**NOTE ILLUSTRATIONS PAGES viii, ix and 15**

**IND102-T**
**INTRODUCTION TO INDIGENOUS PUBLIC LAW**

**General** :

- Legal Concepts Change concept into questions "what", "why", "when" and "who"
  e.g. Reconciliation :
  (a) Why is "reconciliation" important?
  (b) Between whom must "reconciliation" be brought about?
  (c) How must "reconciliation" be brought about?
  (d) What happens if "reconciliation" is not brought about?

- Greater emphasis on people's duties rather than rights
- Important values
  (a) group orientation
  (b) "people orientation"
  (c) truth
  (d) informality

**Study Unit 1**

Lecture 1

1. **The law and human relationships**

1.1 Emphasis on duties rather than rights
1.2 "Public Law" –
- legal relations between a government and its subjects, and
- relations among the different parts of government i.e. legislative (responsible for passing of statutes), executive (responsible for application of statutes and other public services) and judicial organs (the courts)

1.3 "Private law" –
- legal relations between individuals and groups in capacity as private persons

1.4 Maintenance of order is supported by means of approving and disapproving legal sanctions
Sanction means = approval or confirmation of an act; and/or
Punishment of noncompliance with i.e. statutes or behavioural prescriptions.

2. **The name of this subject**

2.1 "law and custom" – implies that customs have the force of law – not the case
2.2 "customary law' – implies that law originated from custom only;

In indigenous law, tribal legislation and edicts of chiefs (traditional leaders) and kings also constitute an important source of origin;
"customary law" now synonymous with "indigenous law"

2.3 "Indigenous" means something originated in a country or region
- it belongs there;
- it is a natural occurrence; or
- it is limited to that particular country or region

3. **The division of indigenous law – National and international law**

3.1 National Law governs , within a certain state,
- the relations among subject as well as foreigners;
- the relations between subjects and government

3.2 International law, governs the relations between states

3.3 Distinction may be made between tribal law (national law) and the law of different tribes (international law)

3.4 Intertribal law ("indigenous international law") –
- agreements entered into between tribes to help one another against communal enemies; and
- marriages between tribal chiefs and women from ruling families of other tribes = sporadic barter between tribes

3.5 A distinction exists between Public and Private law in tribal law – public law governs relations between
- traditional authorities and subjects; and
- authorities within the tribe

3.6 Private Law ito Western Systems has seven subdivisions

3.6.1 **Law of persons** = determines the status of a person i.e. rights, duties, powers, capacities according to sex, age, mental state, married or unmarried, legitimacy. This plays an important part in indigenous law

3.6.2 **Family Law** = concerns marriage, parents and children, guardianship and curatorship

3.6.3 The **law of things** – rules concerning real rights iro material objects i.e. land, cattle, motor vehicles and furniture
The **law of immaterial property** – rules concerning rights over immaterial property i.e. patents and copyright (not known in indigenous law)
COLLECTIVELY KNOWN AS "THE LAW OR PROPERTY"

3.6.4 The **law of obligations** – rules relating to obligations (a legal tie between the debtor and creditor requiring performance by the debtor to do or refrain from doing something)

3.6.5 The **law of succession** – rules determining what is to become of a deceased person's estate (his patrimonial rights and duties)

3.6.6 The **law of personality** – right to honour, good name and privacy

3.7 Law may also be divided into **substantive law** and **adjective law**
- **Substantive law** prescribes to norms or requirements, and attached sanctions (i.e. approval or invalidity of unlawfulness) to these.

- **Adjectival law** or **law of procedure and evidence** prescribes the manner in which norms are to be enforced and sanctions are to be applied.

3.8 In private law, unlawfulness results (consists??? – see pg 7)) in the infringement of a right. An infringement resulting in liability is termed a delict.

**Rights in indigenous law distinguished according to the object**

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

- The first three fall within the vestee's estate
- Violation therefore entails patrimonial loss (loss determined in economic terms) = action for damages
- Rights of personality do not fall within the vestee's estate – violation may result I patrimonial loss
- Legislation and court decisions do not always distinguish clearly between damages and satisfaction

3.8 Group ownership is typical among the SA Bantu-speaking groups – and covers movables such as cattle, agricultural produce, immovable property

3.9 Obligatory rights exist in SA indigenous law i.e. duty to perform is that of an agnatic group in the case of a the right of a bride's family for delivery of marriage goods by the bridegrooms family.

3.10 The patrimonial group right of "guardianship" is well known in indigenous law. It is considered a patrimonial right because it entitled the group concerned to the productivity of its members.

3.11 Rights of personality exist among Bantu-speaking people, for example in cases where rituals are performed to remove pain, sorrow or defilement. Where pregnancy follows defilement, the girl's guardian as the representative of her group is considered to have suffered patrimonial loss and may recover damages.

## 4. Various indigenous legal systems

In former times, each tribe or kingdom had its own legal system. High degree of similarity exists between the different local legal systems with regard to underlying legal principles and legal values.

## 5. The division and features of the Bantu-speaking groups of South Africa.

5.1 "Bantu-speaking" = family of languages
Other languages : Nama, Khoe, !X (!Kung)

5.2 Main groups of SA, Botswana, Lesotho and Swaziland, based on language and culture are :
5.2.1 The Nguni Group
5.2.2 The Sotho Group
5.2.3 The Venda
5.2.4 The Shangana-Tsonga

The groups differ in respect of language, legal systems and customs – but have in common a system of traditional succession and leadership. Individually, the rules of succession are completely different.

## 5.1 Characteristics of the main groups

### The Nguni group

- Most important languages
  - Zulu,
  - Xhosa,
  - Swazi, and
  - Ndebele

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

- Characteristics
  - Composite household divided into two or three sections
  - Each section has a senior wife with subordinate wives
  - Each wife in a section formed a 'house' with its own rank, property and successor

  Still found in rural areas, but in urban areas, a man who has more than one wife, the wives live in separate houses

### The Sotho groups

- Most important languages
  - Tswana,
  - Northern Sotho, and
  - Southern Sotho

- Original areas

- Tswana speaking groups – Botswana, the North West and parts of Northern Cape
- Northern Sotho-speaking groups – Northern Province
- Southern Sotho-speaking groups – Lesotho and Free State

- Characteristics
  - Household is not divided into sections
  - Each married woman has a certain rank, and her house has its own identity, property and successor

**The Shangana-Tsonga groups**

- Main group is referred to as the "Tsonga" or "Shangana"
- Originally settled in Northern Province and Mpumalanga – adjacent to Mocambique

**The Venda**

- Originally settled in the north-eastern part of the Northern Province
- Language is called "venda"
- Have historical links with the Shona-speaking people of Zimbabwe

**Lecture 2**

**Some characteristics of indigenous African Law**

1. **Introduction**

   - According to Allott (131) indigenous legal systems of Africa do not constitute a single system, but a family of systems which no not share a traceable common parent
   - However, their procedures, principles, institutions and techniques are similar

2. **The unwritten nature of indigenous African Law**

2.1 Their law was not recorded in law books
2.2 Court procedures were conducted orally
2.3 Law was transmitted orally from one generation to the next
2.4 Important legal principles were expressed by means of legal maxim
2.5 EG :
2.5.1 *Motho ke motho ka batho* (Sotho); *umuntu ngumuntu ngabantu* (Zulu): "a person is a person in relation to other people", thus expressing group orientation and humaneness
2.5.2 *O mo tshware ka diatla te pedi* (Northern Sotho): " you should hold him or her with both hands", thus giving expression to the marital relationship between husband and wife

## 3. The customary nature of indigenous African Law

3.1 Most indigenous legal systems resulted from age-old traditions and customs – classified as "law"
3.2 Direct orders and instructions from leaders resulted in laws which had to be followed
3.3 Formal administration of justice was known, but indigenous court's function was limited to the application, and not the creation of law
3.4 Indigenous courts had no system of precedent

## 4. Indigenous law as an expression of community values

4.1 Public participation in the process of adjudication resulted in law giving expression to the values or general moral behavioural code of the community
4.2 Because disputes affected the wider community, decisions made iro disputes between parties, usually family groups, had to take into account the fact that it would impact on future relations between parties within the community.
4.3 Administration of justice did not concern legal justice so much as reconciliation of people ("human" justice) – interest of the community were very important

## 5. The role of magico-religious conceptions in indigenous African law

5.1 Two general conceptions regarding the supernatural are fairly common

### Belief in ancestral spirits

(a) Belief in ancestral spirits means that after death, a person continues to live in a spiritual world – almost the same as when on earth
(b) The belief is that the rules for the living, and law, are derived from the ancestors and are protected by ancestral spirits
(c) Deviation from the rules may lead to punishment by ancestral spirits (misfortune such as illness, drought, hail etc are seen to be supernatural punishment)
(d) The effects
    (da) Law is of supernatural origin and therefore not questioned, and
    (db) The law appears static and unchangeable – change would be against the wishes of ancestral spirits

### Belief in sorcery

(a) The belief that there are supernatural powers in the universe that may be used by man for his own ends
(b) These may be used in two ways
    (ba) to the advantage, or
    (bb) the disadvantage
    of people or their interests
(c) Cases always involve a person who uses the supernatural powers to do harm – called a "sorcerer"

(d) It is important that the sorcerer is identified and is usually then killed or banished from the community

6. **The observance of rules for living in indigenous African law**

6.1 Most of the community observe the rules for living, including legal rules, without being "forced" to comply
6.2 Motives for observance are indicative of whether a rule is a rule of law – even if not determined by a court.
6.3 Organs such as police, courts and judges are not necessarily available for the enforcement of legal rules, however voluntary observation is due to factors, such as the following :

6.3.1 Religious or sacral (holy) elements of the law
6.3.2 Public opinion is very important
6.3.3 Knowledge that if a person is harmed, that person will endeavour to get compensation or to protect himself (sorcery!)
6.3.4 Everybody has a broad knowledge of the law because of the participation in the process –and that law is handed down from generation to generation – everyone knows how the law operates
6.3.5 Fear of punishment, especially that of supernatural origin
6.3.6 Influence of indigenous leaders in the community who are living representatives of the ancestors who are responsible for observance of the law

6.4 Recognized leaders played an important role in daily life of the communities without reference to judicial authority i.e. allocation of land, admission of strangers
6.5 Local heads of families and kinship groups were consulted before important decisions were taken i.e. institution of legal action – this ensured proposed action would not be opposed and interests of others would not be harmed, and local headmen and leaders knew about the matter in the event of a legal dispute arising
6.6 Leaders are bearers of tradition and must ensure that traditions are observed.

**Lecture 3**

**The nature of indigenous law.**

1. **Introduction**

1.1 **Specialisation** has to do with the distinction of certain functions or with a definition of certain activities
1.2 Definition according to Myburgh :

Specialisation implies the separation, differentiation, division, distinction, classification, delimitation, definition or individualisation in respect of time, activity, functions, interests, duties, knowledge and conceptions, including the isolation or abstraction of ideas and concepts.

1.3 Examples:

| Specialised Systems | Unspecialised systems |
|---|---|
| • Division between criminal and civil cases<br>• Each division has its own court i.e. Criminal action is held in a criminal court, civil action is held in a civil court | • Criminal and civil cases are heard by a single hearing<br>• No clear division between case and procedure, and case and court |
| • Distinction between criminal and civil cases<br>• Distinction between courts and procedures | • No distinction |
| • Classification : criminal cases, criminal courts and criminal procedure<br>• Civil cases, civil courts and civil procedures | • No classification |
| • Delimitation between criminal and civil cases | • No delimitation |
| • Time – action must be instituted before a certain time, otherwise the action may expire (=prescription)<br>• Exact time is important to determine when rights and duties come into existence<br>• Moment of birth, marriage, contract comes into being | • Time is unimportant, as prescription is unknown<br>• Precise moment when an event occurred is not important |

1.4 Specialisation has to do with size of population, the larger the population, the larger the possibility of specialisation.
1.5 No legal system is totally unspecialised.
1.6 African indigenous legal system is described as “unspecialised” if compared with Western legal systems.
1.7 In South Africa, Namibia and Botswana, recognition of the local legal systems are now subject to a bill of fundamental rights
1.8 Comparison between specialised and unspecialised legal systems results in problems with terminology
1.9 Opinions whether special terminology should be developed for the study of unspecialised legal systems differ :
1.9.1 Creation of a **universal “legal language”** - nothing has yet come of this
1.9.2 **Retention of terms** used in indigenous languages – makes comparison impossible. I.e. whether indigenous terms such as *lobolo*, ikhazi and *thaka* apply to the same legal phenomenon
1.9.3 Use of existing (Western) legal language) with retention of untranslatable concepts – has possibilities

1.9.4 Development of **neutral vocabulary** to describe indigenous law without reference to Western legal systems. This would lessen the value of the study of indigenous law as Western jurists would not understand. Unspecialised systems could be compared with each other, but not with specialised legal systems.

## 2. Similarities between specialised and unspecialised legal systems

2.1 Examples of similarities that exist :
2.1.1 Relations governed by law generally comprise of relations between organs of authority and subjects, and relations between groups and individuals themselves.
2.1.2 Means by which law is transferred from one generation to the other – starts with education in the family, develops in the wider context of the community, and in specialised systems is further support by formal instruction in schools, colleges and universities.
2.1.3 In all legal systems, law and legal rules imply consequences for transgressors.

## 3. Differences between specialised and unspecialised legal systems

3.1 Differences within the sphere of private law relate to
3.1.1 Group v individual orientation
3.1.2 Concrete v abstract approach
3.1.3 The religious element
3.1.4 Governmental functions
3.1.5 Formalities
3.1.6 Categorisation

### 3.1 Group v individual orientation

| **Unspecialised Systems** | **Specialised Systems** |
|---|---|
| Emphasis falls strongly on group rather than individual | Emphasis falls strongly on the individual – individual may uphold rights against interest of state or the community |
| Informal and formal system of education is directed towards the individual's adaptation and subordination to the interests of the group. | Stresses persons individuality and own achievements |
| The individuals acceptance of his particular place and rank within the community is impressed from early childhood | Characteristics determine his particular adult place and role in the community |
| Everyone know exactly what his role in the community is | |

3.1.1. Difference between group orientation is clearly reflected in law. Examples from indigenous private law

- **Rights** ;
  In modern law one individual, and not a group is the owner/creditor

  This is absent in the original indigenous law.

- **The law of marriage**
  Modern law of marriage, the interested parties are restricted to two spouses. Interest of the community are limited to requirements regarding age, prescribed formalities etc

  Indigenous marriages concerns the family groups
  Family groups participate in the choice of marriage partners, preceding negotiations of the agreement, transfer of marriage goods and ceremonies. Without their participation, the marriage cannot take place

- **The law of contract**

  Specialised legal systems, most contracts are concluded between individuals

  Indigenous law, parties are mostly agnatic groups rather than individuals

## 3.2 Concrete versus abstract approaches

3.2.1. unspecialised legal systems follow a more concrete, real and visible approach, specialised systems are more abstract in nature

3.2.2. Unspecialised legal systems, the bride is detached from her group and moved in to the bridegrooms family group : Western law is more abstract consent and abstract expression of intent

3.2.3. Unspecialised legal systems, rights to land are acquired by demarcating and cultivating a particular area : in specialised legal systems, land is acquired by registration in the Deeds Registry.

## 3.3 The religious element

3.3.1 A strong religious element of indigenous law appears from the perception that law originates with the ancestors – and disregard of the law is punished by ancestors

3.3.2 If important juristic acts are planned, the blessing of the ancestors is obtained by special rites.

## 3.4 Categorisation

3.4.1 Distinction between categories, institutions and concepts is foreign to indigenous law

3.4.2 It is difficult t determine whether authority in a family group with many members concerns private law or public law.
3.4.3 Distinction among categories of transgressions is sometimes vague – it is not always possible to distinguish whether a transgression is harmful to the interests of the community or the interest of family groups (referred to as delict and crimes)
3.4.4 In indigenous law, theft of another's property is a delict, whereas stock theft is a crime
3.4.5 There is no distinction between civil and criminal cases – and no separate court procedures for these cases.

### 3.5 **Kinship**

3.5.1 Kinship plays a dominant role in legal life
3.5.2 Family group has extensive authority over its members
3.5.3 It is maintained that in non-specialised systems, the position of woman compares unfavourably with that of the man.

### 3.6 **Polygamy**

3.6.1 Marriage of peoples with unspecialised or less specialised legal systems, is polygamous i.e. one man can be married to more than one woman at the same time.

## Lecture 4

## Statutory recognition of indigenous law before 1994

- The most important provisions of the Black Administration Act 38 of 1927 for the recognition of indigenous law was section 11.
- Section 11 was re-enacted as section 54A.
- Section 54A was repealed by Section 1 of the Law of Evidence Amendment Act 45 of 1988, which says

1. Judicial notice of law and foreign states and of indigenous law

(1)
- Any court may take judicial notice of law of a foreign state and of indigenous law insofar as such law can be ascertained readily and with sufficient certainty;
- Provided that indigenous law shall not be opposed to the principles of public policy of natural justice;
- Provided further that it shall not be lawful for any court to declare that the custom of lobolo or bogadi or other similar custom is repugnant to such principles

(2)

- The provision of sub-section (1) shall not preclude any party from adducing evidence, of the substance of a legal rule contemplated in that subsection, which is in issue at the proceedings concerned.

