

## **Study unit 1**

### **The Law and Human Relationships**

- Legal relation – creates responsibilities and obligations
- Rights v Duties
- Public Law v Private Law
- Aim of legal system and how it is maintained

### **Characteristics of African Customary Law**

#### **1. Unwritten Nature**

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

#### **2. Customary Nature**

- Legal systems the result of age old traditions and customs that came to be classified as law over course of time
- No system of precedent

#### **3. Expression of community values**

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

#### **4. Magico-religious conceptions**

- Belief in ancestral spirits
- Belief in sorcery

#### **Observance of African customary law**

- Religious or sacral element of the law
- Public opinion
- Knowledge that if person is harmed, that person will endeavour to get compensation or take measures to protect himself
- Everybody in community has broad general knowledge of the law
- Fear of punishment
- Influence of indigenous leaders

#### **Nature of Customary Law**

**Specialisation** – distinction of certain functions or a definition of certain activities or separation, differentiation, division, distinction, classification, delimitation, definition or individualisation respect of time, activity, functions, interests, duties, knowledge and conceptions

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

- Relations governed by law more or less the same for all legal systems, ex.
- Means by which law is transferred from one generation to another
- Transgression of the law have consequences for transgressors

## **Differences between specialised and unspecialised legal systems**

### **1. Group v individual orientation**

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

### **2. Concrete v Abstract approaches**

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

### **3. Religious element**

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

### **4. Categorisation**

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

### **5. Kinship**

Read guide

## **6. Polygyny**

Read guide

## **7. Lack of formalities**

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

## **8. Time**

- No strong emphasis on time

## **9. Governmental functions**

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

## **Customary Law and the Constitution**

### **Law of Evidence Amendment Act , Section 1, implications**

- All courts may take judicial notice of indigenous law (subsection1), although they are not obliged to do so.
- Judicial notice is limited in so far as indigenous law may be ascertained readily and with sufficient certainty. The courts are thus not obliged to apply indigenous law in cases where

indigenous law is the obvious system to apply, but cannot be readily ascertained.

- There is no duty on the courts to take judicial notice of indigenous law by, for instance, calling in expert witnesses. It is not necessary for judges or magistrates to have any formal or practical knowledge of, or training in, indigenous law.
- In terms of subsection 2, evidence about indigenous law may be submitted to the court by the party himself (or herself). So, in terms of subsection 2 read with subsection 1, the onus is on the party or parties to prove indigenous law in court. This places a financial burden on the litigant, who must obtain the services of an expert witness.
- A further condition is that indigenous law must not be opposed to the principles of public policy or natural justice. A court may, however, not declare that lobolo or other similar customs are opposed to such principles. (The phrase 'opposed to the principles of public policy or natural justice' is often used as an equivalent for contra bonos mores ['against good morals'].)
- Subsection 3 contains rules for cases involving different systems of tribal law.

### **Before adoption of Constitution, Indigenous Law**

- Limited recognition
- Could be applied by all courts
- Could be amended or repealed by legislation
- Could not be opposed to the principles of public policy and natural justice

### **Questions for study unit 1**

- 1. Discuss Indigenous law as unspecialised law with specific reference to indigenous public law (25)**
- 2. Describe the factors that promote the observance of customary law (10)**
- 3. Discuss the relevance of public policy and natural justice in the application of customary law (10)**

One of the implications of section 1 of the law of Evidence Amendment Act 45 of 1988 was that the application of Indigenous law was not to be opposed to the principles of public policy and or natural justice. A further stipulation under that act was that a court may not declare that lobolo or other similar customs are opposed to such principles. The phrase 'opposed to the principles of public policy or natural justice' is often used as an equivalent for contra bonos mores["against good morals"]- the so called repugnancy clause.

With the constitutional advent the Constitution, the recognition of indigenous law became subjected to the Constitutional values themselves but not the repugnancy clause. Therefore the application of public policy and natural justice is no more relevant in recognising indigenous law. Indigenous /customary law is now subject to the Bill of Rights and must now be interpreted in the light of the so-called fundamental rights, and particularly in the light of the equality clause as contained in section 9.

