

REPORT ON CUSTOMARY LAW RESEARCH FOR LEAP

Lyov Hassim 2002

RESEARCH BRIEF

TO PROVIDE A BRIEF SURVEY OF WHAT LEGAL INFORMATION EXISTS ON THE SUBJECT OF CUSTOMARY LAW WITH SPECIFIC REFERENCE TO GROUP AND INDIVIDUAL RIGHTS TO COMMON PROPERTY IN RELATION TO LAND AND RESOURCES AND THE MANAGEMENT THEREOF

THIS REPORT IS A SUMMARY OF VARIOUS CHAPTERS FROM BENNETT 2002. NO PRIMARY OR SECONDARY RESEARCH HAS BEEN DONE IN THE COMPILATION OF THE REPORT AND THE REFERENCES TO PRIMARY SOURCES IS TAKEN FROM THE SUMMARISED WORK AND THE ACCURACY HAS NOT BEEN VERIFIED.

1. QUESTIONS ABOUT QUESTIONS

The last time I dealt with Customary law was in 1985, when I took a legal course in African Customary law. Then I approached the issues with the critical mind of an activist who condemned all things customary and traditional as an attempt by the Oppressor to 'Tribalize' our people and to keep them in perpetual bondage of their past, when the demands of 'progressiveness' was to eradicate all that was pre-modern and pre-capitalist. Customary Law was located within the context of apartheid's separate development that hindered the movement of history. My ambition then was to move history!

I now visit the same topic again in a very different context and the sense I get from my research brief is a view that Customary Law or aspects of Customary Law may help solve some post-apartheid problem linked to Land tenure reform of Communally Owned land because Customary law, is closer to the 'day to day' reality of many people 'living and loving' on such land. There is also a feeling that western legal concepts are clumsy and problematic when addressing issues of the ownership, use and management of communal land. My ambition now is much simpler ie. to complete a piece of research and get paid!

2. CUSTOMARY LAW AND THE 1996 CONSTITUTION

2.1 INTRODUCTION

At a methodological level this research adopts the view of Allan Norrie who suggests that legal theory has historically been divided into those that assert the autonomy of the Law and those who assert its heteronomy. Norrie argues that "those theories that emphasise Law's heteronomy fail to account for its specificity and those that emphasise its autonomy fail to account for its relatedness" (Norrie:1993: 6). Norrie concludes that "law

must be understood methodologically at the same in itself and its otherness, and this is only possible in regarding it as a specific historical socio-political practice” (Norrie:1993: 16). While I recognise the ‘otherness’ of the law and its location in post apartheid politics the brief requires a focus on the law in itself.

Constitutionalism and Law in post apartheid South Africa is grounded in the political processes that gave rise to the latter’s possibility. Political discourse in post apartheid South Africa is one that locates political contestation and transformation within specific legal boundaries. The Constitution with its contradictory and interconnected rights and duties becomes the politico-legal framework that sets the horizons on what is possible or not in the new order.

It is now trite that the Constitution of the Republic of South Africa Act No 108 of 1996 is the supreme law of the land. Section 2 of the Act states that “this Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.” Now while this may seem a rather rudimentary Constitutional Law point it must be noted that the values and concepts upon which our Constitution and Bill of Rights is grounded immediately distinguish Customary law from the law which is now supreme. For instance, the Constitution and the Bill of Rights is rigid and codified and can only be changed with special majorities. This stands in stark contrast to Customary law which historically has been flexible, uncodified and whose recognition and interpretation was the subject of the Traditional leaders discretion on advice by a council. In addition many of the rights protected by the Constitution was not even within contemplative horizons of pre-colonial Customary Law. For instance, Section 9.3 of the Constitution dealing with Equality, Section 32 dealing with Access to Information, Section 33 dealing with Just Administrative Action, Section 34 dealing with Access to Courts, Section 36 dealing with Delimitation of Rights, Section 38 dealing with the Enforcement of Rights, Section 39 dealing with the Interpretation of the Constitution.