(3)

- In any suit or proceedings between Blacks who do not belong to the same tribe, the court shall not, in the absence of any agreement between them in regard to the particular system of indigenous law, other than that which is in operation at the place where the defendant or respondent resides or carries on business, or is employed, or
- if two or more different systems are in operation at that place (not being within a tribal area), the court shall not apply any such system unless it is the law of the tribe (if any) to which the defendant or respondent belongs

(4)

- For the purposes of this section "indigenous law" means the Black law or customs as applied by the Black tribes in the Republic or in territories which formerly formed part of the Republic

<u>Important implications of section 1:</u>

- All courts may take notice of indigenous law (subs 1) although they are not obliged to do so
- Judicial notice is limited insofar as indigenous law may be ascertain readily and with any degree of certainty. Courts are not obliged to apply indigenous law, although it may be the most obvious system to apply, if the correct one cannot be ascertained
- There is no duty on the court to take judicial notice of indigenous law e.g. to call expert witnesses
- It is not necessary for judges or magistrates to have formal practical knowledge or training in indigenous law
- Ito Subs 2 – onus is on the party to provide indigenous law in court, therefore evidence about indigenous law may be brought to court by the party himself. This places a financial burden on the litigant to employ the services of an expert witness.
- Indigenous law may not be opposed to principles of public policy or natural justice, however the court may not declare that customs such as lobolo are opposed to such principles
- Subs 3 contains rules for cases with different systems of tribal law.

**Lecture 5**

**Indigenous law and the Constitution**

1. **Introduction**

1.1 Indigenous law

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

1.2 In terms of the Constitution of the Republic of South Africa Act 108 of 1996 all existing legislation will remain in force until amended or repealed
1.3 This means that the Black Administration Act 38 of 1927 and the Black Authorities Act 68 of 1951 are still in force
1.4 In Section 211 the Constitution 108 of 1996 gives clear recognition of indigenous law.

## 2. Section 211

(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.

Summary of the implications of Section 211(3)

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

## 3. Section 30 and 31 – applies the basis of a new approach to indigenous law

Section 30 provides :

| | |
|---|---|
| - Everyone has the right | right to |
| - to use the language, and | language/culture |
| - to participate in the cultural life of their choice, | of choice |
| - but no one exercising these rights | but not |
| - may do so in a manner inconsistent | inconsistent with |
| - with any provisions of the Bill of Rights | the Bill of Rights |

Section 39 (1)

- the state is obliged to recognise indigenous law
- Court may consider comparable decisions on foreign law when interpreting the Bill of Rights
- Recognition of indigenous law in Section 30 is derived from rights to participate in culture of choice

- Definition of “culture” has not single or unambiguous meaning – may be interpreted to include systems of personal law, as well as non-legal aspects of social life
- Other systems of personal law are given recognition in the Constitution – concept of “culture in Section 30 may be interpreted to include indigenous law.

Section 15(3) (for instance) provides –

This section does not prevent legislation recognising

(i) marriages concluded under any tradition, or a system of religious, personal or family law, or
(ii) systems of personal and family law under any tradition or adhered to by persons professing a particular religion

This applies particularly to Hindu and Islamic law, due to the polygynous nature of marriage under these laws.

Section 30 only provides individuals may take part of in a culture of their choice, not expressly that indigenous law should be applied.

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

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

<u>According to Section 31, the state has two duties, i.e</u>.
- not to interfere with the rights of the individual
- to allow the existence of institutions that would be necessary to maintain the culture concerned

<u>Section 31 contains an aspect of the right to culture:</u>
- Allowing entitlement of a the group of people
- To maintain a specific group identity
- is based on the assumption that a cultural group or community must first exist.

<u>Persons right to the application of indigenous law is</u>
vested in membership of a group,
which group must be recognised by the state
before the individual may enforce his right

<u>Further implication of Sections 31 and 31</u>
Conversion of a freedom into a constitutional right – what is the difference??

“Freedom” = there is no regulation by law – allows choices
“Rights” = demands specific conduct

(Freedom is subject to a right – because the bearer of a right my enforce that right)

## 4. Indigenous law and the bill of rights

4.1 Indigenous law
- has been accepted and recognised as part of the SA legal system
- like common law, is subject to the Bill of Rights
- must be interpreted in light of fundamental rights – specifically the equality clause in Section 9 (Section 9 (3) – there may be no discrimination, direct or indirect, against any person because of among other things age, gender or culture)

4.2 Recognising indigenous law and prohibiting discrimination, the Constitution gave rise to a conflict between two opposing principles i.e.

4.2.1 right of the individual to equal treatment, and

4.2.2 right of the group to adhere to the culture of its choice

Examples –

(a) the principle of patriarchy is inherent in African culture and indigenous law, but implies discrimination against women.

(b) The Bill emphasis is on individual rights, - indigenous law emphasis is on the group

(c) The Bill emphasis is on rights – indigenous law, the emphasis is on duties

4.2.3 Indications that fundamental rights have priority over indigenous law :

- Section 2 – the Constitution is the Supreme Law
- Section 8 (1) – the Bill of Rights is applicable to all legislation (including indigenous law)
- Section 36 (2) no fundamental rights to be limited by any law (except as provided under Section 36(1))
- Section 39 (1) – requires the courts to promote values that underlie an open and democratic society based on human dignity, equality and freedom in interpreting the Bill of Rights
- Section 39 (2) – in interpreting any law and applying and developing community and indigenous law the courts must have due regard for the spirit, purport 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 indigenous law), provided that such limitation is reasonable and justifiable in an open and democratic society

4.2.4. Application of indigenous law is a constitutional right, and not only a freedom

4.2.5. Indigenous law is equal in status to any of the other fundamental rights

4.2.6. Conflicts between indigenous law and the bill of fundamental rights cannot be solved through the Constitution alone

## 5. Judicial revision of indigenous law

5.1 It is the responsibility of the Constitutional Court and the High Court to resolve any conflict between indigenous law and fundamental rights
5.2 The High Court also has jurisdiction over any alleged or threatening violation of fundamental rights
5.3 Other Courts (magistrate's court and courts of traditional leaders ) are obliged to refer all constitutional matters to the High courts
5.4 Any party to an action may query the constitutional validity of any rule of indigenous law on the grounds of its harmful effect – ito Section 38 this may also be enforced by
- Anyone acting in their own interest
- Anyone acting on behalf of another person who cannot act in their own name
- Anyone acting as a member of, or in the interest of, a group or class of persons
- Anyone acting in the public interest
- An association acting in the interest of its members

5.5 the validity of indigenous law is presumed until decided otherwise by a competent court.
5.6 Everything which is done in terms of a right is valid until that right is later declared invalid
5.7 Rights and duties arising from customary union are therefore valid, even if they are later found to be in conflict with fundamental rights

6. **The amendment of indigenous law by statute**

6.1 Parliament has a duty to further fundamental rights
6.2 This duty may lead to the amendment of indigenous law by statute
6.3 Parliament is assisted in this duty by the Human Rights Commission
6.4 Provincial legislatures have concurrent jurisdiction with the national parliament in maters concerning indigenous law
6.5 The fact that provincial legislation may be applied only in its particular province could lead to conflict in the principles of territoriality and personal law e.g. a person living in KZN is subject to the laws of that province, if that person moves to another province, he will be subject to the laws of the new province, even if those laws are in conflict with his personal rights.

**Lecture 6**

**<u>The application of indigenous law</u>**

1. **Introduction**

1.1 Prior to 1994 indigenous law enjoyed a limited measure of recognition as a legal system
1.2 This position is governed by section 1 of the Law of Evidence Amendment Act 45 of 1988
1.3 The Constitution of SA 108 of 1996 gave further recognition to indigenous law, but limiting it by subjecting it to the Bill of Rights

1.4 In a specific case, the court may decide that indigenous law is not applicable. The question arises as to whether or not common law may or should be applied to the legal problem. The fact that indigenous law as well as common law is subject to the bill of rights, it may happen in a particular case the court applies the legal system best expressing the values of the bill of rights.

## 2. Choice of law

2.1 The problem of choice of law is related to legal conflict arising in cases where rules of two or more legal systems are potentially applicable to a particular legal problem. (e.g. in indigenous law a woman who has been seduced does not have a right to claim herself, but her guardian can institution a claim for seduction. In common law, a woman can institute the claim herself provided she was a virgin.)

2.2 Section 1 of the Law of Evidence Amendment Act 45 of 1988 limits the application of indigenous law in the following ways :

- Indigenous law may not be opposed to the principles of natural justice or public policy
- *Lobolo* and other similar customs may not be declared repugnant
- The courts may take judicial notice (it is not necessary to prove indigenous law in court if it can be ascertained with certainty) of indigenous law insofar as such law can be ascertained readily and with sufficient certainty

2.3 Indigenous law may not be applied if it cannot be ascertained readily and with sufficient certainty – application is therefore a case of judicial discretion

2.4 Principles that guided the courts in those decisions may be :

- If the cause of action originated from
  - a certain legal system, or
  - was known to only on one of the legal systems, or
  - where only one of the systems offered a solution

  that system should be applied
- in cases that could be tried either by indigenous law or by common law, there were various approaches. In some cases it was decided that common law was primarily in force; in other cases it was decided that indigenous law was primarily in force; and in *Ex parte Minister of Native Affairs :* in *re Yako v Beyi 1948 (1) SA 388 (A)*, it was decided that neither common-law nor indigenous law was primarily in force.
- Sometimes the intention of the parties was taken in to consideration
- Sometimes the nature of the legal act was taken in to consideration
- Sometimes the parties had agreed on what law to apply to that particular case
- Sometimes the place of residence of the parties guided the court in its decision
- Sometimes the presence of certain personal characteristics, such as westernisation or a certain degree of education. In constitutional terms, this approach is in harmony with the right to culture in terms of sections 30 and 31 of the Constitution.

2.5 The constitution expressly provides in Section 211 that the courts must apply indigenous law when that law is applicable. The courts therefore no longer have a discretion to decide whether indigenous law is applicable or not.

2.6 Unisa's opinion is that a party can, by appealing to the right choice of culture, request that indigenous law be applied. This freedom is not absolute, the choice of one person may not infringe the rights of another.

2.7 Another approach would be to consider who has a duty in terms of the particular legal relationship

- Where an individual in terms of Sections 30 and 31 an individual has the right to adhere to the culture of his or her own choice, means that there is a relation between the state and that particular individual and that the state is obliged to make it possible for that individual to adhere to the culture of choice- vertical application – the right to culture does not impose any duties on the individual ; it merely makes the individual entitled to that right
- If an individual now exercises his or her right to culture, other individuals are obliged to respect this. This is horizontal application of fundamental rights between individuals. The horizontal application of the right to culture therefore creates responsibilities for individuals.

## 3. Public policy and natural justice

3.1 Section 1 of the Law of Evidence Amendment Act 45 of 1988 provides that courts may take judicial notice of indigenous law, provided that indigenous law is not in conflict with the principles of "public policy and natural justice".

3.2 That fact that a difference in legal conceptions and moral standards does exist does not merit a specific legal usage to be declared opposed to "public policy and natural justice" – the act expressly provides that the custom of *lobolo* and other similar customs are not repugnant – (equivalent to *contra bones mores* principles.

3.3 The courts applied this condition sparingly – in *Sibeko v Malaza 1938 NAC (N&T) 117* the court refused to recognise the custom of child betrothal. The court also decided that a widow may remarry and that she is not obliged to enter in to a levirate union (marriage with the brother of the deceased)

3.4 In many cases the courts did not refused to recognise a particular custom as such – what was refused was the use of force in the application of the custom (the levirate as a legal custom and its legal consequences are recognised by the courts – the courts will merely decide that the woman may not be forced to conclude such a relationship).

3.5 Section 211(3) is explicit in that the application of indigenous law is subject to the bill of rights, implying that these principles are no longer necessary.

## 4. Conflict among various systems of indigenous law

4.1 There are several systems of indigenous law in SA.

4.2 Courts may therefore be required to decide which one of two or more systems to apply in a certain case

4.3 The principles according to which such a case must be tried in Court are incorporated in Section 1 (3) of the Law of Evidence Amendment Act 45 of 1988, and are

- If the parties belong to the same tribe, that tribal system applies
- If the parties do not belong to the same tribe, they can decide amongst them which legal system should apply in the case of a dispute
- If the parties do not belong to the same tribe and they have not agreed on the system to be applied, then the court should apply the legal system, that applies to the defendant's place of residence, place of business or place of employment, provided that there is only one indigenous legal system in that area
- Where there is more than one legal system and where the defendant's place of residence, business or employment is not within a tribal area, and one of the legal systems is that of the defendant, the court should apply that system.

4.4 The Natal and KwaZulu Codes of Zulu Law are exceptional cases. These codes are linked to the person of the litigant, no matter where that person may reside. This principle applies also in the case of the Codes. From some court decisions, it seems that the Natal Code has territorial application because in those cases it was decided that the Code excludes all other possible systems of indigenous law within the territory of the former Natal.

4.5 A similar problem is encountered where a Zulu person from KwaZulu-Natal settles in another province. Some decisions seem to indicate that these Codes have only territorial application, that is it seems that they are not applicable to Zulus from KwaZulu-Natal who settle in other provinces.

**STUDY UNIT 2**
**INDIGENOUS LAW IN ACTION**

Overview

- Most disputes are settled in a satisfactory manner outside the courts by means of negotiations within and between groups of relatives
- If a particular problem cannot be solved in this way, the first option is to make use of a process of mediation before formal appeal is made to the courts
- A party not involved with the dispute tries to help the people involved in the dispute to come to an agreement or solution with regard to the problem
- Should this mediation fail, the next phase is the court procedure
- The court procedure usually leads to a decision that must be enforced or executed

**Lecture 1 : The indigenous process of negotiation with regard to disputes**

1. Introduction

- The processes of negotiation and mediation in indigenous law are aimed at bringing about reconciliation between people or groups of people who have a dispute with each other
- "Settling" a dispute means "deciding, resolving determining" a dispute

  (a) The first phase is the **grievance or latent-conflict phase –** this refers to a condition or event that is experienced by a party as harmful = the subjective judgment of the aggrieved person or party
  (b) The second phase is the **conflict phase** – a phase during which the aggrieved party communicates his or her aversion or feeling of being wronged to the other party
  (c) The third phase is the **dispute phase,** during which the other party gets involved in the dispute by for instance offering apologies or a denial with which the aggrieved person does not agree
- A dispute does not necessarily always comprise all three of the phases mentioned – and not necessarily in that order
- Today the following seven procedures may be found worldwide :

**1)** **disregard** = so that the grievance does not lead to conflict
2) **avoidance** = which often causes the aggrieved party to break off social and other relations
3) **self-help** – where the aggrieved party acts unilaterally in order to settle the dispute – physical violence or even acts of sorcery
4) **negotiation** – between the parties, with a view to reconciliation and restoring existing relationships
5) **mediation –** where a third party becomes involved in the dispute as a mediator between the disputing parties
6) **arbitration** – where the disputing parties agree to a third party getting involved, and the decision of this third party will be binding
7) **judicial adjudication** – where one or both parties appeal to a court to settle the dispute

- From a human-relations point of view, procedures involving one, two or three parties may be distinguished
  - Disregard, avoidance and self-help involve only one party
  - Negotiation involves two parties; and
  - The procedures of mediation, arbitration and judicial adjudication involve three
- In the indigenous law of countries in Southern Africa, most of the above-mentioned procedures are found
- Arbitration is seldom used
- Self-help is not recognised by the general law of the land

2. <u>The settlement of disputes within family groups</u>

- The head of the family group has to see 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
- A dispute is reported by the mother or senior female figure in 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
- Meetings are held indoors since it is regarded as a private matter
- Personal matters mentioned to outsiders are 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
- In urban areas neighbours are virtually always invited to help, since the relatives do not live close by
- During such meetings, the matter is discussed thoroughly and openly
- Strong emphasis is placed on restoring the relations between those involved in the dispute
- 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” = a chicken or goat must be slaughtered and cooked and eaten during a meal shared by those present
- The mean then symbolises that relations have been restored
- Disputes within the family group are usually settled with the help of relatives
- If it does happen that the parties concerned do not accept the proposed solution, they have to take the dispute to the local headman = head of the lowest indigenous court
- 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

3. The settlement of disputes between non-related family groups

- If a dispute develops between members of non-related family groups the people involved in the dispute first try to settle the dispute among themselves by means of negotiation
- If the negotiations are unsuccessful the matter may be taken to the headman's court

Distinction between disputes that develop between
(a) a husband and wife, and
(b) those that develop between other non-related family groups

Dispute between husband and wife

- The matter is first discussed within the husband's family circle
- If no solution is found, the wife's family is invited to help
- If no solution, it may lead to the termination of the marital relationship between the husband and wife without the headman being involved
- In indigenous law, it is possible to dissolve an indigenous marriage outside court and without the court being involved
- Negotiations bring about a reconciliation, a reconciliatory meal is usually held – this being offered by the party at fault

Dispute between non-related family groups

- The aggrieved person first discusses the matter within his or her own family group
- If it is agreed upon that a wrong has been done, the matter is reported to the family group of the wrongdoer
- The wronged group usually sends two or more members (+ neighbour) to report the matter – called "throwing a kierie"
- The complaint is heard but not acted on –
- The wrongdoer's group then meets to investigate and discuss the complaints
- If it is clear that a wrong has been done, this group sends representatives (+ neighbour) to the wronged party to offer apologies
- If the apology and the damages are accepted, the matter has been solved
- If there is no reaction, the aggrieved group will again "throw the kieire" after some time has elapsed and ask "why are you ignoring us?"
- The process of "throwing the kierie" is repeated up to four times before the matter is taken to court – in this regard it is said "the cow has four teats"
- Form this procedure it appears that a dispute may not be taken directly to court
- If a case is taken directly to court and the wrongdoer is found guilty of the offence, it will also reprimand the group for not wishing to come to the reconciliation
- It is therefore said that the first blow of the stick (the phase of negotiation) does not hurt – it is the blow that comes later (the decision of the court) that hurts
- Negotiations between the family groups cannot come to an agreement, the headman is usually invited to help – the headman then acts as mediator
- If at any stage during the process of negotiation or mediation the parties concerned comes to an agreement, a reconciliation meal is held.