- 4. Discuss the implications of section 211 for the recognition of customary law. (10)**

Section 211 of the Constitution of the Republic of South Africa, 1996 gives clear and unambiguous recognition to customary law. What recognition there is, is also expressed indirectly in various other provisions of the Constitution. These provisions and their implications are discussed in detail below. At this stage, it is important to remember that the Constitution contains a Bill of Rights.

This section reads as follows:

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

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

- All courts must apply and therefore also recognise customary law.
- The recognition and application of customary law are subject to the Bill of Rights.

- The recognition and application of customary law are subject to legislation that specifically deals with this. 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 thus have discretion to decide whether customary law is applicable in a particular case. This discretion should be exercised in agreement with the general principles of choice of law

**5. Why is it stated that section 30 and 31 forms the basis of a new approach to customary law? (20)**

- Section 30
- Section 31
- Discuss the meaning of the sections
- Discuss the implication of the sections
- Conclusion

**6. 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 culture of choice. How should this conflict be dealt with? (15) (self-evaluation question 2)**

**Judicial Revision of customary law**

- Role of Constitutional Court
- Role of High Court
- Section 38
- Rule is presumed constitutionally valid until decided otherwise by



competent court

## **Study unit two – The indigenous law of persons, customary family law and the law of marriage**

### **Introduction to Indigenous Law of persons**

- 1) In Customary Law, who or what can be the bearer of rights? (2)
- 2) Distinguish between status and rank in customary law (5)
- 3) How is status in customary law influenced by age(5), sex(5), family rank(5), house rank(5)?
- 4) In 1960, Thabo entered into a valid customary union with Zandi. In 1964, Thabo decided to enter into a customary marriage with Fikile. Fikile gave birth to a son named Senzo and a daughter named Lungile. In 1985, Zandi's house (from now on referred to as house Z) concluded an agreement with Fikile's house (from now on referred to as house F), in terms of which house Z had to provide five head of cattle to house F, which house F required as lobolo for Senzo (21). House F appointed Lungile (19) as the source from which the debt was to be repaid. House Z delivered the five head of cattle, but when house F received lobolo for Lungile in 1987, house F refused to transfer the lobolo to house Z on account that the debt had prescribed. As a result, house Z decided to take house F to court for the outstanding debt.

Discuss the legality of the following:

- a. The agreement between house Z and house F and the defence of house F that the claim has prescribed. (4)
- b. The decision of house Z to take house F to court. (4)

1. Only natural persons within the context of the group can be the bearers of rights.

2. Status is linked to a person's legal position or standing, and it is this status that determines a person's powers. In this connection, reference is sometimes made to a person's competencies, that is, powers derived directly from objective law.

Rank is just one factor which may influence a person's status. Rank plays a significant role in customary law. Thus the wives of a polyginist each have a particular rank, as does each of their houses. The members of the agnatic group also have a particular rank, according to their order of seniority in the group.

### 3. Age

- Minority and majority were unknown
- Age was not without legal significance ex a person could not marry until he/she had reached puberty
- Greater importance was attached to physical development, puberty was strongly emphasised with initiation ceremonies
- Considered adult when initiated and may marry.
- Position differs in modern indigenous law

### Sex

- Only male persons could succeed to positions of status
- Thus woman could never become family head or succeed to general property

- Woman could call upon wider family group if husband dealt irresponsibly with family goods
- Females occupied an inferior position.
- Position differs in modern indigenous law.

4a. The agreement between the houses is legal. The transfer of property between houses must be reasonable and for a just cause. Such transfer cannot take place arbitrarily. The family head must consult the members of the house concerned. The claim that the debt has prescribed is invalid. There is no such thing as prescription in customary law.

4b. House Z can not take house F to court. This is because the family head, namely Thabo can not simultaneously represent the one house as plaintiff and the other house as defendant. The principle involved here is that a household cannot be divided against itself. In modern indigenous law, the woman belonging to the house with the claim can initiate the claim against the family head or the other house.

### **Customary family law and the law of marriage**

#### **1. Evaluate the reform which has taken place in terms of the Recognition of Customary Marriages Act 120 of 1998, with regard to the proprietary consequences of a customary marriage. (8)**

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

been retained.