Constitutional supremacy has substituted for white supremacy and it is my opinion that in an ironic twist of fate, Customary Law while recognised and dignified by the Constitution retains a status no different from that which it enjoyed under apartheid but also has the added threat of the Bill of Rights which is grounded on a particular conception of individual liberty.

The fact that the Constitution is declared the supreme law of the Republic establishes Constitutional Sovereignty within the Republic and any law (whether customary, common or statute) or conduct inconsistent with the Constitution and the interpretation thereof by the Courts will be declared invalid. Post Apartheid South Africa has opened politico-legal space for the constitution of a Constitutional culture in which the rules of the post apartheid political game, in so far as it applies to individuals, groups; political parties, the state etc, are grounded in the Constitution and redefined by the courts as the game is played. The point simply is that in the final analysis the Constitutional Court and the Constitution are supreme in terms of determining what our Constitutional Rights and obligations are at any one single point in time.

Bennett argues that “South Africa’s new constitutional dispensation has provided the occasion for instituting a series of major legal changes. The reforms affecting customary law have been aimed, principally, at implementing the Bill of Rights and cleansing the country’s plural legal system of its associations with the apartheid past”. (Bennett: 2002:32)

The South African Law Commission, in its *Report on Conflicts of Law (1999) Project 90* recommended a thorough overhaul of the current Law. According to Bennett the Commission considered that both Courts and litigants deserve clearer and more explicit choice of law rules and that a new enactment is now needed in order to disentangle choice of law from the two statutes currently regulating it; the Black Administration Act (which is closely linked to the policies of segregation and Apartheid) and the Law of Evidence Amendment Act (which is concerned with ways of proving foreign and Customary Laws) (Bennett: 2002:32)

The South African Law Commission also submitted a *Report on Customary Marriages*. This report put forward a common code of law with regard to Marriage in South Africa and most of the Commissions recommendations were accepted by Parliament and enacted in the Recognition of Customary Marriages Act 120 of 1998. This Act gives full recognition to all existing Customary Marriages and it establishes a set of minimum requirements for future Customary Marriages, and ensures that the consequences of all Marriages, whether civil, Christian or customary, are more or less the same. At the same time the South African Law Commission is also proposing uniform codes of law on Succession and the Administration of Estates. (Bennett: 2002: 33). The key issues are defining the boundaries of Customary Law regarding

According to Bennett, “these attempts to create single codes of rules are, in part at least, a response to South Africa’s history of dual and discriminatory laws. Understandable as the principle of equal treatment may be, the considerable literature on legal pluralism demonstrates that it is impossible to eliminate the regulatory orders of semiautonomous social fields. Some form of accommodation is necessary and thus a perpetuation of the conflict of Laws”. (Bennett: 2002:33). The key issues in this area will be: the boundaries of substantive and procedural Customary Law, the power relations that underpin the institutions that preside over the customary legal regime. All of this will obviously have to face Constitutional scrutiny.

According to Bennett, “whenever a state is prepared to recognise the regulatory order of a semi-autonomous social field such as the recognition by the Apartheid state of Customary Law such a state acknowledges the innate pluralism of its legal system.” (Bennett: 2002:21) However, because the state decides to what extent these regulatory orders should be applied such pluralism has been described as “weak” pluralism. In contrast to “strong” pluralism, “weak” pluralism is simply a modified version of legal centralism”.

Weak legal pluralism denotes the superior position of state law in the following respects:-

1. Overriding authority is given to national legislation and certain other aspects of the central legal order;
2. The laws of only certain semi-autonomous social fields are singled out for recognition;
3. The State decides via the provision of choice of Law rules when subordinate legal regimes will apply.

Customary Law has been a subordinate element in the South African legal order in that it was subject to state legislation, certain Courts could not take judicial notice of it, and it could be applied only if compatible with principles of public policy and natural justice. These were the requirements of the so-called “Repugnancy Proviso”. In addition customary law was subordinate to Roman-Dutch common law and the common law provided the model to which customary law was expected to conform. In fact all legal analysis or comments on customary law are mediated by western legal categories.