- This is a visible and concrete way of announcing the relations and harmony between the parties and also with the broader community have been restored

4. Changes

- Today family groups often no longer function as explained above.
- In both rural and urban areas it happens more and more than the local residential group takes the place of extended family groups

**Lecture 2 – The indigenous-court procedure**

1. Introduction

- The indigenous court procedures still apply in the recognised courts of traditional leaders (S 20 (2) of Act 38 of 1927)
- These procedures were amended by Government Notice ("GN") R2082 of 1967, in which supplementary rules were promulgated

Distinction between a headman's court, and a chief's court

- Only a chief's court is not a court of record = does not keep a written record of court proceedings
- A chief's court, for the purposes of the Criminal Procedure Act 51 of 1977 is neither a higher nor a lower court
- According to indigenous law, the headman's court is the lowest court, and the chief's court is the senior or highest court

- The trial procedure is basically the same for the headman's court and the chief's court
- The court procedure for civil and criminal actions does not differ
- Although the terminology for both civil and criminal action is the same, a distinction is made between "plaintiff" (civil action) and "complainant" (criminal action), and between "defendant (Civil action) and "accused" (criminal action)

- In tribal law, civil actions are instituted where an agnatic group's rights and powers have been infringed upon.
- These actions for instance involve claims for seduction, adultery, the dissolution of marriage, damage to property and contractual debts
- In such cases the court may order the reparation of damage (the payment of compensation)

- Criminal actions are instituted by the traditional authority against an offender.
- If found guilty, the offender is punished
- Punishment can be in the form of a fine, and previously it could also be in the form of corporal punishment

- If an act gives rise to both a civil and criminal action both aspects will be dealt with in the same hearing E.g. assault and theft
- The court may impose punishment and award damages to the harmed party

2. The lodgement procedure

- In a civil case, the plaintiff's agnatic group first tried to negotiate with the defendant's agnatic group
- The negotiations however did not lead to an agreement, and the plaintiff's group reported the matter to their headman
- If the defendant and the plaintiff life in the same ward, their headman sets the date of the trial and notifies the defendant
- If they do not live in the same ward the plaintiff's headman sends the plaintiff's group together with a representative of the ward to the headman of the defendant in order to report the matter to the latter
- The headman of the defendant will then set a date
- The general principle is that a case is tried in the court of the defendant's headman

- On the day of the hearing, both parties and their witnesses must be present
- If one of the parties cannot be present, the case is postponed
- If a party is absent without any excuse for the second time, he is generally brought to court by messengers – and may be punished for contempt of court.

- Under statutory court rules a civil case may be heard in a chief's court
  - in the absence of a party (Rule 2 (1) GN R2082 of 1967), and
  - sentence may be given against such party in his absence = "judgment by default"
- The party may not be punished for contempt of court as well *(S v Khuswayo 1969 (1) SA 70 (N))*

- If one of the parties is not satisfied with the decision of the headman's court the dissatisfied party may ask that the case be referred to the chief's court
- A headman's court may also refer a case to the chief's court if it is complicated
- A person who "receives" these cases sets a date
- The procedure in the chief's court is the same as that in the headman's court

- In the **criminal case**, the general procedure is that the agnatic group of the harmed person reports the case to the local headman
- The headman investigates the matter and reports to the chief
- If the complaint is founded, the chief sets a date for trial
- Each party must see to it that its witnesses are present on the day of trial
- In criminal cases the indigenous procedure applies, to the extent it is not in conflict with the public policy of natural justice
- A person may not be sentenced in his absence *(cf R v Butelezi 1960 (1) SA 284 (N))*
- A chief may not administer justice in a case in which he himself is the complainant

3. The trial procedure

The main principles of the indigenous court are :

1) Onus is on the accused to prove his innocence in court. Often the accused pleads guilty when asked to plead, and then wishes to lead evidence to prove his innocence
2) The sessions of indigenous courts are held in public
3) All court sessions are open to members of the public. Any person present may participate in the court procedure by posing questions to the parties and by submitting information to the court about the case
4) All parties must be present during the trial – Judgement by default was unknown. Parties are given full opportunity to state their side of the matter without interruption
5) Legal representation was unknown. Nobody appeared in court without assistance; every person, regardless of age or sex was assisted by relatives. Each party had to see to it that its witnesses were present. Witnesses may not be related to the parties concerned. Neighbours were often the main witnesses in a case.
6)

- All proceedings were conducted orally
- no written record of cases is kept
- Today all chief's courts keep a court record in which basic information regarding a case must be recorded.
- Legislation (Rules 6 and 7, GN R2082 of 1967) also requires that the judgment of a chief's court be registered.
- This case must be reported in quadruplicate straight after judgment.
- This report must contain, inter alia,
  - the names of the parties,
  - the particulars of the case, and
  - the judgment.
- The report must be signed by or on behalf of the chief and two members of the court.
- The original report must be handed in at the local magistrate's court for registration and each party is given a copy of the report
- Today a chief's court judgment must be registered in order to be valid
- The judgment must be registered with the magistrate within two months, or else it lapses
- In *Mhengu v Mpungose (1972) BAC 124 (NO))* it was decided that the Court Rules place an administrative duty on a chief to submit the written judgment for registration. Failure to do so may lead to liability for the costs incurred to implement judgment, or for any damage suffered by a third party because of the chief's failure to register the judgment

7) The chief is judge-in-council. The chief or ward headman delivers the judgment. Judgment usually is a synopsis of the consensus opinion of those present
8)

- The court proceedings are fairly formal (i.e. few formalities)
- The proceedings follow a specific pattern
  (a) First the plaintiff or complainant states his side of the matter,
  (b) Then follows the reply of the defendant or accused
  (c) Usually a few questions are asked by the council members and others to clear up obscurities
  (d) Then follows the evidence of the witnesses of the plaintiff/complainant

(e) The witnesses are questions by those present
(f) Next the evidence of the witnesses of the defendant/accused is heard and questioned, and the plaintiff/complainant and the defendant or accused may give further explanations or question each other
(g) The matter is then discussed by those present, followed by the views on the facts and the matter of the council members present
(h) Thereafter judgment is given
(i) A consensus judgment is considered ideal (the matter is discussed until the council members have reached consensus
(j) Persons who misbehave may be removed from the courtroom and may even be fired

9) Nobody is judge in his own case. This principle is expressed by the Sotho people in the maxim *selepe ga se itheme* (an axe does not chop itself)

10) During the hearing of a civil case, the defendant may not institute a counterclaim against the plaintiff and ask that his liability towards the plaintiff be removed. The applicable maxims are :
- *Molato ga o rere mongwe* (one debt is not heard by another)
- *Molato ga o lefiwe ka o mongwe* (one debt is not settled by another)

It is also said that a person cannot pay attention to two matters at the same time *maebana mabedi ga a rakwe* ( two doves cannot be followed at the same time)

11) In former times, asylum was known – a person affected by a court order could escape punishment by fleeing to a certain place

12) Mendacity (i.e. telling lies) is not punishable. No oath is taken by either the parties or their witnesses. Perjury (willfully giving false evidence under oath), is unknown and not punishable.

13) Prescription of a debt or a claim is unknown. A plaintiff is compelled to submit his claim without delay. Two reasons for this :
(a) a delay may make it more difficult for the Plaintiff to prove the facts because witnesses may move or die. The plaintiff may lose the action if he dies before the action is instituted. If action has already been instituted and he dies, the action passes to his successor.
(b) He may harm the other party through his delay. The other party may for instance be denied the opportunity to examine the facts in good time. An important witness may die or leave the area. If a plaintiff waits too long to institute an action, the court may refuse to hear the case. The reason is not prescription but the damage or the facts can no longer be established with certainty.

Once a case has been instituted, it may be postponed indefinitely

14)
- The court proceedings are inquisitorial in nature.
- This means that it is the court's duty to try to establish the truth through questioning and cross-examination.
- In principle, no evidence is excluded.
- Witnesses are given ample opportunity to submit evidence to the court.
- The court is also competent to hold *in situ* (i.e. where the offence took place) investigations.
- The court may even make use of extra-judicial methods of proof, such as pointing out by a diviner (*isangoma)* to establish the truth.
- It therefore is said that time cannot stand in the place of truth.

**LECTURE 3**

**THE SENTENCE OR JUDGMENT OF AN INDIGENOUS COURT, AND ITS EXECUTION**

1. Sentence or judgment

- One of the most important functions of the modern court is to "find" the law
- This "finding of the law" by the court then becomes the sentence that has to be executed by the court

- Judgment of an indigenous court is based on consensus (general agreement).
- There is no majority or minority judgment
- The indigenous court makes statements on behalf of the community and must "find" the law that accords with the current law of the community
- In this process it is tried to bring about a reconciliation among the parties, and between the parties of the community
- This reconciliation also entails that the party that has been harmed should receive compensation in some form

- A feature of judgments by an indigenous court is that each case is judged on its merits
- The court is therefore not bound to previous judgments on comparable cases

- In criminal cases, judgment may mean punishing the accused
- This punishment can take the form of a reprimand, a warning, corporal punishment etc
- In civil cases, judgment may mean rejecting or accepting the plaintiff's claim
- If the plaintiff's claim is accepted, te defendant is usually asked to compensate for the plaintiff's damages

- In indigenous law there is not always a clear difference between civil and criminal cases, nor is there a distinction between the civil and the criminal elements of the case
- The Northern Ndebele do use words to distinguish between fine and compensation
  - "Fine" refers to the punitive element (element of punishment)
  - "Compensation" to the civil element of a case

- Factors are taken into account in determining the amount of compensation to be paid
- If the damage was done intentionally, this is taken into account and compensation is set for a higher amount
- The court may reject a plaintiff's claim if found unfounded

- For certain offences, such as making an unmarried woman pregnant, there is a fixed amount of compensation

- 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 lace
- Sometimes the court orders additional goods or money, other than damages, to be delivered
- This may be called "a court levy" or "court costs"
- It is called a "levy because in former times no money was used.
- The Sotho-speaking groups refer to this "levy" as *mangangahlaa* (literally : "to tighten the jaw or to move the jaw a lot")
- It refers to the talking that the court councillors need to do to try to convince a difficult litigant of his guilt.
- In this context *mangangahlaa* may be regarded as a 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 a head of cattle, if the case took a long time was given
- The animal was slaughtered for the members of the court, and then eaten in a meal shared by them and the litigants
- In this way any trace of dissidence that still existed among the litigants was removed in a visible and concrete manner
- In this respect *mangangahlaa* also pays a role in the reconciliation of the parties

- Sometimes *mangangahlaa* is also ordered to compensate for malicious damage that was caused
- It is also ordered if, during negotiations, one of the parties unreasonably refused to come to an accord with another family group.
- In this respect *mangangahlaa* contains an element of punishment

- In criminal cases the fine that is imposed sometimes includes *mangangahlaa*
- The *mangangahlaa* part is usually used for the food served to the members of the council and the accused

- Today the court levy takes the form of money, which by law (S 9 Act 68 of 1951) must be paid into the tribal fund
- The court levy or court fees are usually due by the party against whom judgment is given

2. <u>The execution of the sentence or judgment</u>

- The judgment of an indigenous court must be executed, unless it is taken on appeal.
- The compensation or the fine, whatever the case may be, must be paid as soon as possible after judgment has been given
- In the case of compensation the successful party is notified that the goods or livestock may be fetched
- Sometimes this party then gives part of the goods or livestock to the court, to be used for serving food to its members

- In former times members of the court were not rewarded for their services

- Should a person refuse/neglect to pay the fine/compensation in a reasonable period of time, the indigenous court ordered that the person's property be confiscated.
- Some groups had a special messenger, known as an *umsila* among the Xhosa, who performed this function.
- In such case the fine were usually increased summarily.

- The increase may be regarded as a fine for contempt of court.
- This additional levy was called *thupa* ("stick" or "admonition" (warning) by the Northern Sotho)
- It was used for maintenance of the messengers

- The judgment debtor, may also arrange with the court to pay the judgment goods in installments
- In former times, sentence in the form of corporal punishment, banishment and the death penalty was enforced directly after the court session
- Today a sentence by an indigenous 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 indigenous court, application must be made to the clerk of the magistrate's Court for execution of the sentence or judgment
- Today the messengers of the indigenous court are not allowed to use force in order to execute a sentence or judgment
- Any interference with the messenger in the execution of his duty is considered a crime (Rule 8 (4) GN R2082 of 1967)
- No more goods may be seized than is laid down in the judgment
- Section 20 (5) of the Black Administration Act 38 of 1927 makes provision for another way in which to exact unpaid fines.
- If an indigenous 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 the magistrate may order that the fine be paid immediately
- Failure to do so may lead to imprisonment of a period not exceeding three months.