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

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

The Act also makes provision for spouses in a customary marriage entered into before 15 November 2000 to jointly apply to a court for leave to change the matrimonial property system governing their marriage or marriages. The court

may grant the application if it is satisfied that:

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

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

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

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

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

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

- (i) in the case of a marriage which is in community of property or which is subject to the accrual system;
  - (a) terminate the matrimonial property system which is applicable to the marriage; and;
  - (b) effect a division of the matrimonial property;
- (ii) ensure an equitable distribution of the matrimonial property; and
- (iii) take into account all the relevant circumstances of the family groups which would be affected if the application is granted.

The court may:

- (i) allow further amendments to the terms of the contract;
- (ii) grant the order subject to any condition it may deem just; or
- (iii) refuse the application if, in its opinion, the interests of any of the parties

I       Involved would not be sufficiently safeguarded by means of the proposed contract.

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

## **2. Discuss the indigenous prescription regarding the competence to enter into a valid traditional customary /indigenous marriage.       (8)**

There were no fixed age requirements. Among some Tswana, betrothal agreements were made between family groups even before the birth of the boy and girl.

Marriage only concluded once both parties were sexually mature.

In most cases no one could marry until they had undergone traditional initiation ceremonies.

Marital unions within certain degrees of kinship are forbidden

These prohibitions vary from group to group, but amongst all groups there is a prohibition on marriages between children of the same mother and father

Serious mental illness

Impotence and serious physical defects

Married woman could not have more than one husband.

## **3. Compare the legal requirements for a traditional customary marriage, a customary union and a customary marriage. (25)**

### **Traditional customary (indigenous) marriage**

- The must

- In case of woman there is a further requirement that she is not already involved in a marital union.

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

- Payment of (or delivery) of marriage goods
- Transfer of the bride
- There must be consent of the bride's guardian;
- There must be consent of the bride;
- Consent of the bridegroom

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## Requirements of customary union in KZN:

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

### Customary Marriage

- The prospective spouses must both be above the age of 18;
- They must both consent to be married to each other under customary law;
- Marriage must be entered into and celebrated in terms of customary law;
- Prospective spouses **must not be related to one another** within the prohibited degrees of kinship;

Or Similarities must cover **(full marks if all the differences and similarities are covered)**

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

[10]

## **Differences**

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

Customary marriage law has been drastically amended by the Recognition of Customary Marriages Act 120 of 1998. Discuss this statement with reference to:

4. In 1998, Sibongile (17) and Lebogang (16) concluded an agreement of marriage. Lobolo was agreed upon and Sibongile was delivered. She resided with the family of Lebogang. In 2002, the couple converted their marriage into a civil marriage. In 2007, Lebogang married Nonnie by customary rites as second wife.
- a. Did a legally valid marriage come into being between Sibongile and Lebogang?(5)
  - b. Would a legally valid marriage have come into being between them if they had concluded their marriage on 10 December 2001? (5)
  - c. Did a legally valid marriage come into being between Nonnie and Lebogang? (5)

## **Study Unit 3 – The Customary Law of Property**

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

- (c) What was the basic argument that was advanced by the Master and

The Minister in support of section 23(2) and regulation 3(1) in the *Moseneke* case and how did the court respond to this argument? (5)

(d) Who is responsible for the control of general property and house property? (5)

Distinguish between "general succession" and "special succession". (6)

Discuss the implications that could follow should the principle of patrilineal succession be abolished

(15)

Explain how the Traditional Leadership and Governance Framework Act 41 of 2003 has provided

for the resolution of succession disputes in indigenous law.

## Study unit three – The Customary Law of Property

### 1. What is the difference between inheritance and succession? (5)

Inheritance is mainly concerned with the division of a deceased's assets 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. Please note that this position is not the same for all groups. We will elaborate on this at a later stage in this lecture.