The new Constitution placed the common and customary law on a footing of equality. Section 211 (3) of the Constitution of the Republic of South Africa Act 108 of 1996 provides that; “The Courts must apply Customary Law when that Law is applicable, subject to the Constitution and any legislation that specifically deals with customary law”. It can be argued that, although Section 211 (3) of the Constitution elevates customary law to the same position as the Common Law, the Section maintains the subordinate position of customary law in that the Courts must:

1. apply customary law only if it is compatible with the Constitution;
2. only to the extent that it is not amended by legislation; and
3. provided it is “applicable” in terms of choice of Law Rules.

In this regard ‘must’ which is peremptory becomes a ‘may’ which is directory.

3. PROPERTY RIGHTS – CUSTOMARY LAW

(SUMMARY FROM: IP Maithufi 'The law of Property' in Bennett (ed): 2002: 53-70)

3.1. INTRODUCTION

Bennett argues that, "research into Customary Law has always been bedevilled by lack of agreement on how to translate its rules into terms that will be comprehensible to western lawyers. In the case of land tenure, this problem is complicated by the fact that Customary Law has no distinct category of Property Law". (Bennett: 1995: 129).

According to Bennett, "rules that Common Law might regard as contract or property, Customary Law subsumes under status a categorisation that reflects its overriding interest with long term, personal relationships. Unlike western legal systems, African Law stresses not so much rights of persons over things, as obligations owed between persons in respect of things. Western Law allows individuals an assortment of rights, powers and freedoms over property, which they can assert against an anonymous public. Because Customary Law emphasises the responsibilities of people associated in specific, long-standing relationships, entitlements to property are narrowly conceived in terms of specific obligations arising out of bonds of political loyalty, kinship, and occasionally tort". (Bennett: 1995: 130).

Bennett goes further by stressing that this different prospective on property law makes it difficult to do justice to Customary Law in a human rights discourse which is in itself very much the product of western jurisprudence. Bennett believes that the first step towards bridging the gap between Customary Law and western legal concepts would be to use language more sensitively. According to Bennett, "common – law terms obviously cannot be employed as direct translations for Customary institutions nor should we expect Customary Law to contain equivalents of common – law concepts". (Bennett: 1995; 130). According to Bennett the notion of ownership is historically and culturally specific and does not have *a priori* meaning and the western notion of ownership may well not have existed in Customary Law. (Bennett: 1995: 130).

Bennett suggests that the Courts are well aware that common – law terminology cannot be applied to Customary interests and as a result they have been amenable to adjusting their language accordingly, however he is also of the opinion that the Courts willingness to adapt has sometimes led to even greater confusion. For example Bennett refers to the situation where the Courts often refer to African rulers as 'trustees' of the land, to the tribe as holder of an 'allodial' title, and to individual land holders as 'usufructuaries'. Bennett suggests that as a descriptive device the notion of a trust helps to explain why a leader could neither alienate national land without the sanction of his people nor expropriate an individual's interest without good cause. He believes that the terms are deceptive because traditional authorities are clearly not trustees in the common – law sense of the word and if a ruler was to abuse his position then land holders would have none of the remedies available to a beneficiary under a common- law trust.

Bennett suggests that, “a simple and as far as possible a non-technical vocabulary must be used to describe customary tenure. Words such as ‘interests’, ‘rights’ and ‘powers’ can be used instead of the common – law terms ‘ownership’, ‘trust’ or ‘usufruct’. A neutral vocabulary such as this will hopefully direct enquiry away from the search for a universal institution of ownership towards the more fundamental elements of tenurial regimes”. (Bennett: 1995:132).