**LECTURE 4**
**THE INDIGENOUS LAW OF EVIDENCE**

1. Nature

- Trials in indigenous courts are still governed by the indigenous law of evidence (S20 (2) of Act 38 of 1927) Rule 1 GN R2082 of 1967) provided that the rules applies are not in conflict with the principles of public policy and natural justice
- An appeal to the Magistrate's Court against judgment in an indigenous court, the general South African Law of evidence will apply to the evidence given in the Magistrate's court (*Nombona v Mzileni et al 1961 NAC 22 (S))*
- The indigenous law of evidence is based on customs rather than rules, and disregarding or violating them does not constitute a contravention of the law
- The indigenous law of evidence is therefore fairly information, and is based largely on reasonableness and effectiveness
- The court is interested in the merits of the case and technical grounds for judgment are unknown
- Two characteristics of the indigenous law are
  1) its inquisitorial procedure (the court plays an active part in examining the parties and their witnesses to determine the "truth"), and
  2) its free system of evidence (no evidence is excluded; all evidence is admissible)

2. Burden of proof and evidential burden

- A distinction should be made between burden of proof and evidential burden in indigenous law

**Burden of proof**
- Determines which party loses the case if the court does not have enough grounds to make a finding on an issue of fact – this is inconceivable in indigenous law because extra-judicial methods of proof are known
- Evidence is so informal and free in nature – there is no scientific reasoning concerning the burden of proof
- The court decides on the merits of the evidence, which rendering of the facts is true
- If it is difficult to come to a decision, the court may use extra-judicial means of proof, i.e. referring the party to a traditional healer (*inyanga*)

**Evidential burden**
- The principle is that the party must prove its claims in court
- In a civil action, the plaintiff's group must submit evidence which proves its claim – otherwise judgment is given in favour of the defendant
- Equally, the defendant's group must submit proof which rebuts the case against it and shows the claim to be unfounded
- A party is not required to prove an issue of fact conclusively

- The court plays an active part in examining the parties and is in a position to judge the rendering of the facts itself
- In criminal cases, the principle is that a party must prove its claim in court
- The onus is on the accused to prove his or her innocence
- 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 plays an active role in the process of questioning 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 the general law of the land is unknown in indigenous law
- In indigenous law, no court case can end in an "absolute from the instance" (i.e. dismissal of the claim by the court because it cannot make a decision in favour of one of the parties on the evidence submitted)
- In indigenous law neither of the parties, nor both together, have the burden or proving their case
- It is the court who acquires proof by playing an active part in the process of questioning so as to be able to give judgment

3. Measure of proof

- 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 indigenous law – the measure of balance of probabilities does not apply in civil cases (i.e. the person, who in the view of the court gives the most probable rendering of facts is entitled to judgment in his favour)
- The principle of "beyond reasonable doubt" does not apply in criminal cases
- The primary aim of an indigenous 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 community
- Judgment is given by the court after all the parties and their witnesses have given their rendering of the case
- The court is interested in the "truth"
- There is no specific test i.e. the "reasonable man"
- In Mpumalanga a spokesman remarked that a particular set of facts could possible be true but within their cultural experience and perception it would not be probable
- Facts and evidence are therefore evaluated within the local cultural context
- In indigenous courts, parties are allowed to submit their unabridged version of the case
- No case is decided without everybody having been heard
- In a civil case, the claim is first argued by the respective family group, and only after no agreement could be reached the matter is referred to the headman's court
- Then the parties ought to know whether the case is founded or not

4. Evidential material and means

- Facts in dispute are proved in an indigenous court by means of evidence and questioning
- Other evidential means include admissions, judicial notice and presumptions

4.1 Evidence

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

**Direct evidence** –
- evidence of a person who has seen or heard something directly is the best evidence
- evidence of an eye witness is considered important
- It is also emphasized that a person who presumes or sees a potential wrong should preferably take along a witness
- Direct evidence on its own is not enough proof, and is always considered together with other evidence

**Circumstantial evidence**
- Is used to supplement other evidence and other evidential material
- In such matters as seduction or adultery special value is attached to circumstantial evidence supporting the evidence of the girl – as direct evidence is seldom at hand
- In such cases the evidence of a singular person may be accepted as sufficient evidence, provided the other party cannot disprove this evidence

**Hearsay evidence**
- Is admissible, and is considered together with other evidence
- A case relying mainly on hearsay has little chance of success

**Concrete evidential material** (can consist of a pair or trousers, or a kierie)
- 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" without a sound reason
- This is a form of judicial notice and a presumption
- The court takes note that 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 of crime
- Sometimes a person caught in the act is "marked" by giving him one or two blows on the body, preferrably the back

- That person must explain to the court how is property came to be in the possession of another, or how he was injured or wounded
- Concrete evidential material together with other evidence is often decisive (considered enough 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
- A member of the court council does not have to withdraw from the process just because he was an eyewitness in a particular case
- Any person present in court may
  - submit further evidence to the court in support of the evidence given
  - Query the evidence
  - Question the parties and their witnesses
- 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 witnesses' refusal to answer a question will lead to an unfavourable conclusion , namely that the person is hiding something from the court

4.2 Admissions

- Civil cases are first discussed by the agnatic groups concerned
- If this process does not lead to a settlement the case is taken to the court of the headman
- There must already be clarity about the facts – therefore it is not necessary for the court to ask the parties to admit certain facts
- In criminal cases, the case is usually investigated by the accused'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, the case judgment may be given
- Admissions made by a party outside the court may be used as evidence in court

4.3 Judicial notice

- The court takes notice of known facts without proof being submitted in this regard
- This is particularly true where the personal particular 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
- The court also takes notice of cultural customs i.e. that a person may not enter another person'[s hut in the other person' absence

- Notice is also taken of animal behaviour – i.e. a cow will not reject her calf in the suckling stage

4.4 Presumptions

- A presumption is an assumption made by the court about a fact that ha snot been proven directly by evidence
- The fact presumed is accepted by the court as correct until it is rebutted
- The following presumptions are known :
  1) the children of a married woman are the children of her husband
  2) an adult is mentally sound – until there is evidence to the contrary
  3) a person does not voluntarily entrust pieces of personal clothing to a stranger
  4) a person does not voluntarily remain prostrate (i.e. lying with face downwards) so that another person may hit him on the back
  5) an action is instituted without delay – Plaintiff's who fail to institute an action therefore have the intention to harm their opponents
- A person who refuses to answer a question in court is withholding information from the court (not a presumption – rather conduct having a harmful effect)

4.5 Extraordinary evidential

- In former time, if the facts of a case were difficult to prove, the court would sent the parties with two or more messengers to an *inyanga*
- Today members of tribal police are used for this puirpose
- The task of the *inyanga*, by means of extra-judicial methods (i.e. throwing bones) determine if the accused is guilty
- These messengers then convey the findings of the *inyanga* to the court – the *inyanga* does not appear in court to give evidence
- The findings of the *inyanga* is accepted as decisive by the court – no further evidence is reuired
- All that remains is for the court to give judgment

## 5. **Competece to give evidence or to testify**

- The general principle is that **all** persons, except insane or intoxicated, are competent to testify in an indigneous court
- Even a young child who can remember or relate an incident or can identify a person can testify in court
- Co-accused may also testify against each other
- A person who is too intoxicated to testify is first allowed to get sober – the case is usually postponed
- A wife may testify for or against her husband and visa versa
- The court will weigh such evidence carefully
- Such evidence must usually be corroborated by other evidence
- Cheifs and headmen may not act as witnesses in a case

- The same applies to members of the court council
- They do not have to withdraw themselves form am a case because they know something about the case
- They must convey their evidence to the court
- In former times, the chief usually testified in private to a chief councillor, who passed this information on to the court
- The chief and the headman, together with the members of the court council, decide a case so that the outcome of the cannot cannot be influenced by a certain individual's prior knowledge of the case

## 6. Giving evidence

- In a traditional court, evidence is not given under oath- therefore perjury is unknown
- No action is taken against a party or a witness who tells lies
- The parties to an action are responsible for seeing to it that their witnesses are present on te day of the trial
- If a witness cannot attend the trial, the court may on request, postpone the trial once
- The court proceedings may also continue without the witness until it appears that particular witness is necessary and then the case is postponed
- The court itself may 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 must give reasons before hand, 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 fo the date of the trial
- He is also asked to bring his witnesses on the day
- In court, evidence is given orally in the presence of the parties concerned
- Each party and all the witnesses are given full opportunity to testify at their discretion to the court, without interruption
- If the court fees it is very long-winded, he will be asked to come to the point
- If he does not do so, it can harm his case
- It is the court who determines the relevance of the evidence
- If later it appears that a person is wasting the court's time, he can be fined.

**STUDY UNIT 3**
**INDIGENOUS COURTS AND OTHER DISPUTE-RESOLUTION FORUMS**

## Lecture 1 – Indigenous law and the courts

1. Introduction

- The Law of Evidence Amendment Act 45 of 1988, all courts can apply indigenous law "insofar as such law is readily available and certain".
- Section 39 (2) of the Constitution, Act 108 1066 makes provision for the application and development of indigenous law by the courts as long as it accords with the spirit and purport of the bill of rights

2. Courts which can apply indigenous law

Structure of court which are recognised ito Section 155 of the Constitution an can apply indigenous law

High Court
(Constitution ss 168 & 168)

Constitutional Court
(Constitution S 167)

Magistrate's Court
(Constitution S 170)

Small-claims courts

Court of traditional leaders

- Cases which involve indigenous law can be instituted in a court of traditional leaders, the magistrate's or small claims court
- The aggrieved party has the choice
- The court of the traditional leader as the court of first instance has a right of appeal to the local magistrate's court and from there to the High Court
- Action first instituted in the small claims court has not right of appeal to the magistrate's court
- If it appears that the indigenous law which is in dispute is in conflict with the bill of fundamental rights, the matters must be referred to the Supreme Court of Appeal or the Constitutional Court
- The court has the power to adjudicate on any alleged or threatened violation of fundamental rights
- The High Court has the jurisdiction to decide on a violate of the bill of fundamental rights, but cannot make a finding on the constitutionality of an Act of parliament

3. Indigenous law and the magistrate's court

- The application of indigenous 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
  1. the court of first instance, where the matter is first instituted in the magistrate's court
  2. a court of appeal where a matter is first instituted in the court of the traditional leader and then referred to the magistrate's court for appe4al

- The powers of the magistrate in respect of an appeal is governed by Section 29A of the Magistrate's Court Act 32 of 1944 –
  1. If a party appeals to a magistrate's court in terms of the provisions of section 12 (4) of the Black Administration Act 1927, the 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 ito subsection (1) shall be deemed to be a decision of a magistrate's court for the purposes of the provisions of Chapter XI

- The Magistrate apparently has no power to review the decision fo the court of the traditional leader which was being appealed against
- 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 a court of the first instance, the magistrate has a choice to apply common law or indigenous law
- When hearing an appeal from the court of the traditional leader, the magistrate must apply indigenous law
- This rule applies regardless of whether the legal phenomenon is found in common law or indigenous law

- The jurisdiction of the magistrate's court and the jurisdiction of the court of a traditional leader may sometimes overlap
- The implications of concurrent jurisdiction has not been property investigated
- Although it has been held that whilst proceedings are underway in once court, the same action should be instituted in another court, there is no rule which actually prohibits it (*Mdumane v Mtshakule 1948 NAH (C20) 28)*
- This appeal is not an appeal in the ordinary sense of the word, a this could involve a retrial (the case which was previously hear is heard as though it had not been hear din the past)
- The overlapping of jurisdiction has at least two undesirable consequences :
  1) a party has the opportunity to chose his own settlement forum – the plaintiff is entitled to make use of a court which will provide him with the most effective remedy – regardless of the prejudice it may cause the defendant
  2) the possibility that an action instituted in the wrong court may have to be transferred to the correct forum which results in loss of time and money
- Most legal systems in Southern Africa leave it to the clerk of the court to decide in which tribunal (court) the action should be instituted

1. Indigenous law and the small-claims court

Small Claims Court Act 61 of 1984

- Small-claims courts operate in an informal manner – and should attempt to reconcile the parties
- The jurisdiction of the courts is restricted to the hearing of small claims which do not exceed an amount determined by the Minister from time to time in the GG – currently R3000.00
- Matters are specifically excluded from the jurisdiction of small claims courts :
  1) dissolution of customary- law marriages
  2) actions for damages for seduction
  3) breach of promise to marry
- The officers presiding over these courts are advocates, attorneys or magistrates and they act as commissioners
- According to the inquisitorial procedure, the court takes an active part in the investigation before the court – similar to the indigenous-court procedure
- There is no requirement in the Small Claims Act Act 61 of 1984 that the commissioners should be able to speak a Bantu language, or that they should be proficient in customary law

4. Divorce courts

- The Black Administration Act 38 of 1927 originally made no provision for the establishments of a court o deal with suits of divorce or nullity of civil marriages between blacks – subject to the jurisdiction of the former Supreme Court
- Ito Section 10 (1) of the Black Administration 1927 Amendment Act 9 of 1929, as amended the State President is empowered to establish, divorce courts
- At present the jurisdiction of divorce courts is governed by section 2 of the Divorce Act 70 of 1979, which replaced Act 22 of 1939
- Sections 1 and 2 of the Divorce Act at present govern the jurisdiction of these courts as well as the grounds for divorce
- Section 10 (2) of Act 9 of 1929 as amended by the Abolition of Special Courts for Blacks Act 34 of 1986 provides
  - The area of jurisdiction of a divorce court shall be determined by the Minister of Justice by Notice in the GG
  - Ito proclamation 1587 of August 1 1986 three divorce courts have been established :
    (a) North Eastern Divorce Court
    (b) The Southern Divorce Court
    (c) Central Divorce Court
- Ito Section 10 (3) of Act 9 of 1929 as amended by Act 34 of 1986, every divorce court shall be a court of law and shall consist of as many divisions as the Minister of Justice from time to time may determine
- Each division shall consist of a president who may appoint to persons to sit and act as assessors in an advisory capacity on questions of fact
- Sessions of two or more divisions may be held simultaneously

- Ito Section 10 (5) of Act 9 of 1929 appeal can be made against the judgment of a divorce court to the local provincial division of the High Court
- The jurisdiction of the High Court is not affected by the provisions of section 10 (1) of Act 9 of 1929
- The High court is accessible to any black person who elects to bring an action for divorce or declaration of nullity
- Supreme Court is not includ3es to accept such cases as a court of first instance, since the divorce courts were established for this purpose in particular
- Although section 10 (2) of Act 9 of 1929 still refers to (judicial) separation in respect of marriages, since June 1 of 1979, a court may no longer make such an order
- The Divorce Act 70 of 1979 abolished judicial separation
- The court may decide on matters arising from divorce i.e. questions of custody or and control over children, maintenance and property rights
- The divorce court has no jurisdiction in respect of the reclaiming of lobolo since it does not arise out of a divorce action
- The rules of the divorce courts
  - were published under Government Notice R2726 of December 24 of 1982,
  - amended by Government Notice R1945 of September 9 1983, and
  - Government Notice R1615 of July 28, 1986
- Section 10 was revoked by section 74 of the Magistrate's Court Amendment Act 120 of 1993
- Section 71 contains interim provisions with reference to divorce matters
- Section 71 (1) rules that a divorce court which is established by virtue of section 10 (Act 9 of 1929) must be regarded as a family court established ito Section 2 (k) of the Lower Courts Act 32 of 1994 notwithstanding the revocation of section 10
- Section 71 (2) states that any rule which applied to a divorce court remains applicable until it is amended or revoked
- Section 71 (3) rules that the presiding officer of a divorce court is deemed to be a family magistrate

## Lecture 2 – The courts of traditional leaders

1. Introduction

- According to sections 12 and 20 of the Black Administration Act 38 of 1927 traditional leaders are empowered to adjudicate civil and criminal cases, provided the Minister (for traditional affairs) has granted them this power
- It is unlikely that the courts of the traditional leaders will consistently draw the careful distinction between criminal and civil matters they are required to do by the Black Administration Act and by common law
- Should they act in contravention of this act, and impose a criminal penalty, they will fall foul of the criminal prescription of common law and can be held liable for any consequences which may arise as a result
- Only black people (described as "a member of an aboriginal race or tribe of Africa") have access to the courts of the traditional leaders
- An argument regarding unfair discrimination is misplaced- as it is general practice to limit institutions of a particular culture to the members of that cultural group
- In *Gerhardy v Brown (1985 159 CLR 70)*, the Australian High Court found a local Act to be valid although it discriminates on racial grounds, since it was a "special measure" to protect the cultural group concerned
- Indigenous courts function for the benefit of black people who do not have access to the magistrate's courts or the Supreme Court on account of financial and educational reasons
- Indigenous courts provide them with a forum that is in harmony with their cultural expectations
- Important differences between the indigenous courts and other courts :
  1) Indigenous courts can apply only indigenous law and not common law
     Other courts can apply both indigenous law and common law
  2) No Legal representation is allowed in indigenous courts

  These differences are in agreement with cultural orientation
- Black people have a choice as to which court to institute their action
- They are not obliged to institute their action in the court of the traditional leader in the first instance

2. Jurisdiction in civil matters

- The Minister may ito Section 12 (1) of the Black Administration Act 38 of 1927, empower a traditional leader who is recognised or has been appointed, to hear and decide on civil claims between blacks
- At the request of a traditional leader, such powers may be granted to a deputy
- Ito Section 12 (2) – the Minister may withdraw the jurisdiction granted to such person at any time
- A traditional leader who hears and decides civil claims, constituted a court and his findings are 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 :
  1) result from indigenous law

2) are instituted by black people against black people residing in the area of jurisdiction

- A traditional leader may not decide on any matter concerning nullity, divorce or separation iro a civil marriage between black people
- In *Gqada v Lepheana (1968 BAC (S))* it was decided
  (a) that a claim concerning lobolo iro a civil marriage is a claim which originates from indigenous law
  (b) Bekker questions this decision
  (c) He argues that this decision assumes an expert knowledge of the general law of persons on part of traditional leaders iro civil marriages and their dissolution, and that lobolo iro a civil marriage is a matter *sui generis* (distinctive) in which indigenous law only serves as a directive, and that such a claim does not arise from inidigenous law
  (d) Unisa's opinion is that this decision has merit – as at the stage of dissolution of the marriage as already been decided by the court, so that the lobolo issues does not arise from the dissolution of a civil marriage (???)
  (e) A traditional leader is empowered to decide on any lobolo claim arising from an indigenous marriage
- A traditional leader's powers are limited to black people who reside in his area – criterion = **residence**
- In *Ex Parte Minister of Native Affairs* – interpretation was given for the word "resident"
  - The issue to decide is one of place of residence and **not of *domicilium***
  - A person can be domiciled in one place and temporarily reside in another place
  - A person can have more than one place of residence but can live only in one place at a time – a person must prove to the court where he resides when summons was served
  - The court did not give a comprehensive description of the word "reside" – there must be evidence that there are good grounds to regard such place as his regular residence at the time when summons was served
- The procedure in the court of the traditional leader is the indigenous-law procedure – it can be assumed that indigenous rules of evidence are applicable
- Section 12 (4) provides for an appeal against a sentence imposed by a traditional leader to the local magistrate's court
- There is no right of appeal iro a claim for less than R10, unless after a summary enquiry the court certifies it involves an important principle of law
- Execution of sentence of the traditional court is postponed until the appeal has been decided upon