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

### 2. What was the basic argument that was advanced by the Master and The Minister in support of section 23(2) and regulation 3(1) in the *Moseneke* case and how did the court respond to this argument? (5)

The Constitutionality of both section 23(7) of the Black Administration Act and regulation 3(1) of Government Notice R200 of 1987 was contested in this case. The court found that section 23(7) and regulation 3(1) impose differentiation on the grounds of race, ethnic origin and colour and as such constitute unfair discrimination as envisaged in terms of section 9 of the Constitution and furthermore, that the limitations posed by the relevant legislative provisions were not 'reasonable and justifiable in an open and democratic society based on equality, freedom and dignity'. Accordingly it was held that both provisions were inconsistent with the provisions of the Constitution and thus invalid. However, in order to reach a just and equitable order it was held that ;

- (a) Section 23(7)(a) of the Act is invalid with immediate effect

- (b) The status quo with regard to estates already completed in terms of section 23(7)(a) of the Act and regulation 3(1) should be upheld
- (c) The declaration of invalidity in respect of regulation 3(1) is suspended for two years.

The order of the court in this case is said to have brought considerable changes to the winding up and administration of intestate Black estates that devolve in terms of the common law.

### 3. Outline the distinction between general property and house property. (8)

#### General Property

- Refers to property of the whole household, controlled by the head of the family including:
  - Property of the family's mother's house to which he has succeeded;
  - Property which family head has earned by his occupation;
  - Land allocated to the family head by tribal authorities and which has not been allocated to a particular house.

#### House Property

- Is property controlled by the head of the house which belongs to each separate house;
- The wife has reasonable degree of control over house property as far as daily household effects are concerned;
- In case where the property is used to the benefit of another a debt relationship is created;
  - House property includes earnings of family members including earnings of midwife or medicine woman;
  - Allocation of livestock to a particular house from general property;
  - Property given to a woman on her wedding day ie. Household utensils and *ubulungu* beast;
  - Marriage goods received for the daughter of the house,
  - Compensation for wife's adultery or seduction or seduction of any daughter;
  - Yields from fields belonging to the house;
  - Land allocated to a house for dwelling and cultivation.

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  - Compensation for wife's adultery or seduction or seduction of any daughter;
  - Yields from fields belonging to the house;
  - Land allocated to a house for dwelling and cultivation.

**5. State the general principles of the indigenous law of succession. (10)**

**6. Discuss the implications that could follow should the principle of patrilineal succession be abolished (15)**

**7. In 2000, Thabo (a family head) suffered a severe heart attack and died. He left behind two daughters, namely Nonhlanhla and Bongiwe, and a son named Mandla who were born from his first customary marriage to Zandi. He also left behind a son named Senzo and a daughter named Lungile, who were born from his second customary marriage to Fikile. His estate consisted of: marriage goods received for Lungile; compensation in respect of the seduction of Bongiwe; and land which had been allocated to him by the traditional authority, and had not been allotted to a particular house. Thabo also had an outstanding debt to pay, namely additional cattle for his son Senzo's lobolo. Explain how Thabo's estate will devolve.**

In the facts before us, the marriage goods received for Lungile constitutes house property and will, therefore, be succeeded to by the house successor, that is, Senzo. The compensation received in respect of the seduction of Bongiwe also constitutes house property and will therefore be succeeded to by the house successor which, in this case, is Mandla. The land which had been allocated to him by the traditional authority, and which had not been allotted to a particular house, constitutes general property and will therefore be succeeded to by the general successor who, in this case, will be Mandla. Originally, the successor succeeded to the predecessor's assets and liabilities; in modern indigenous law, the position varies. In KwaZulu-Natal, a successor succeeds to the assets of the estate, and he is generally liable for debts that are equivalent to the assets of the estate. He is also fully liable for debts that emanate from marriage contracts (the lobolo debts). In the rest of the Republic of South Africa, a successor succeeds to the assets and debts of his predecessor. If the family lived outside KwaZulu-Natal, then the successor, namely Mandla, would be liable for all the predecessor's debts, including the additional cattle for his son Senzo's lobolo and any other debts he may have had. If the family lived in KwaZulu-Natal, then the successor would only be liable for any debts emanating from marriage contracts. Which, in the case before us, therefore means that he would be liable for the additional cattle for his son Senzo's lobolo.

