ruler's actions can be reviewed by a higher authority e.g. local magistrate.
Can be done on request of the aggrieved or on the higher authority's own accord.
The organ can confirm, disapprove, amend or replace the action - the decision must fulfill validity requirements of an administrative determination.

If subject not happy with decision of the reviewing authority he can oppose it in court.
Traditional leader cannot oppose the decision in court as he and the magistrate are in the same hierarchy of power. He must appeal to a higher official.

**Judicial control according to common law**

Subject can directly apply to magistrate or Supreme Court to check the administrative action of the ruler.

**The subject has various remedies**:

1. Apply for review of the validity of the administrative act.
2. Apply for an interdict - chief ordered to stop the act which infringes the rights of the applicant.
3. Apply for mandamus - chief is compelled to execute his power.

In respect of review the court looks at validity and not effectiveness of the administrative act.
Today the traditional leader is privately and criminally liable for invalid actions.
Judicial review according to legislation

In terms of Promotion of Administrative Justice Act - any person may institute proceedings for judicial review of an administrative action.

The provisions of the Act apply to administrative decisions of traditional leaders but not to their judicial functions.