3. Jurisdiction in criminal matters

- The Minister can ito Section 20 (1) of the Black Administration Act 38 of 1927 empower traditional leaders and their deputies to try criminal offneces
- The Minister can revoke this power at any time
- According to *Minister van Naturellesake v Monnakgotla (1959 (2) PH (k.70)* such revocation must be done according to the *audi alterem partem* principle (hear the other side)

- There is a rebuttle presumption that a traditinoal leader has the proper power to hear such a case *(R v Dumezweni 1961 (2) SA 751 (a) at 755)*
- A traditional leader is competent to hear
  1) any crime in accordance with common law
  2) any crime in accordance with indigenous law
  3) any statutory crime referred to by the Minister

- A traditional leader's powers are limited in the following way :
  1) his jurisdiction is limited to crimes committed between black people in an area which is under his control – extent of his power connected to residence and no group membership
  2) his jurisdiction is limited to black people

- There are 35 offences listed in the Third Schedule of the Black Administration Amendment At 13 of 1955 which are excluded from the traditional leader's jurisdiction e.g. High treason, mutiny, sedition, murder, culpable homicide, rape, robbery etc (do not need to memorise them)

- The Third Schedule does not limit statutory offences, traditional leaders have jurisdiction in this regard only to the extent prescribed by the Minister through regulation
- Offences not mentioned in the Third Schedule are
  - neglect of children,
  - deprivation of liberty
  - violation of tombs,
  - damage to property,
  - contempt of court,
  - offences against the prerogative and revenue of the State,
  - offences regarding registration of births and deaths, and
  - offences against public health
- The interpretation of these offences has problems
  - In indigenous law, civil and criminal matters are heard in a single suit
  - In both common law and indigenous law arson is merely a form of malicious damage to property
  - Damage to property is also a well-known delict in indigenous law
- A similar problem is encountered in connection with
  - fraud which may not be heard by a traditional leader, and theft, which he may hear
  - kidnapping, which he cannot hear, and child-stealing, which he may hear

  There is a question whether a traditional leader will distinguish between these offences
- With the unspecialised nature of indigenous law, it is unlikely that such fine distinctions on technical grounds will be made
- It may happen that a traditional leader decides on both the delictual and the criminal element of a case although he has no power to do so in respect of the criminal element
- In offences where any of the accused or victims are not black, such offences may not be tried by a traditional leader

- A traditional leader is empowered to punish any person, including a non-black, for contempt of his court in *facie curiae* (in the face of the court) : see
  - *Makapan v Khope 1923 AD 551*
  - *R v Vass 1945 TWPD 34* against
  - *Prinsloo & Myburgh 248*
- The procedure for a trial and the execution of a sentence of the court of the traditional leader are given in accordance with indigenous law – indigenous rules of evidence are applicable
- Section 20 (5) makes provision for an additional way of claiming for unpaid fines
- If the traditional leader fails to recover a fine, he may arrest the person concerned and within 48 hours after arrest, he must be brought before the magistrate's court
- The magistrate my order payment of the fine on being satisfied the fine is lawfully imposed and is still unpaid
- The magistrate may sentence him to imprisonment for a period not exceeding three months – and must issue a warrant for his detention
- The magistrate's action does not amount to a retrial, but an inquiry whether
  (a) the traditional leader was empowered to try the offence, and
  (b) the traditional leader was empowered to impose the fine, and
  (c) why the fine or part had not yet been paid
- Fines must be used in accordance with indigenous law except where the Black Authorities Act 68 of 1951 rules otherwise
- Section 20 (2) contains the following explicit provisions on the punishment which a traditional leader may impose :
  1) he may **not** impose a punishment which entails death, mutilation, grievous bodily harm or imprisonment
  2) he may not impose a fine in excess of R40 or two head of large stock or ten head of small stock (note : amount which is imposed as a fine is not in accordance with current market value of cattle)
  3) A traditional leader cannot impose corporal punishment except in the case of unmarried males below the apparent age of 30
- The limitation of punishment accords with Section 11 (2) of the Constitution 108 of 1996 – the only exception is corporal punishment which is generally seen as being in conflict with fundamental rights (*S v Williams and Five Similar Cases 1994 (4) SA 126 (K) at 139)*
- An accused may appeal against his conviction or any sentence to the magistrate's court having jurisdiction in the area in which the trial took place (S 20 (6) as amended by Act 34 of 1986)
- These appeals are governed by Section 309 A of the Criminal Procedure At 51 of 1977 as amended by Act 34 of 1986, Schedule L).
- The magistrate can either
  (1) uphold the appeal and set aside the conviction and sentence, or
  (2) confirm or alter the conviction
- Should the magistrate alter the conviction, he may not impose a fine in excess of R40 as this is the limit a traditional leader can impose
- On default of immediate compliance with the magistrate's sentence, the magistrate may impose a sentence of imprisonment for a period not exceeding three months

- Ito Section 29 A (1) of the Magistrate's Court Act 32 of 1944, the Court when entertaining an appeal may hear new evidence – considered more a retrial than an appeal
- Provision is made in the Rules of Court (Rule 6) for keeping a written record of the proceedings, this does not include the evidence heard, so the court may well consider new evidence – not heard by the traditional leader
- A copy of the written record must be delivered to a local magistrate within two months of the date of judgment, otherwise the judgment will lapse (Rule 7 (2))
- The Appeal Court may nullify a traditional leader's judgment where indigenous law was wrongly applied – it is not free to alter the cause of action at will
- The magistrate must continue to apply indigenous law on appeal

**Lecture 3 – Informal dispute-resolution forums**

1. Introduction

- In addition to courts mentioned previously, blacks in urban areas, have created various and diverse unofficial forums of dispute settlement and peace keeping
- Traditional court of the ward headman in rural areas was never recognised by the Black Administration Act 38 of 1927 – although continued to function as a lower court in most tribal areas

2. The court of the ward headman

- Although the court of the ward headman in rural areas has functioned since earliest times, it is not recognised in the existing legislation and regulations
- The provisions of section 12 and 20 of the Black Administration Aft are applicable only to "chiefs and headmen", not to ward headmen
- This omission has not had any adverse effect on the existence and functioning of the ward headman and his court
- In terms of the indigenous court system, the ward court is subordinate to the chief's court and is the lowers of the traditional courts
- The ward headman derives his authority from the chief who appointed him
- The ward headman's court has no inherent jurisdiction – its jurisdiction applies only to the persons resident in his ward
- Provision is made for parties living in different wards, usually disputes are hear in the defendant's ward
- A ward headman may never preside over a court session alone
- He is always the presiding judicial official, and he alone has the right to give judgment in any case that serves before his court
- The jurisdiction of the ward court is territorially limited and may only hear cases involving disputes between ward members, or in which ward the member is the defendant
- The ward headman's discretion to refer any case which he considers too "heavy" for his court to the court of the traditional leader
- The ward court has no power
  (a) to try criminal cases, or
  (b) to deliver judgment,
  (c) levy a fine or impose corporal punishment iro any criminal offences
- He is empowered to investigate any such cases that may have occurred within his ward before sending them through to the traditional leader's court
- With the exception of very serious cases, all criminal cases must first be investigated by the ward court before taking them to the court of the traditional leader

Dispute-settlement forums in urban areas

2.1 Introduction

- Until 1986 the Black Administration Act 38 of 1927 provided for a special court system for blacks
- The urbanisation of blacks placed the black urbanites beyond the jurisdiction of the traditional leaders
- The urban blacks were left with the erstwhile commissioners' courts as court of first instance
- During the late 1960's and early 1970's a number of forum's sprang up in urban areas to address needs of these people
- Some under the authority of representatives of the traditional leader who were appointed to serve their subjects in urban areas
- These forums were inclined to apply tribal law in an urban environment
- There were informal "courts" and vigilante groups which set up as part of the formal community-council system
- Information networks of neighbours and cultural movements also became involved in local dispute-settlement activities – and these even included gangs
- These forums arose because of the lack of confidence in the official legal system, unsuitability of the Western dispute-settlement procedures to solve the problems peculiar to urban blacks
- The state's failure to provide adequate law-enforcement in the overcrowded crime-ridden and violence-torn black townships
- One of the first generation forums was the *makgotla*
- Presently the "people's courts" are the main forums

There are two types :

3.2 *Makgotla*

- *Makgotla* is derived from the Sotho word (le) *kgotla* – means "meeting", "court", "the place of meeting", "court session", and also people at such meetigns or only the advisors of a court
- It is comparable to the court of the ward headman in rural areas
- In urban contexts the term *makgotla* is commonly used to describe the informal and unofficial forums involved in the dispute-settlement activities
- The term includes other bodies varying from vigilante groups, gangs, ward committees and even counseling organisations
- All these *makgotla* have many functions other than legal such as social, economic and even political functions
- These institutions are supposed to be
  (a) flexible in procedure,
  (b) to encourage free speech, and
  (c) to incorporate the general opinion of the people present in their decisions
- The rules of procedure and evidence resemble those of traditional indigenous law
- The legal process is informal and devoid of the impersonal and technical rules characteristic of Western legal procedure

- The main aim is to reconcile the parties with each other and with the community at large
- Criminal and civil matters arising from a single set of facts are dealt with in the same hearing
- In some of the *makgotla* corporal punishment is an important sanction
- The content of the law applied comprises a peculiar mix of indigenous and Western law, with a degree of "selfmade" law
- It is alleged that the crime-rate has dropped significantly since these bodies started to operate
- Leaders also requested formal recognition of the *makgotla* by the authorities – instead the authorities intervened to reduce the powers of these informal dispute-settlement tribunals
- In 1983 indications were that less than 2% of the blacks in the Pretoria area took their grievances to the official courts
- Developments in black politics during 1985 resulted in alternative popular and civic associations which took over the functions of the courts and police

3.3 People's courts

- People's courts and street committees became a prominent feature of the political scene during 1985
- They sprang up in many black townships as part of a community initiative to combat the growing crime rate caused by groups of criminal who were exploiting political turmoil
- Another impetus to the creation of people's courts was that the political movements decided to create disciplinary structures for reasons other than justice
- There was a desire among political movements to show townspeople that they were able to take over and manage the township administration, including the administration of justice
- Creating people's court became a way of educating township residents politically and strengthening their self-reliance
- "People's courts" and street committees, served as both courts and places at which the moral values of the future South Africa was passed on to the residents
- Residents could become involved in political structures
- The people's courts were an attempt to experiment with government functions at the lowers level of a post-apartheid adjudicative infrastructure
- Initially People's courts sprung from a breakdown in the formal policing of the townships
- The attention of the police had been diverted to contain protest marches and illegal gatherings
- These circumstances provided the opportunity for criminals and other gangs to prey on other sin the community
- People's courts found an immediate task in the prevention and combatting of crime
- Their jurisdiction sometimes extended to
  (a) regulating political campaigns and to maintaining party obedience, and
  (b) Mediating domestic and neighbourhood disputes
- Popular justice is seen as the aim of many of these forums

- Reconciliation is often held as a prime goal while violence and punishment are associated with the formal state system
- Simplicity and informality are the main features of the trial procedures
- No effort is made to distinguish law and morality – instead the judgments usually reconfirm the principles infringed in the case
- The people's courts differ from the *makgotla* which preceded them and in most cases coexisted with them
- Some of the *makgotla* were associated with the community councils and most had a conservative and nonpolitical stand
- *Makgotla* tended to complement state structures rather than to challenge them

3.4 Community courts

- At the end of 1980 a process of restructuring of the people's courts in various urban residential areas took root
- The process worked hand in hand with the change in name of the people's courts to "community courts"
- They differ from that which existed during the period 1985- 1995 in the sense that they are not organised in party politics
- People are not forced to bring their cases to these courts for adjudication
- The type of law that is applied here is a mixture of indigenous law, Western law and general instinct of what is right and wrong
- The characteristics of the indigenous court system is largely retained, namely
  (a) speedy hearings of cases,
  (b) informal procedures, and
  (c) search for truth and reconciliation

4. Reform

- The changes following the Report of the Hoexter Commission were supposed to effect major improvements in the SA court structure
- It has been shown that the poor prefer to air their complaints in their own forums
- It is more acceptable to litigate in these forums where language, kinship and culture are better known to them
- The law-reform measures in SA paid no regard to the various unofficial methods that already existed for handling disputes
- If due consideration has been paid to the forums already operating in the townships, the legislature might have considered incorporating them in to the state system, rather than creating a new and wholly experimental system of small-claims courts
- It is clear that one of the main goals of the informal justice movement – reconciliation of the various parties, is tied to the particular type of sociopolitical structure

**STUDY UNIT 4**
**INDIGENOUS CRIMINAL LAW**

There are certain offences that may be decided on by the courts only. These offences are considered offences that are harmful to the community as a whole = these fall under indigenous criminal law,

## Lecture 1 – The act as an element of a crime

Four elements :
1. The Act
2. The requirements that need to be met before an act may be called "an indigenous crime"
3. There may be more than one perpetrator
4. The principle that the head of the agnatic group is liable for the actions of the members of his group

1. <u>Introduction</u>

- A knowledge of indigenous criminal law is important because
  - It serves as the necessary background for understanding indigenous law as a whole
  - It is applied in the indigenous courts
- Section 20 of the Black Administration Act 38 of 1927 recognised the fact that traditional chiefs and headmen have limited criminal jurisdiction
- Indigenous criminal law may be defined as the law pertaining to crimes
- Criminal law determines what conduct should be punished – what conduct constitutes a crime
- A crime
  - Is a human act
  - That is in conflict with the generally accepted interests of the community
  - That can be blamed on the perpetrator
  - And the consequence of which
  - Is that the perpetrator may be punished
  - By the community
- The elements of a crime are
  1) There must be a **human act**
     1.1) Some is done actively (called an"act"), or
     1.2) Failure to act in instances where by law, action is required (called an "ommission")
  **2)** The act must be **unlawful**
  3) It must be possible to **blame** the act on the perpetrator – i.e. the relation between the act at the consequences of the act will be examined
  4) The community must be of the opinion that such an act should be **punished**

- An act may be harmful to a private person and the community at the same time

- Assault – it is the victim who sustains physical injuries, but the community is also harmed by the act because of the human relationship that is disturbed

Differences between a crime and a delict :

| | Crime | Delict |
|---|---|---|
| Parties that are harmed | The community is harmed | The individuals or agnatic group are harmed |
| Property that is affected | The public property is affect | Property of a particular individual or agnatic group |
| Procedure involved | The matter must first be tried in court | Mediation between the parties is required before legal proceedings may be instituted |
| The punishment or compensation granted | The offender is punished | Damages (in the form of money) is payable to the party that was harmed |

- In indigenous law certain acts may constitute both a crime and a delict
- There are no separate actions and the matter as a whole is settled in court
- In the same process, punishment and compensation is granted to the aggrieved party
- In most indigenous communities the theft of property, excluding cattle, constituted a delict only
- It is important to determine how the act in question is viewed by that particular community
- Infringement of communal interests sometimes takes the form of defilement (pollution) of the community e.g. "offences of the blood" = assault, homicide
- Incest, and in some communities, contempt of the ruler are considered defiling
- Not only is punishment imposed, but a meal of lustration (purification) and conciliation is ordered as well
- Cattle paid as a fine are generally slaughtered at the court – and members of the court council and persons involved in the act of defilement must join in the meal as a visible, concrete manner of showing reconciliation with the community
- In indigenous criminal law, prescription of a crime is unknown – *molato ga o bole, go bola nama* ("a crime does not perish; only meat does") – Tswana

2. <u>The Act</u>

- According to indigenous law, only conscious human acts can constitute a crime
- Unconscious human acts, i.e. hurting somebody in one's sleep i.e. involuntary acts – cannot constitute a crime
- The act must cause harm
- An attempt to commit a crime that does not cause harm is not punishable
- Acts of animals cannot constitute a crime i.e. a dog attacking a person – whether instigated or not
- A criminal act may also involve an omission, i.e. failure to execute an order of the ruler

- It is not a person's duty to prevent a crime

3. Cause and effect : the problem of causality

- Sometimes it is difficult to determine whether a particular act caused the effect
- If a series of people are involved, it often is difficult to determine which person's action caused the forbidden effect
- In indigenous law, there is no theory of causation – from research a certain act usually causes that particular effect
- The criterion used is therefore the experience of the community
- Every act that constitutes an indispensable condition for a particular state of affairs is considered a cause i.e. A is head by a "knobkierie" by B, and then chased in the sun by C & D – and then dies. The blow with the "knobkierie" constitutes an **indispensable condition** for that particular state of affairs
- Poisoning itself is not taken to be the cause of death – as it is believed that there is always a possibility the poison wont be effective
- A person's omission may bring about a particular effect – thus a person who fails to prevent his vicious dog from attaching another, and due to the failure, the attach is the cause of the effect – the person's failure to control the dog constitutes an omission (??)