## Study unit four – The customary court procedure and evidence

**1. *Mangangahla* which is a *Sotho* word for court levy is significant in the following manner in customary law: (allocate 2 marks for any of the on five points from the 7 below))**

- It serves as compensation to the court or members of the court council for the time they have spent on a particular case;
  - Serves as goods that are given to the court councillors to close court proceedings in a form of a goat or cattle;
  - In case where the case took longer than expected a goat or cattle is slaughtered to feed the councillors;
  - It unified the court members and litigants and help to remove any visible trace of disagreements between these parties through sharing a meal;
  - Serves as compensation for any malicious damage caused;
  - Serves as punishment to any party who refuses to come to an accord (discussion) with another family group;
  - Today the court levy or *mangangahla* serves as a fine in a form of money to be paid into the tribal court.
- (10)

**2) Discuss the African customary law process of negotiation for settling disputes within the agnatic group**

The head of the family group, which consists of related agnatic groups comprising at the most three generations, is responsible for the conduct of its members, and has to see to it that disputes among its members are settled. The correct procedure here is negotiation with a view to reconciliation. Family disputes are settled by the head, assisted by the adult members of the family. In many cases the dispute is reported by the mother or senior female figure in the family. If she thinks that the people involved in the dispute cannot settle the dispute, the matter is reported to the head of the family. The head of the family then arranges a meeting for the adult members of the family in order to discuss the matter with the people involved in the dispute. This meeting is mostly held indoors, since it is regarded as a private matter. Family matters are generally regarded as private matters, and are not meant for the eyes and ears of outsiders, except neighbours. If a person mentions such a matter to outsiders, he or she is said to bring 'the eyes' of other people into the intimate affairs of the family.

If a matter cannot be settled within the family circle, senior relatives outside the



family are invited to help. If the matter also cannot be settled within this circle, the assistance of direct neighbours, who are often not relatives of the family, are called in. Sometimes the help of neighbours is called in before members of the wider family group are asked for help. In urban areas neighbours are virtually always invited to help, since the relatives of the parties concerned often do not live close by and are therefore not readily available.

During such meetings, the matter is discussed thoroughly and openly. The object is to look for ways of reconciliation the parties involved in the dispute with each other. Strong emphasis is placed on restoring the relations between those involved in the dispute, and between them and the other people present. Women generally also take part in these discussions. In some cases the procedure is conducted by one of the senior sisters of the head of the family.

If the meeting finds a solution to the problem, the wrongdoer is reprimanded, and is also required to 'wash the wrong'. This usually means that a chicken or a goat must be slaughtered and cooked and eaten during a meal shared by those present. Today even tea and biscuits or bread are used for this purpose. The meal then symbolises, in a visible way, that relations have been restored and that the disputing parties and the family group have been reconciled.

Disputes within the family group are usually settled with the help of relatives. It seldom happens that the disputing parties do not accept the proposed solution. However, if it does happen that the parties concerned do not accept the proposed solution, they have to take the dispute to the local headman. This headman is the head of the lowest customary court, and he may settle disputes between the inhabitants of that particular ward. In such instances the parties concerned have to be assisted by their relatives, but the relatives often do not wish to give such assistance. In such instance the headman serves first as a mediator before he makes a formal judicial decision.

The principles regarding competence to give evidence or to testify give expression to the

free and open system of evidence in customary law. Evaluate this statement.

- Everybody who knows something about cases is allowed to submit the evidence to court, **or**
  - all persons are competent to testify in court excluding insane and intoxicated persons;
  - There are no which technical grounds on which evidential material is excluded in principle;
  - Husband and wife may testify for and against each other and young children may testify as well;
  - It the task of the court to establish the truth and to bring about reconciliation.
- (5)

**2. Discuss the lodgement procedure in the African Court process (10)**

**3. Explain evidential burden in the African Court (10)**

## Study Unit 5 – African Customary Criminal Law

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

In Tswana and Northern Sotho contempt of the ruler is known as go nyatsa kgosi. The Southern Ndebele refer to it as ukunyaza ikosi. Contempt of the ruler is a serious crime. Any act of a subject that intentionally rejects, disregards, opposes or disputes the authority of the ruler constitutes a crime. Rejection of the authority of the traditional leader, the national assembly or the representative of the ruler, such as a headman or a messenger, is also regarded as contempt of the ruler.

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

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

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

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

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

Since the death penalty and corporal punishment as forms of punishment have been abolished by the Constitutional Court these forms of punishment can no longer be imposed. Nowadays traditional leaders also do not have the authority to banish subjects, and the only valid form of punishment is a fine.

**2. Discuss Guilt (culpability) as an element of a crime according to indigenous law. (10)**

- African customary law requires an act to be either intentional or negligent for it to be considered unlawful; **or** intention and negligence are the two forms of guilt
- Intent is when someone consciously does something he knows to be wrong (*boomo/maekaelelo*) eg assault, rape, murder, contempt of court.
- Negligence is when official discipline is not adhered to ie culpable homicide, which is the unlawful and negligent killing of a human being;
- African customary law does not make a strict distinction between intent and negligence, what it does consider is the relations between cause and effect;
- Customary law does not treat a small child and insane person as criminally liable for their unlawful conduct **or** they do not have mental ability to judge their actions or Customary law gives consideration to whether a person can be held criminally liable for his actions or not;
- Customary law determination for criminal liability in children in order to determine age of majority, depends on whether in case of boys that boy was just herding goats or whether herding cattle **or** in former times another test used to determine whether the perpetrator was still a minor, whether the in case of boys, the boy had undergone initiation ceremonies, if not then such a boy was considered not be a matured person and therefore lacked criminal liability;
- In customary law intoxicated or drug condition does not exclude criminal liability, nor can be used as a mitigating factor if the accused is responsible for his condition;
- The only time an intoxicated or drugged person can use the condition as a mitigating factor is only when the person accused was made or coerced to commit the crime;
- Supernatural causes such as sorcery does not exclude criminal liability;
- But fear that sorcery performed by the victim may endanger a person or his relatives or even the community may be regarded as a mitigating factor.

**3. During a stick fight C incurs serious injuries as a result of the other party in the stick fight (D). He accuses D of assault. What defence can D raise in court? (6)**

## Study unit 6 – Traditional Constitutional and Administrative Law

### 1. Discuss the constitutional inconsistencies which have been brought about by the recognition of traditional leadership.

The constitution of the Republic of South Africa<sup>108</sup> of 1996 makes provision for the continuation of traditional authorities in section 181 (1), and by implication for traditional leaders. This section states the following:

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

According to section 211(1), ‘the institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution’.

The inclusion of traditional leadership in a democratic constitutional dispensation, which is also included in the new Constitution which came into effect in 1997, leads to certain inconsistencies. The difference in degree between traditional and modern governments, and the meaning of these differences, greatly depends on the various functions of the government and the level of government in which they are exercised.

In so far as the legislative function is concerned, a democracy implies, among other things, regular elections. This system of chosen leaders is in contrast to the traditional system of hereditary leadership. Hereditary leadership is based on the principle of male primogeniture, with due regard to the status of the main wife or tribal wife. (Problems in this regard and the way in which the traditional principle is manipulated and abused when striving towards political power is discussed below in lecture 4). Even though these rules of succession are very much manipulated and abused, it is clear that elections should not be a measuring-rod for succession to traditional office. Hereditary leadership further implies that the official holds office for life, in contrast to the fixed terms of office of elected leaders in a democratic system. We must also accept that the constitutional writers consciously accepted that traditional leadership would be an exception to the democratic principle of free elections. The principle of elections has little effect on legislative powers at local- government level, as legislation never was an important characteristic of African customary law. Traditional

leaders always had unwritten and unlimited powers to make new 'law' for the community. The emphasis fell on the maintenance of existing law rather than on changes with a view to future developments.

This inconsistency is brought sharply to the fore when we look at the new powers that were given to the traditional leaders on the provincial and national levels. At the provincial level, provision was made for a House of Traditional Leaders and a Council for Traditional Leaders at the national level. These Bodies must advise the provincial and national legislatures respectively, and must make suggestions about matters concerning the traditional authorities and African customary law, as well as the traditions and customs of the traditional communities (s 212(2)).