4. More than one perpetrator and co-liability

- Indigenous law also takes note of the fact that there can be more than one person involved in a crime
- A broad distinction may be made
  (a) between persons participating in a crime (ie. Co-perpetrators), and
  (b) persons assisting another person who has committed a crime (ie. Persons with co-liability. viz **accomplices**)

- If person persuades, orders or bribes another person to commit a crime he is also considered to be participating in a crime – such participation is punishable
- Conscious collaboration in the commission of a crime is a requirement
- The person collaborating must be aware of the fact that he is committing a crime – he is regarded as a **co-perpetrator**

- A person who intentionally helps others to commit a crime is a also punishable
- He must be distinguished from a perpetrator and is called an **"accomplice"** as he intentionally does something to promote the commission of a crime
- The Tswana call such a person a "helper" (*mothusi*) – and require this person be given a heavier punishment than the perpetrators

- A person who intentionally helps a criminal to evade liability by e.g. hiding a criminal, commits an independent crime
- In indigenous law there is no specific term for this crime and is referred to by paraphrases i.e. "hiding a robber", "hiding stolen goods" etc

- In general law this si known as an "accessory after the fact"

- In indigenous law the head of the agnatic group is always liable for the conduct of members of his group
- He had no part in this conduct and did not even render assistance – yet he has co-liability
- The agnatic group has certain rights and duties – therefore the group is also liable for the crimes of its members
- The Northern Sotho use the following sayings :
  "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 s teals gets his father in to trouble"

- Liability of the group has nothing to do with being participants and accessories
- It has to do with the principle of group rights and duties
- The group member himself incurs the liability and is punished
- A fine must be paid by the group, represented by its head
- The Northern Sotho say "the big wolf has no guilt; the guilt is brought on by the little wolves"

**Lecture 2**
**Unlawfulness, guilt and punishment as elements of a crime**

1. Introduction

- Requirements for an act to be punishable
  - Be a human act
  - Be a conscious human act
  - Have certain harmful consequences
- The act must therefore also be unlawful, i.e. in conflict with what the community considers to be right

2. Unlawfulness

- There may be factors excluding the unlawfulness of a certain act
- It is considered to be forbidden to kill another person
- To kill a person in self-defence will not be guilty of murder
- An act is therefore considered a crime (unlawful0 only if it is in conflict with (harmful to) the interests of the community
- There are certain circumstances under which what looks like an unlawful act is still considered lawful – referred to as "**grounds for justification**" (i.e. private of self-defence)
- Grounds for justification –
  1) defence
  2) necessity
  3) self-help
  4) executing orders
  5) impossibility
  6) consent
  7) institutional action
  8) discipline

**Defence**
- a person may forcibly defend himself/his property, or other persons or property against unlawful attack without being criminally liable
- Only as much force as it necessary tow ard off the assault, abduction, robbery or other peril may be used
- Such conduct is justified against an attack that has already begun, or is threatening to begin
- The person being attacked need not flee to avoid the attack (e.g. a child attacking an adult) – to flee may be considered humiliating
- If a person's life is in danger, the attacker may even be killed if there is no other way of avoiding the attack

**Necessity**
- Protecting oneself or another person, or one's own or another person's property, from danger, excludes unlawfulness

- E.g. breaking in to another's home to extinguish a fire and save the property = necessity
- Killing a sorcerer is not punishable = necessity

**Self-help**
- A thief, rapist, abductor or adulterer caught in the act may be assaulted, and sometimes killed
- Vengeance does not exclude unlawfulness, - **assault after the offence is not allowed**

**Executing an official order**
- An official order issued by an indigenous ruler or authorised agent for e.g. seizing the property for a judgment debtors – is not an unlawful act

**Impossibility**
- To execute an order excludes unlawfulness
- A person who has to attend a headman's court session, and is summoned to the ruler is not guilty of contempt – the ruler takes precedence over other duties

**Consent**
- If an agnatic group has consented to a certain act which causes harm, unlawfulness is excluded
- A medicine specialist who gives medicine with the consent of the head which results in harm – unlawfulness is excluded

**Institutional action (i.e. action according to a recognised cultural institution)**
- Injuries sustained by men in a recognised stick and "kierie" rights – do not constitute assault

**Discipline**
- Under indigenous law adults have wide disciplinary powers
- Any adult who catches a child committing an offence has the power to discipline or punish, even beating

3. Guilt

- Indigenous law requires that the act must be intentional or at least negligent in order to be unlawful
- The acgt must be accompanied by guilt
- If the unlawful act is merely an accident i.e. chopping wood, a chip goes in to someone else'e eye and he loses his eye, there if not liability for assault

- There are two forms of guilt (culpability) :
  1) intent
  2) negligence
- **Intent** is the form of guilt that is required for most indigenous crimes
- A person acts with intent if he consciously does something he knows is wrong ; is acting from malice
- Examples :
  (a) contempt of court
  (b) assault
  (c) murder
  (d) rape
- **Negligence** – when an official discipline is not adhered to, and in the case of culpable homicide (i.e. unlawful and negligent killing of a human being)
- Negligence means not to act like an ordinary man or woman
- In indigenous law no strict distinction is made between **intent** and **negligence**
- What is looked at is the relation between cause and effect, i.e. did the act cause that particular effect? and, Did the perpetrator plan the act?

- A small child and an insane person are not criminally liable for their unlawful conduct; it is said a child's "brain is still too weak", and an insane person "is not a whole person and his actions are like an injury caused by a tree trunk"
- Consideration is also given to whether a person can be held liable for his actions or not i.e. whether he is **criminally liable**

- There is no fixed age at which children may be held criminally liable
- In former times it would be a consideration whether a particular boy was just hearing goats, or whether he was already herding cattle
- Also, a person who had not yet undergone the initiation ceremonies was not considered a mature person – therefore not considered fully criminally liable, whatever his age

- Intoxication or other drugged condition does not exclude criminal liability
- It is also not a mitigating factor if the accused is responsible for his condition
- If a person in an intoxicated or drugged condition is made to commit a crime, his intoxication or drugged state, as well as he was made to commit the crime, are considered mitigating factors

- A supernatural cause such as sorcery does not exclude criminal liability
- A belief in sorcery, together with the fear that the sorcery performed by the victim may endanger a person or his relations or even the community may be regarded as a mitigating factor

## 4. Punishment

Originally the following forms of punishment were known in indigenous law
1) the death penalty
2) banishment

3) confiscation of property
4) removal of the offender to an appointed area within the communal territory
5) fines, mostly in the form of stock
6) corporal punishment
7) compulsory labour
8) a warning after having been found guilty

- Punishment may be increased by combining any of the above forms of punishment
- The death penalty and banishment from the communal territory were often accompanied by confiscation of the offender's property
- Imprisonment was unknown as a form of punishment, although freedom could be restricted
- Determination of punishment was influenced by various factors

- **Mitigating circumstances** were the following :
  (a) The insignificance of the offence,
  (b) youth
  (c) provocation, and
  (d) diminished liability

- **Aggravating circumstances** were :
  (a) The seriousness of the crime
  (b) The use of force in the perpetration of a crime
  (c) Perpetration of the crime within the victim's dwelling or within his premises
  (d) Repeated perpetration of crimes
- Intentional unlawful acts were punished more severely than negligent acts

- Today an indigenous court may still impose punishment in accordance with indigenous law, but with limitations
  (a) no punishment resulting in death, mutilation or bodily harm including corporal punishment
  (b) the maximum fine that may be imposed has been limited
  (c) may not sentence to imprisonment
- In former times a common method of executing a judgment was to detain a conflicted person until the imposed fine had been paid by his relatives
- Today this is not allowed since it boils down to imprisonment until the fine has been paid

**Lecture 3 - Contempt of the ruler, assault and rape**

1. Introduction

- The seriousness of a crime contempt of the rules serves as an indication of the position and authority held by the ruler in traditional law
- Indigenous views on assault serve to indicate the position held by a subject in indigenous law
- Note : the unspecialised nature of indigenous law

2. Contempt of the ruler

- 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 rules
- The following are examples of acts which were punished in indigenous course as contempt of the ruler :
  (1) explicitly rejecting the ruler's authority
  (2) unlawfully calling and holding a tribal meeting
  (3) usurping a headmanship
  (4) conspiring to usurp the ruler's position
  (5) encouraging and canvassing subjects to divide the traditional authority and to establish an indepe4ndent traditional authority
  (6) encouraging subjects to leave the tribal area and to join another ruler
  (7) rejecting the authority of a headman
  (8) adultery with the "tribal wife"
- Contempt of the ruler requires intent as a form of guilt (culpability)
- A stranger cannot commit this crime

- In former days, this crime was punished in one of the following ways :
  (1) banishment, because of the maxim *go nyatsa kgosi ke go tloga* ("contempt of the ruler means to leave")
  (2) the death penalty for serious forms of contempt, together with confiscation of property
  (3) a fine
  (4) corporal punishment
- the death penalty and corporal punishment have been abolished by the Constitutional Court – so can no longer be imposed
- Traditional leaders do not have the authority to banish subjects, and the only valid form of punishment is a fine

3. Assault

- In Northern Sotho "assault" is described as *go itia, go betha* ("to hit somebody"). And *go gobatsa* ("to hurt somebody")
- In Tswana the terms for "assault" can be translated with the word "attack"
- I therefore appears that according to indigenous law "assault" has to do with unlawfully and intentionally hurting another person's body
- Assault is particularly associated with blood and with bodily injury
- An attach causing an open wound or permanent bodily injury is regarded as assault
- It is believed that human blood belongs to the ruler
- To injure someone until the blood flows also has a public, defiling effect on the community
- This defilement is then compensated for by means of a reconciliatory meal at which both the assailant and the victim, and members of the court council are present
- The assailant must provide the animal that is slaughtered as a sacrifice meal
- An attach where there is no blood or bodily injury, regardless of the seriousness of the attack, is **not** considered an assault
- Intention and unlawfulness are requirements for assault
- Bodily injury caused by negligence does not constitute assault
- A person will be liable if he did not provide the necessary warning, and is therefore considered negligent
- Defence, executing an official order or discipline, participation in recognised "kierie" or stick fights or initiation ceremonies are considered grounds of justification
- In cases of assault there must be a complainant
- The victim and the assailant must also settle the matter between themselves before proceedings are instituted at an indigenous court
- If there is a settlement in such a case, it therefore means that there is no punishment under indigenous law
- This does not mean that the less serious assault does not constitute a crime, but the interests of the community are satisfied because relations between those concerned are restored
- The harmony can be regarded as public satisfaction
- Punishment in cases of assault is decided on by the court and was generally in the form of a fine or corporal punishment, or a combination of the two
- Provocation by the victim is considered a mitigating circumstance
- Serious injury and the use of a dangerous weapon are aggravating circumstances
- The court often gives part of the judgment goods to a complainant "to heal the would" – as satisfaction
- The court also sometimes ordered a form of retaliation (i.e. revenge) which meant that the injured person could injure the assailant in a similar way
- Today the assailant is ordered by the indigenous court to pay the victim the medical costs that were caused directly by the assault = an element of compensation in cases of assault

4. Rape

- According to indigenous law, rape occurs when a man uses violence to force a woman to have sex without being married
- Sex with a girl who is not sexually mature is punishable as rape, even if no violence is committed
- The use of violence is a requirement for rape
- The woman therefore has to offer resistance unless she is threatened
- The terms used for "rape" emphasise the element of violence
- The Northern Sotho refer to rape as *kato* - "to hold tight"
- The Tswana use *petelelo* "to constrain" or "to overpower"
- If under the law of the Northern Sotho, it is proven that the woman was thrown on the ground, or that she was constrained and that her clothes were torn, while she was screaming, or was offering resistance, these are sufficient grounds for the attacker to be found guilty of rape
- The woman must have reported the matter to the head of her family immediately
- Some groups require penetration for rape to have taken place - no penetration can be regarded as assault
- Rape is a serious crime and is regarded as unlawful and intentional harm to the woman's body and honour
- At the same time it also harms the honour of the agnatic group
- In former times, rape could be punished with the death penalty, particularly if the victim was the wife of the traditional ruler
- Other recognised forms of punishment were fines or corporal punishment, or both
- A person who caught a rapist in the act with his wife, daughter or sister, could give him a severe thrashing without being punished
- There are also cases where the rapist was killed and the killer was not punished
- The killing and the assault were regarded as lawful means of self-help that excluded the unlawfulness of killing and assault
- The killing and the assault at the same time also serve as lawful means of protecting guardianship
- The killing and thrashing must therefore also be seen as forms of satisfaction
- Today, rape may not be tried by an indigenous court as a crime, but only as a delict

**Lecture 4 – Sorcery as a crime**

1. Introduction

Sorcery as an example of a a crime against public belief

2. Terminology

- The Bantu-speaking peoples of Southern Africa have a religious system involving a belief in non-human powers that are active in the universe – known as "magic"
- It is believed that some people have the ability to manipulate these powers to the advantage or disadvantage of people, and so distinction is sometimes made between "good" and "evil" magic
- Sorcery is a form of "evil" magic
- Sorcery is the belief that some individuals have a mystic ability to harm other people
- This ability is inherited
- It is believed that some fo these people can change their appearance or that they can become invisible
- They can also send agents called "familiars" to do their evil deeds
- These people usually work at night and are called "night sorcerers" – and sometimes referred to as "witches"
- There are other individuals who can also manipulate the "evil", although they do not have the mystical ability that witches have
- People usually use medicine and other magical means to harm people
- These people are sometimes called "day sorcerers", or simply "sorcerers"
- As opposed to witches and sorcerers, who manipulate the "evil", there are people who have the abilities to manipulate the "good"
- Some of those people who manipulate " good" magic are herbalists, diviners and prophets, and are often referred to wrongly as "witch-doctors"

Differences between "good" and "evil" magic

| Magic to the | |
|---|---|
| Advantage of the community ("good magic") | Disadvantage of the community ("evil" magic or sorcery) |
| 1.Herbalists (acquired knowledge<br>2.Diviners (first called by spirits, then trained)<br>3. Prophets (called by spirits) | 1.Witches (inherited abilities)<br>2. Sorcerers (acquired abilities) |

3. The Act

- The Sotho-speaking (Tswana, Northern Sotho and Southern Sotho)people refer to sorcery as *boloi*

- The Nguni (Zulu, Xhosa, Ndebele and Swazi) languages – sorcery is known as *ubuthakathi*
- Sorcery can be described as the magical abilities and powers with the purpose of harming others
- The use of a concoction to poison another person is therefore also regarded as a form of sorcery
- Sorcery can occur in many forms
- Often any result that cannot be explained is ascribed to sorcery
- With sorcery the question is not what and how is happened, but **WHO** caused it to happen

4. Unlawfulness and guilt

- Sorcery can cause the following harm:
  (1) injury
  (2) illness or death
  (3) damage to or disappearance of property
  (4) droughts, accidents
- A sorcerer, need not come in to direct contact with his victim
- A sorcerer may cause harm to his victim just by uttering a formula and the victim's name
- He can put down medicine in a footpath or in the victim's food
- A sorcerer can cause a certain person or place to be struck down by lightening
- Witches perform their evil acts without medicine and in secret
- Witches are not bound by natural human limitations i.e. can enter through a small crack, or change their appearance in to a baboon
- They can be helped by an animal called a "familiar" to harm another person
- A night sorcerer can make people work on the lands in their sleep or they ca make people walk long distances in their sleep
- A night sorcerer can also harm a person in his sleep so that he or she wastes away, or becomes ill, dies or goes insane
- According to indigenous beliefs a person can either be born with the powers of a sorcerer, or he can acquire these powers later on
- Any person who wishes to harm another person can perform sorcery through medicine and advice obtained from a sorcerer
- Any person whose conduct is harmful to communal life can be branded a sorcerer
- A sorcerer can also be hired to bewitch another person
- Sorcery is therefore accompanied by malicious intentions
- If the consequences of an act are harmful it does not necessarily mean that the act was unlawful
- If a herbalist supplies medicine that will make a wrongdoer fall ill so that he can be tracked down, it does not constitute an unlawful act
- This applies to persons who use medicine to protect themselves against harm and then in doing so, they cause harm to another person e.g. a person who hides medicine near his cattle kraal to prevent his cattle being stolen, and the medicine causes a cattle thief to be bewitched or ill or dies, it does not constitute an unlawful act

- Counter-magic with the intention of harming the wrongdoer is not unlawful
- Harm caused by counter-magic is justified as acting in necessity and therefore excludes unlawfulness
- It is not regarded as acting with evil intentions if a person harms a criminal until he (the criminal) admits he is guilty
- Competitive magic – it is customary for diviners and herbalists to attract clients, or to keep clients away from competitors – so they use competitive magic to try and harm an opponent
- Prinsloo and Myburgh suggest that these actions are institutional actions (i.e. recognised conduct in that particular profession) and that such actions are not unlawful

5. Forms of punishment

The following forms of punishment were recognised in indigenous law
(1) the death penalty, often carried out immediately, without formal trial
(2) banishment
(3) banishment and confiscation of property
(4) fines, and even corporal punishment

- If, in former times, it could be proven that persons were sorcerers they could be killed immediately without formal trial
- Sorcerers were regarded as potential and constant threats to the community
- Indigenous courts often made use of extraordinary methods in order to prove a person to be guilty of sorcery
- One such method involved he use of various ordeal tests
- In order cases the services of a diviner would be employed, and the court would then judge the findings of the diviner
- The diviner himself did not testify in court
- A sorcerer was believed to have extraordinary abilities, so in cases of sorcery no ordinary evidential material and methods could be used by the courts
- Northern Sotho say *moloi ga a sekise* " a sorcerer does not stand trial"
- The saying refers to both the use of extraordinary evidential methods and the fact that the punishment was carried out immediately
- In former times the family of a sorcerer was also killed
- This was done because of the belief that the ability to perform acts of magic can be hereditary = "a mamba gives birth to a mamba"
- There is no way of determining whether the ability involved is an inherited or an acquired ability
- Banishment as a form of punishment can also be seen as a form of "social killing"
- The banishment took place in public so that neighbouring tribes could also know about it
- The sorcerer actually had no place to live
- Such a person could in any event be killed without formal trial
- Today people are also known to be expelled from urban residential areas if suspected of sorcery by their community

- Today cases of sorcery can no longer be tried in indigenous courts and the death penalty and banishment are no longer regarded as suitable punishments

## 6. Sorcery, under the general law of the land

- Today a person who kills a sorcerer will be tried for murder under the general law of the land
- The indigenous belief that sorcery poses a threat to a person or the community is no recognised by South African case law – therefore cannot be used as a ground of justification for filling a sorcerer
- At most an accused person's belief in sorcery can serve as a consideration when it is determined to what extent he can be held liable for the crime
- It may also be regarded as a mitigating circumstance
- In 1957 the Witchcraft Suppression Act (Act 3 of 1957) was passed in order to make certain types of conduct punishable by law
- Section 1 (a) of the Act states that a person who accuses another person of being a sorcerer or of committing sorcery is guilty of a crime
- The Act does not recognise the criminal acts that in former times were recognised as acts of "sorcery" in indigenous law and today this still is a matter of concern among indigenous people
- Accusing another person of sorcery is under the general law of the land a more serious crime than was the original crime of "sorcery" under indigenous law
- The Act also does not differentiate clearly and consistently between what constitutes "unlawful" and "lawful" acts of magic
- Section 1(e) uses the word "witchdoctor" where it should have used "diviner" or "herbalist"
- The Bantu-speaking people do not understand what is meant by the term "witchdoctor" as "witch refers to antisocial and unlawful behaviour, whereas "doctor" refers to a learned person with an honourable occupation

**STUDY UNIT 5**
**THE INDIGENOUS CONSTITUTIONAL AND ADMINISTRATIVE LAW**

**Lecture 1**
**The indigenous state in Southern Africa**

- The indigenous peoples of Africa have always had their own form of self government and administration on public matters
- Control and administration is served by political leaders and their governmental organs

1. Introduction

- This encompasses the characteristics of the indigenous state in Southern Africa before large-scale influence from Western institutions of authority
- The indigenous state as a system with centralised authority, administrative organisation and jural organs

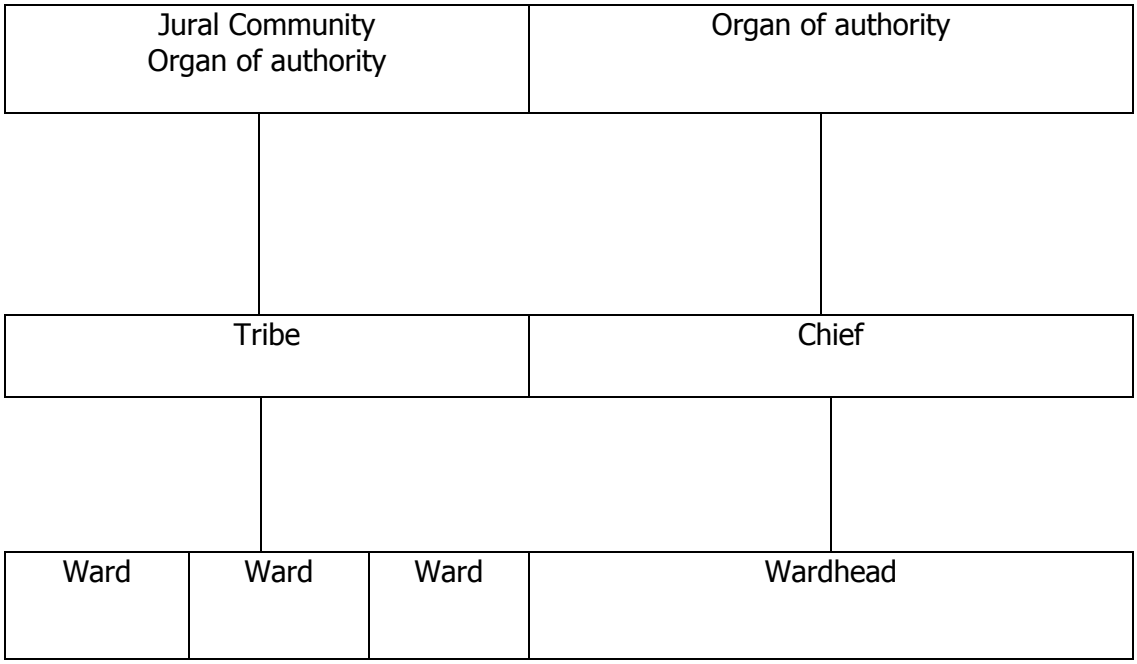
2. Characteristics of the indigenous state

- The indigenous state comprises an autonomous jural community
- A jural community is a political unit with an own juristic life
- The criteria determining whether a community is a jural community are the following:
  (1) **An own territory** –
    (1.1) the boundaries of the comprehensive jural community are clearly demarcated by phenomena such as rivers, mountains and valleys
    (1.2) Within the comprehensive jural community subordinate jural communities are not clearly defined
    (1.3) The organ of authority within each jural community has control over its own territory
    (1.4) The control of subordinate jural communities over their territories is subject to the higher and authority of the comprehensive jural community
  (2) **An own household**
    (2.1) the term "household" denotes the interaction between the members of the jural community including their everyday contacts
    (2.2) Membership of the household may be acquired or lost in various ways
  (3) **An own public law authority**
    (3.1) every jural community has organs of authority that exercise authority within the community and also represent the community against other outside jural communities
    (3.2) The head of the jural community is its most important organ of authority

- Three factors in particular play a role in the establishment and structure of the jural community i.e.
  (a) the genealogical
  (b) the religious

(c) the territorial

- Among the Bantu-speaking groups of Southern Africa, jural communities were as a rule territorial units – in that every jural community had an own territory
- Most jural communities, developed out of an original founding group which formed the core of the jural community and in which the ruling family was established
- The genealogical or kinship principle thus played a role, even though non-related persons and strangers joined the core group
- The ruling family was regarded as the descendants of the original rulers
- The state comprised a hierarchy of constituent jural communities
- From the most comprehensive to the smallest, the following jural communities can be distinguished :
  (1) the empire
  (2) the federation of tribes,
  (3) the tribe,
  (4) the district or section,
  (5) the town and town wards
  (6) the ward
- The commonest and simplest indigenous structure of the state was the tribe which comprised a number of wards
- The comprehensive jural community could be enlarged by the addition of tribes or tribal segments through conquest or voluntary subjugation
- In this manner empires were founded such as those of Shaka and Moshesh
- The organ of authority of the comprehensive jural community exercised control over the territory and its occupants
- The authority of the constituent (but) subordinate jural communities was limited to that particular area and occupation of each
- The structure of the jural communities most commonly found



- Every ward generally comprises a number of family groups
- Every family group included a number of related households which in turn were composed of related families
- The legislative, executive and jural functions – the head of the comprehensive jural community exercised all these functions
- The lower organs of authority had no legislative functions
- Lower organs of authority had only executive and jural functions
- **NOTE: THIS FEATURE IS INDICATIVE OF AN UNSPECIALISED LEGAL SYSTEM**

3. Citizenship

- People who lived in the communal area were subjects and followers who trusted in and were loyal to the ruler
- Citizenship was acquired through birth, conquest or voluntary subjugation and terminated voluntarily or by banishment
- Owing to the belief in ancestors, membership did not end at death since ancestors form part of the community
- A citizen had a right to an allotment of land for residential and agricultural purposes
- He could keep unlimited numbers of livestock which he was entitled to graze on communal land
- He could rely on the ruler for emergency relief
- He could make representations to the rule on any matter and was entitled to protection under the law
- The citizen
  1) owed allegiance to the ruler
  2) had to pay tribute (compulsory occasional gift on special occasions)
  3) perform public service
  4) obtain permission from authorities to leave the area
  5) men had to perform military service and attend meetings of public interest

4. The ruler

- In principle the head of state was a man (exception Lobedu tribe)
- Among some groups women could act as temporary heads of state and serve as regents
- The principle of patrilineal succession or succession in the male line was generally applied
- Factors such as spiritual and physical ability, character and capability were also taken in to account in the selection of the successor after the death of a ruler
- Among some groups spiritual maturity was measured against formal tests such as initiation or marriage
- A successor was not specifically trained for his reigning function – although he sometimes temporarily assumed some of the functions of government during his predecessor's lifetime
- Among many groups the successor had to be of a particular descent such as, the eldest son of the ruler's main wife
- The Tsonga tribe – a ruler was first succeeded by his younger brothers before his sons could succeed him
- Previously the indigenous ruler had only an official or public capacity
- This power was limited to state or public property
- It was incorrectly deduced that the ruler could deal with such property at will – however he could not do as he liked this with this property
- If he exceeded his powers, such actions would have been invalid and unenforceable
- Should the ruler persist with illegal actions, the subjects could refuse to obey him

- In extreme cases, the subjects departed from the area leaving his with no citizens ("ruler of pumpkins")
- The subjects could also have revolted against the ruler's illegal actions which could have led to civil war or assassination of the ruler
- The most important functions of the indigenous head of state were legislative, judicial and executive in nature
- He was assisted by various councils who acted as his advisors
- The various councils were divided into four types
  1) private council
  2) general/representative council
  3) court council
  4) people's assembly
- The ruler could not adjudicate alone – among most groups he had to be assisted by the court council
- For executive functions the assistance of a council was not always required
- Description of indigenous system of government as "a system of authority-in-councils"
- Another characteristic of this system is the general participation of especially adult males in public matters
- All decisions were decided on the basis of consensus
- In modern terms – "participatory and consensual democracy"

5. <u>The councils</u>

- Not all groups has all four types of council
- The rules was not bound by the advice of any council
- In certain circumstances he had to act in collaboration with a particular council – he had to consult the council but was not bound by their advice
- The private council was composed especially of kinsmen of the rules but could also include confidants of the rules and men of particular capability and influential headmen
- Membership of this council was not necessarily hereditary
- This council most met informally and in the case of some groups in secret
- The private council advised the ruler about legislative and important administrative measures, daily occurrences, controlled his actions and if necessary censured him
- The general or representative council was composed of members of the private council, heads of constituent jural communities and council members nominated by the rules
- This council advised the ruler on weighty measures and legislation
- The general council could control the actions of the rules and could also criticise him
- The court council was in most cases the same as the general council in that the majority of the members of the court council were also members of the general council
- The court council acted as assessors and although they had to attend the court sessions, the full council did not always have to be in attendance
- The judgment of the members of the court council helped the ruler to a decision about the case before the court

- The people's assembly was limited to men
- It consisted of the heads of families, initiated men, male regiments or all adult males
- These meetings were convened by the rule with or without consulting this private council to give attention to matters affecting all subjects, such as
  (1) the altering of boundaries of the state,
  (2) settlement of a dispute with a neighbouring state,
  (3) war,
  (4) execution of suspected witches,
  (5) harvest festivals,
  (6) tribute and legislative measures
- Attendance was compulsory when important legislation would be discussed
- In principle the ruler was the head of each of these councils
- He could be re4presented by a kinsman or confidant
- Decisions at these councils were not take by means of a vote - the general principle was that of consensus
- The indigenous system of government can possibly be best described as a monarchial system with elements of a democratic system

**Lecture 2**
**Traditional authorities in South Africa**

1. Introduction

- Two forms of administration of the subjected communities were developed by the various colonial powers
  (1)Followed by the French colonies : was that of **direct rule** - according to which indigenous political institutions were replaced by colonial institutions
  (3) Followed by Britain : was that of **indirect rule** – according to which indigenous administrative institutions were recognised and adapted to the requirements of the colonial authority. In Southern Africa it was the form of indirect rule which was mainly applied

2. Recognition before 1951

- During the colonisation process, the indigenous authorities in SA were subordinate to the colonial authorities
- The result was that the indigenous ruler's authority was diminished
- The indigenous ruler no longer had any legislative power + his executive and judicial powers were limited
- In 1910 there was no uniform policy in respect of Bantu-speaking communities in SA
- The control and administration of these communities were reserved for the central government
- In 1927 a uniform policy was formulated in the form of the Black Administration Act 38 of 1927
- This Act made provision for the following :
  (1) the establishment of the State President as supreme chief of all Bantu-speaking groups with all the powers which a chief held under indigenous law
  (2) the granting of legislative powers of Bantu-speaking communities to the State President. These powers were exercised by means of a special proclamation. This power of proclamation is similar to that of parliamentary legislative power (*Rex v Mahara*). This means that a proclamation has the same power as an Act of parliament
  (3) Special officials who undertook the administration of Bantu-speaking communities and who exercised control over chiefs
  (4) Special courts acting alongside the indigenous court of the chief. The chief's jurisdiction in civil and criminal matters was limited and subordinate to special commissioner's courts
  (5) The recognition and appointment of chiefs by the State President
- After 1927 a chief did not hold his position on the grounds of birth in the male line alone - he had to be recognised and appointed by the State President
- In addition, the Minister had to grant him limited judicial powers
- A chief not so recognised and appointed had no administrative and judicial powers
- The powers of the State President and the Minister now lie with the provincial legislatures according to the Schedule 6 of the Constitution

- The functions of the chief are contained in Proclamation 110 if 1957 and include that he shall:
  (a) further the interests of the tribe
  (b) further the material, moral and social well-being of the people
  (c) develop and improve the territory
  (d) actively stimulate participation of the people in the administration of the tribe
  (e) maintain law and order in the territory
  (f) execute his powers, functions and duties in co-operation with the traditional authority
  (g) 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
  (h) bring all new acts and regulations to the attention of the tribe

3. Traditional authorities

- The Black Authorities Act 68 of 1951 made provision for self government on local, regional and territorial level
- Provision was also made for the adaptation of indigenous authorities to the demands of modern administration
- A traditional authority is composed of the chief and a number of council members
- The council members can be nominated by the chief or they can be elected
- According to the legislation, provision has been made for only one advisory council in tribal administration, therefore the indigenous councils are not recognised

According to Section 4 the powers, activities and duties of the traditional authority include the following :
(1) managing the matters of the tribe
(2) assistance and guidance to the chief in the exercise of this duties
(3) in general exercising powers and performing activities and duties which are in accordance with the State President's judgment and fall within the scope of the traditional tribal management or the power that he may grant

- Traditional authorities observe indigenous laws and customs when exercising their powers and performing their duties
- In terms of the Proclamation 111 of 1994, the administration of traditional authorities lies with the provinces

During 1996 there were 794 recognised traditional authorities in SA – these came to the fore in the following provinces

| PROVINCE | KING | PARAMOUNT CHIEF | CHIEFS | WARD HEADS |
|---|---|---|---|---|
| EASTERN CAPE | - | 6 | 173 | |
| MPUMALANGA | - | 2 | 45 | |
| NORTHERN | - | 1 | 193 | |
| KWAZULU-NATAL | 1 | - | 289 | |
| FREE STATE | - | 2 | 13 | |
| NORTHWEST | - | - | 69 | |
| **TOTAL** | 1 | 11 | 782 | 1138 |

**Lecture 3**
**Traditional leaders and the Constitution**

1. Introduction

- The constitution makes provision not only for traditional authorities, but also for the recognition, institution, status and role of traditional leadership
- The important questions
  1) What should be understood by "traditional" leadership?
  2) Who qualify as traditional leaders?
  3) What are the constitutional implications of the recognition of traditional leadership?