At provincial level, traditional leaders are elected or appointed by traditional authorities to provincial houses, and on 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 to be considered by the provincial and national legislature, but cannot make laws by themselves. In addition, they can insist on being consulted about matters of African customary law, but they can do little more than delay the legislative process if they do not agree with specific legislation.

Another inconsistency with the Constitution is the clash with the equality clause (s 9(3)), and thus the African customary system of male succession. With a few exceptions, women are not clothed with any public political function in terms of African customary law. The Lobedu of Modjadji do however have a woman as the chief, while the Venda and Swazi clothe the chief's mother or sister with important functions. According to the Swazi, the king's mother is the mirror image of the king. In other groups, women today can act as regents while the rightful successor is still too young, or for any other reason cannot succeed.

According to the principle of equality there can be no argument that it is discriminatory that a chief's daughter cannot succeed if she is the first-born. According to the principle of primogeniture the first-born must succeed, regardless of whether they are male or female. The discriminatory element in the succession system is therefore the principle of patrilineal succession. This means that only males in the patrilineage can succeed. If a woman is allowed to succeed, it would mean that her children cannot succeed, as they are not members of the patrilineage. The question which arises in such circumstances is: Who must

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

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 deal with reverse discrimination (only women), and with the further problem that she is not allowed to marry formally.

Gender discrimination is not limited to succession to political offices it also affects the succession system of ordinary people, if the prohibition against gender discrimination is to be applied uniformly. If women would be allowed to succeed according to the African customary system of succession, they must fulfil the functions of a successor. This means, among other things, that they must support and maintain the members of the household and perform rituals during sickness and death. This will bring about fundamental changes to the status of women, and indeed to the 'traditional' way of communal life.

It is however not yet clear whether in this regard the chapter on fundamental rights should be applied only horizontally. Even if horizontal application is assumed, strong arguments can be advanced against the application of the equality clause in the case of traditional political succession.

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

Secondly, the provisions of section 36 may be applicable. Section 36(2) states, among other things, that an indigenous legal rule does not limit the fundamental rights in the Constitution, 'except as determined in subsection (1) or any other determination of the Constitution'. Sections 211 and 212 of the Constitution make provision for the continued existence of traditional authorities. If the principle of patrilineal (or agnatic) succession is abolished, it will mean that this authority is no longer traditional. Thirdly, it can be argued

that the political background that resulted in the chapter on traditional authorities (ch12) in the Constitution cannot be ignored if a decision is made on the application and interpretation of this chapter. The traditional leaders were specifically persuaded to support the Constitution and the new political dispensation on condition that the traditional government will be protected. It will be highly unjust if the Constitution is later interpreted in such a manner which ignores this understanding.

**(2) Distinguish between general and particular administrative determination. Explain why the distinction is important? (10)**

The difference between a general and a particular determination is important, because the rules of creation, revocation and interpretation of a general determination do not apply to particular determinations. A particular determination is directed at a particular subject and is conveyed to the person concerned by personal notification. A general determination must be made known in public in such a way that the whole chiefdom can take notice. Generally a general determination is made known during meetings of the ward or the general assembly. Further the annulment of a general determination affects the whole functioning of the determination, and not only the particular subject who opposes it. When some subjects successfully dispute the effect of a general determination on the grounds that the determination did not fulfil the legal requirements, and is thus invalid, the whole of the determination falls away, thus in relation to all the subjects and not only towards those subjects who opposed it.