2. Traditional leadership

- The term "traditional" 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 objectives and behaviour of people that is necessary in order for them to survive within a group
- The term "tradition is also used in a popular sense, ie. That has stood for many years and continues unchanged e.g. traditional foods, dress, weapons
- Tradition can also have a subjective meaning, with reference to the traditional inviolability (sacredness) of marriage, or traditional value of freedom of speech
- It can also have a negative meaning when referring to conservatism or backwardness of people, i.e. (traditional backward societies, traditional insufficient medicine and traditional backward law
- "tradition" and its derivations have conflicting and ambiguous connotations
- There is no indicate in the Constitution a to which meaning should be attached to traditional leadership
- Section 211 (2) refers to a traditional authority "that observes a system of indigenous law"
- Constitutional Principle XIII also refers to "traditional leadership corresponding to customary law"
- We can infer that the understanding of traditional leadership refers to a cultural institution (indigenous leadership) which has been handed down from generation to generation
- In the SA context we can assume that the principle of heredity and succession by men (only male members of the patrilineage; the patrilineage also includes female members) are also included
- It is not clear which version of indigenous law is implied
- We can assume that it refers to indigenous law as applied " in accordance to any applicable legislation and customs, whereby is included any amendment or repeal of that legislation or customs"
- The traditional leadership under discussion is now regulated by the Black Administration Act 38 of 1927 and the Black Authorities Act 68 of 1951

3. Categories of traditional leaders

- In Lectures 1 & 2 different levels of government can be distinguished in indigenous constitutional law e.g. heads of kingdoms, tribes and wards
- Lecture 2 it was indicated that heads of tribes and communities which are not recognised as tribes are given recognition by way of legislation - there is therefore only talk of chiefs and appointed headmen
- In the Constitution reference is made to the institution, status and role of traditional leadership (S211 (1))
- The meaning of "traditional leaders" is not defined
- It will sometimes appear from the general use of the term "traditional leaders" that "traditional leaders" refers to the leader corps known as chiefs
- Sometimes ward heads (the indunas or councillors) are also included, especially when the composition of the Provincial houses of Traditional Leaders are taken into account
- An organisation such as Contralesa (Congress of Traditional Leaders of SA) – we see that women play a prominent role in this organisation
- It is not clear whom these people themselves regard as traditional leaders
- According to the Constitution and according to the composition of the Provincial Houses of Traditional Leaders, it seems that kings, chiefs, ward heads and other councillors are regarded as traditional leaders

4. The Constitutional position of traditional leaders

- The Constitution of the Republic of SA 108 of 1996 makes provision for the continuation of traditional authorities in Section 181 (1).
- This section states
  "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, in the new Constitution leads to certain inconsistencies
- This system of chosen leaders is in contract to the traditional system of heredity leadership
- Heredity leadership is based on the principle of male primogeniture
- Heredity leadership further implies that the official holds office for life, in contract 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 of local-government level, as legislation never was an important characteristic of indigenous law
- 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 level

- These bodies must advise the provincial and national legislatures respectively, and must make suggestions about matters concerning the traditional authorities and indigenous law, as well as the traditional and customs of the traditional communities
- At provincial level, traditional leaders are elected or appointed by traditional authorities to provincial houses, an 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 indigenous 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
- They can insist on being consulted about matters of indigenous law, but they can to 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 (S9 (3)) and thus the indigenous system of male succession
- With few exceptions women are not clothed with any public of political functions in terms of indigenous law
- The Lobedu of Modjadji do have women as the chief, while Venda and Swazi clothe the chief's mother or sister with important functions
- According to the Swazi, the kings' mother is the mirror image of the king
- In other groups women today can act as regent while the rightful success is still too young
- According to the principle of equality there can be no argument that it is discriminatory that the 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 pagtrilineal succession
- This means that only males in the patrilineage can succeed
- If a woman is allowed to succeed, it would mean that her children cannot succeed as they are not members of the patrilineage
- In the 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 deal with reverse discrimination (only women)
- 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 - women must fulfil the functions of a successor
- It is 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 indigenous political succession
- First, we must determine what is mean by "unreasonable discrimination" a found in Section 9 (3)

- 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 this 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 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

**Lecture 4**
**Succession to traditional leadership**

1. Introduction

At present there are a number of disputes regarding traditional leadership

2. Statutory measures on 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 (*A kgosi is Kgosi* through the blood of chieftainship)
- The following situation may arise on the death of a ruler
  1) There is a suitable successor and succession can take place without delay
  2) 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 a lawful successor is in a position to succeed
- The original power of the ruling family, and the tribe who would decide on a successor, has been subjected to the recognition of the successor by the state authority
- The authority of the state is described as follows in Section 2 (7) of the Black Administration Act 38 of 1927, as amended :
  "(7) The State President may recognise or appoint any person as chief of a Black tribe … may depose any chief so recognised or appointed"
- Consequently the State President is not bound to the rules of the indigenous law of succession
- Neither is he expected to consider them or observe them when recognising or appointing a particular person
- The Statement President acquired the power to depose or remove from office a chief who had been recognised or appointed
- This power encroached upon the indigenous-law principle that a rules occupied his position for life
- According to Schedule 4, Part A of the Constitution, Act 108 of 1996, matters which concerned indigenous law are entrusted to the different provinces.
- At present the provinces are vested with the power to recognise and appoint chiefs
- The provincial legislature is now bound by the local law of succession of a particular tribe
- In practice tribes are usually permitted to nominate a person according to tribal law for institution and recognition as chief (*Chief Pilane v Chief Linchwe and Another)*
- In the previous constitutional dispensation territories such as Transkei, Ciskei, Venda and Bop, had independent status, the recognition of chiefs was governed in terms of the particular constitution of each country
- In BOP, the recognition of chiefs was entrusted to the President ito Sction 57 (1) of the Constitution

- Ito Section 36 (1) of the BOP Act on Traditional Authorities 23 of 1978 the President could recognise any person as chief or acting chief of a tribe
- In *Mosome v Makapan NO and Another* it is clear that although modern law occasionally provides for the observation of the indigenous law of succession, the authorities are not bound by it

3. Indigenous principles of succession to traditional leadership

- The law of succession to chieftainship is as follows :
  (1) It is a hereditary system and the position of the chief follows the patrilineage (male line). Succession in the female line is the exception in Southern Africa
  (2) The successor is the eldest son of the ruler by the tribal or main wife. The tribal or main wife is often marriage specifically for this purpose and her position is indisputable. Among most groups such woman should meet specific requirements. Among Northern Sotho no woman other than the tribal wife can bear the successor
  (3) The other wives of the rules occupy a particular position of rank and this ranking order has significance especially in the situation where an acting chief or regent has to be appointed
  (4) The sons of a ruler by his various wives retain the rank of their mothers. This ranking order is confirmed during the rites of circumcision
  (5) The ruler according to which younger full and half brothers of a successor may succeed vary greatly among different groups. Northern Sotho such sons cannot succeed, but can act only as regents
  (6) General recognition of a substitution of the ruler by the institution of the levirate and substitution of the tribal wife by the sororate institution. The rules in this connection differ markedly among the various groups. In any dispute arising from this, the principles of the community concerned should be taking into account
    - Substitution of the husband occurs where the husband dies before he can marry, or before marrying the tribal wife – children are raised on his behalf with a wife married after his death. 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 ito the *ukungena* custom and this son becomes the lawful successor
    - Substitution of the tribal wife occurs in those case where she dies without a son, in which case she is substituted for by a relative. This is a 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. Her inability to bear a son is supplemented for by a relative "supporting wife". Once this "wife" bears a son as a successor, she has not obligation to stay with the husband's people, and may marry another man.

4. Problems in connection with succession

- In days gone by, tribal fission resulting from succession disputes was a common way in which new tribes came in to being
- In many cases tribal fission was the only way to solve a succession problem
- There was no mechanism within the ruling family to solve serious differences in respect of succession
- 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
- A decision of a court seldom succeeds in solving a problem of succession, with the result that internal disputes regarding chieftainship became a chronic problem which could last generations

- The following are some of the causes of succession disputes :
  (1) The chief tries to divorce the tribal wife without cooperation of the ruling family. There are examples of cases of a chief being married to his tribal wife in a civil marriage and later on marrying further wives according to indigenous 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 civil law
  (2) It sometimes happens that the chief marries a wife in a civil marriage without the cooperation of the ruling family or against their will and wishes. This wife is then the only wife and is sometimes not even regarded as tribal wife, although in terms of indigenous law she is not
  (3) The appointment of the tribal wife or another wife of the chief as a regent. The appointment of a wife to act temporarily as chief occurs fairly often nowadays. Some of the problems in this connection result from situations :
    - Where the tribal wife associates with "unacceptable males"
    - Where she refuses to co-operate with the ruling family
    - Where a wife who is not the tribal wife tries to usurp the chieftainship for her son
    - Where the tribal wife is opposed by the deceased chief's brothers and half brothers
  (4) the ranking of the chiefs wives often give rise to disputes. The tribal wife's position is disputed by descendants of a wife who was married before the tribal wife was married
  (5) 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 afterwards claims the status of tribal wife
  (6) 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 the child of the cattle (marriage goods)
  (7) Witchcraft also often leads to accusations against the tribal wife in order to exclude the rightful successor
  (8) 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. The man or woman who acted as substitute claims the privileges

5. Consequences of succession disputes

- The incidence of succession disputes in respect of chieftainship indicates that the office of chieftainship in rural areas is still of significance
- As the chief reigns with the assistance of the ruling family, this family has to appoint a successor
- Any succession dispute results in a split in the ruling family which is reflected at the tribal level.
- It is thus necessary that any succession dispute be solved as soon as possible and this requires cognisance and application of the local law of succession

**Lecture 5**
**The indigenous administrative act**

1. Introduction

- In indigenous law the functions of government (legislative, executive and judicial) are not divided
- All the indigenous organs of government are also executive organs of government
- The chief, the indigenous representative council, the statutory traditional authority, ward heads and other officials of the tribal administration are also executive organs

2. Validity requirements

2.1 General

- An indigenous administrative act refers to an action of an administrative organ, such as the chief, the ward head, the traditional authority or an official land designator.
- Such acts result in rules for subjects and authoritative bodies
- Acts in conflict with these rules constitute a crime
- An **administrative determination is an act whereby legal relations are created, amended or abrogated**
  e.g. of indigenous determinations are :
  (a) the allocation or refusal or residential and agricultural land
  (b) the permission or refusal of immigration of emigration
  (c) the permission or refusal to gather natural products from communal land

**General and particular determinations**

- General legal relations are created, amended or ended by general determinations : e.g. is the traditional leader's decision or determination t reserve a particular area as grazing land for a specified time.
- A particular determination creates, amends or terminates particular legal relations e.t. the allocation of a residential site to a particular family or the removal of a particular family from one place to another

- 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
- A General determination is made known during the meetings of the ward or the general assembly
- The annulment of a general determination affects the whole functioning of the determination, and not only the particular subject/s who opposes it.
- A person who neglects a prohibition or a command that is instituted in an administrative determination commits a crime.
- A crime can however be committed only if the administrative act is legally valid
- Although some maintain that the chief's word is law, the chief cannot act arbitrarily

2.2 The author

- According to indigenous law the ruler (king or chief) is the organ of authority who acts as the author of the determination from which all duties of the subjects or the particular subjects flow
- The ruler can exercise his powers as soon as he is inaugurated
- The traditional ruler can institute or revoke valid general determinations only as long as this administrative power is exercised in accordance with valid legal rules
- The ruler has no power to create new acts or laws
- The competent organ who could make new laws was in the past the general assembly, and now it is the traditional authority
- Discretion which affects the rights or powers of subjects , the ruler must do in collaboration with the traditional authority
- A discretion includes the power to present a choice – this choice must still be exercised according to the requirements of law
- If the ruler does not consult the proper council, then his action is invalid
- A ruler's administrative determination is valid only in the area of the traditional authority and on the residents who are in the territory
- An instruction which addresses a person who lives outside of that territory cannot be enforced

2.3 The form of the act

- The formal requirements of an administrative determination are related to
  1) the announcement thereof
  2) its content
  3) the correct procedures
- No determination is valid if it does not come to the attention of the person to whom it relates
- General determinations must be made known in public, e.g. at a public assembly
- Some determinations are made known via rituals such as the commencement of ploughing season i.e. rain ritual
- According to tradition particular determinations are conveyed orally to the person concerned by the ruler's messenger.
- Presently the decisions can be conveyed to the particular people concerned in writing by the secretary of the traditional authority
- The content of the determination must be clear and understandable e.g. an order for removal must clearly indicate who must be removed, when they must be removed where they are to be removed and why they must be removed
- The procedure of determinations relates to the fact that a ruler must consult the relevant councils in circumstances where a subject's rights have been infringed
- Presently the traditional authority must be consulted as it is the only council that has been statutorily recognised

2.4 The purpose of the act

- According to the indigenous law a ruler may not execute a particular administrative action out of hand
- Such an action must be executed in view of a particular objective
- The purpose of all administrative actions is to further the public interest
- If authorised action is directed towards an unauthorised purpose, the action is invalid e.g. a removal order cannot be issued if the ruler wishes to give than particular residential land to a friend

2.5 Consequences of the act

- The consequences and effect of the administrative act must be reasonable
- The requirements for reasonableness include the following
  (1) the consequences and effect of the act must be possible
  (2) the rights and freedom of subjects must not be exceedingly burdened by the exercise of discretion
  (3) there must be no discrimination between individuals or groups except where the law permits it
- The ruler's order that subjects must work for free in the interest of the community was seen as being reasonable and ws confirmed by the former Supreme Court in *S v Moshesh*
- The ruler may not make an unreasonable distinction between age regiments
- According to indigenous law no compensation is payable with regard to orders for removal
- Suitable land must be allotted elsewhere to the people required to move
- They must also be allowed to remove all building material
- In the event of cultivated land, they must allow for a reasonable amount of time to elapse in order to gather the harvest of the land

3. <u>Control over the traditional leader's administrative actions</u>

3.1 Introduction

- The general form of control over the actions of the traditional leader is exercised by means of advice by the different councils
- The basis of this control is expressed in the Northern-Sotho legal maxim "a kgosi is kgosi *thanks to the people"*) – this means that the rule must act in accordance with the will of the people
- Previously it was the private and the representative council who advised the ruler over administrative acts
- At present it is the traditional authority who is empowered to do this
- The requirement of administrative determinations are not as complete unless the law also provides for methods to enforce these requirements.
- Indigenous law provides for legal remedies when a subject is wronged by an administrative action of the ruler, ward head or another organ of authority
- Here we give attention only to the control over the ruler

## 3.2 Mediation

- Mediation embraces the solution to a dispute outside court with the intervention of a third party
- The following principle applies : any objection to an administrative action of the ruler must go before the private council for mediation
- This council exercises the most control over the actions of the ruler, and ensures that it is actually the ruling family that rules with the ruler a the mouthpiece only
- An aggrieved subject relates his complaint to a member of the private council who consults the rule in private
- If he finds the ruler acted incorrectly, he can reprimand him and require him to offer his pardon to the subject
- One or more pieces of cattle can be delivered by way of reconciliation
- The council can also act on its own against the wrongful action of the ruler
- If the private council and the ruler cannot come to a compromise, the matter was referred to the representative council
- If this council did not succeed, the matter was referred to the people's assembly, where it was dealt with publicly
- At present the traditional authority also fulfils this function
- E.g. the administration of corporal punishment to women; incorrect composition of the representative council; mismanagement of tribal funds; refusal to award residential land to a subject

## 3.3 Judicial control according to indigenous law

- Indigenous law does not allow a court action to a subject to oppose an administrative action of the ruler in the tribal court
- The ruler will then act as judge and accused in the same case
- An aggrieved subject can however use indirect means to oppose an administrative determination of the ruler by raising the invalidity of the act as a defence in a criminal suit e.g. where people were accused of not delivering cattle and proved they had not received notification of such an order

## 3.4 Internal review according to common law

- Today the traditional ruler functions within a hierarchy of organs of authority
- This means that his actions can also be reviewed by a higher authority within the same hierarchy of power
- Internal review can be done at the request of an aggrieved subject or out of the higher organ's own accord
- The higher authority can consider the validity of the act as well as the desirability and effectiveness of the act
- The particular organ can confirm disapprove, amend or replace the action
- The reviewing authority can also take new facts into account and apply new considerations

- If a subject is not satisfied with the decision of the reviewing authority, he can oppose it in a court of law
- The traditional ruler cannot oppose the decision in a court of law, because he and the magistrate belong to the same hierarchy of power and are not independent parties in such a case
- The ruler can appeal to a higher official in the hierarchy if he is not satisfied with the decision of the review

3.5 Judicial control according to common law

- An aggrieved subject can apply directly to the magistrate's court or the Supreme Court to check the administrative action of the ruler
- The subject can :
  (1) apply for **review** of the validity of the administrative act
  (2) apply for an **interdict** in which the chief is ordered to stop the act that infringes the rights of the applicant
  (3) 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
- By instituting an action the force of the force of the ruler's administrative act is not deferred
- If the subject wishes a deferment, he must specially apply for a temporary interdict
- The court merely looks at the validity requirements and not the effectiveness
- The traditional leader on account of his invalid administrative actions is today privately and criminally liable e.g. if he without authorisation deprives a subject of his property or damages it, the subject can institute a claim against him
- A traditional leader who metes out corporal punishment can also be charged with assault