**4. Advise the premier of the province concerned regarding succession in this tribe. (10)**

- Whenever a customary dispute concerning customary law or customs arises within a traditional community, or other customary institutions on matters arising out of implementation of the Act 4 of 2003, the members of such



community and traditional leaders must seek to resolve the dispute internally and in accordance with the customs;

- If the dispute cannot be resolved internally, it must then be referred to the relevant provincial house of traditional leaders, which must seek to resolve the dispute in accordance with the internal rules and procedures. If the provincial house of traditional leaders is unable to resolve the dispute, then it shall be referred to the premier of the province who will then apply the following customary law principles:
  - In principle the ruler is a male, except for the *Bolebedu* tribe, where at present the ruler is invariably a female, amongst some tribes females may act temporarily as traditional leader
  - It is the hereditary system and the position of the traditional leader to follow the patrilineage (male line) of succession;
  - Succession in South Africa in the female line is an exception and only to the fore only in parts of Malawi and Mozambique and amongst the Wambo in Namibia;
  - Where a successor is not suitable or not competent to succeed, a person has to be appointed as a regent until such time as a lawful successor is appointed or in a position to succeed;
  - The successor becomes the eldest son of the ruler of the tribal or main wife. Or the tribal wife is often married specifically for this purpose and the tribe contributes towards her marriage goods. Her position is undisputable and the ruler cannot decide to divorce her. Amongst most of the tribes no woman other than the tribal wife can bear the successor;
  - A ruler according to which a younger half or full brother of a successor may succeed vary greatly amongst different tribal groups. Amongst the Northern Sotho tribe such sons cannot succeed, but can only act as regents;
  - Where ruler married a wife in terms of civil marriage, in many cases the role of such tribal wife is disputed. In modern times it sometimes happen that the traditional leader marries a wife without the corporation of the ruling family, in that case the wife if she the

only wife, she is regarded as the tribal wife, although in terms of customary law she is not;

- 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 a child is a child of the cattle.
- (10)

**5. Discuss the control over the traditional leader's administrative actions according to the common law and statutory law. (15)**

- **Judicial review according to common law:** today, the traditional ruler functions with hierarchy of organs of authority, this means that his actions can also be reviewed by a higher authority within the same hierarchy of power;
- The local magistrate, the provincial minister entrusted with traditional authorities, and the state President can review the administrative actions of the traditional ruler;
- Internal review can be done at the request of an aggrieved subject or out of higher organ's own accord, **or** the higher authority can consider the validity of the act as well as the desirability and effectiveness of the act, or the internal organ confirm, disapprove, amend or replace the action, or the reviewing authority can also take the new facts into account and apply new consideration, however the decision must fulfil the validity requirement of administrative determinations;
- If the subject is not satisfied with the decision of the reviewing, he can oppose it in a court of law as the decision does not have the power of a court decision, or however the traditional ruler cannot oppose the decision of the court of law, because he and the magistrate belong to the same hierarchy of power and are not independent parties in such cases, the ruler can appeal to higher official in the hierarchy if he is not satisfied with the review.
- **Judicial control according to common law:** An aggrieved subject does not have first apply for internal review of the ruler's administrative action before

he can approach a court of law, he can directly apply to the magistrate's court or the supreme court to check the administrative action of the ruler;

- The subject can apply for review of the validity of the administrative act, apply for an interdict (which the chief is ordered to stop the act that infringes the rights of the applicant), apply for a mandamus (whereby the chief is compelled to execute his power),
- The act complained of can be opposed indirectly by raising the invalidity of the act as a defence in a criminal case.
- If the subject wishes to have the administrative action of the ruler deferred it must apply for a temporary interdict, because with review the court merely looks at the validity requirements of the administrative act and not the effectiveness;
- Today traditional leaders on account of invalid administrative actions are held privately and criminally liable. If he authorises or deprives a subject of his property or damages it or allows the initiation rites without his consent and to be circumcised, the subject can institute a claim against him.
- **Judicial review according to legislation:** In terms of section 6(1) of the Promotions of Administrative Justice Act of 2000, any person may institute proceedings in a court of law or a tribunal for judicial review of an administrative action;
- Administrative action refers only to action taken by an organ of state, when exercising a power, in terms of the constitution or the provincial constitution or exercising a public power or performing a public function in terms of any legislation, or any natural or juristic person, other than an organ of the state in terms of an empowering provision, which adversely affects the rights of any person and which has direct, external legal effect;
- Traditional leaders, headman and traditional authorities do make decisions of an administrative nature likely to have the said effect;
- Thus the provisions of the said Act apply to the administrative decisions of traditional leaders but not to their judicial functions. **(15)**