3.2. WESTERN LEGAL CONCEPTIONS OF PROPERTY

The law of property is sometimes referred to as the law of things as it deals with rights to things, ie real rights. The law of things may be described as that law which describes the relationship of a legal subject, or person, to a legal object, a thing, that he or she owns or possesses. A right to property implies a relationship between the holder of the right and other persons. It therefore creates a dual relationship between a person and a thing and other persons. Other persons have a duty to respect the relationship between a person and a object of his right.

Property may be defined as anything that is capable of being owned or possessed and which is useful and beneficial (valuable) to a person. The object may be of various kinds, namely, movable and immovable, consumable and non-consumable, divisible and indivisible, fungible and non-fungible, negotiable or non-negotiable. Rights to property may take various forms in that they may be either be real rights or limited real rights. Ownership is regarded as the most complete real right in the sense that it is the only real right in ones own property-the real right of ownership means that the thing in question belongs to the owner. The same cannot be said with regard to limited real rights, since they are limited by rights to specific uses of property that belongs to someone else.

3.3 TRADITIONAL OR CUSTOMARY LEGAL CONCEPTIONS OF PROPERTY

Traditionally customary law accorded rights, including rights to property, to family or agnatic groups with the members sharing in the group’s rights to property. Under colonial influence heads of families, who were normally married males, were perceived as the only persons with full legal capacity in terms of customary law. This does not however imply that other members of the family could not acquire rights to property. According to Maithufi, “ Customary law protected, and still protects, the rights of individuals through families through which it belongs. Thus an individual in customary law is deemed to have acquired or to acquire a right through his or her family head. The right is also protected in the same manner. The co-operation of the family members represented by the family head is of the utmost importance in the acquisition and disposal of property rights. The emphasis in African traditional communities always falls on the family group as an individual person has a status and functions within this group context.” (Maithufi in Bennett ed :2002: 54)

Customary law recognises the right of ownership and other limited real rights to property. The nature and content of these rights must, however, be understood within the

framework of family relationships that is in the context of marriage, family and succession. Consequently, customary law recognises the following categories of property; family property, house property and personal property.

3.3.1 FAMILY PROPERTY

Family property is property which has not been allotted to any house, or which does not accrue automatically to a house. This property is controlled by the head of the family, although he is not the owner, of the property since the family members share in the property. Family property includes property which the family head inherited from his mothers house, property acquired by his family head by his own efforts and labour, and land allotted by the traditional authority to the family group but which has not been allocated to a particular house. (Maithufi in Bennett ed :2002: 55)

3.3.2. HOUSE PROPERTY

House property has been defined as the property, which has accrued to a specific house, consisting of a wife and her children, and has to be used for the benefit of that house. Although this property belongs to a house in the it automatically accrues to it in terms of customary law or has been allotted by a family head to a house, the family head still retains control over it. House property includes earnings of the members of the house, livestock allocated to the house and its increase, property given to a wife at her marriage, lobolo received for daughters of the house on their marriage, compensation received in respect of dealings committed against members of the house (including compensation received in respect of seduction and adulatory claims), agricultural products produced by the wife on her fields and other products produced by the members of the house. (Maithufi in Bennett ed :2002: 55)

House property is to be used for the benefit of the house to which it belongs and if it is used for the benefit of another house, and inter-house debt (ethula) is created. In his use and control of house property, the family head has to consult the wife as well as the elder son of such house. (Maithufi in Bennett ed :2002: 55)

Any interest that a member of a family has in the house and its property is a collective rather a personal one. As a result of modernisation and urbanisation new types of property were acquired, notably houses held in terms of customary or statutory law, which are regarded as house property. The children and the wife of the house established by the marriage has a special interest or rights of such property. At the dissolution of the marriage or divorce their rights or interest are normally not terminated as they continue to reside in such house. Similarly when the husband dies the widow acquires control of the property and after her death this control passes to one of her children. (Maithufi in Bennett ed :2002: 55)

3.3.3 PERSONAL PROPERTY

This property belongs to a person who has acquired it, although it may be under the control of the family head. Such property is usually regarded as house property, that is, part of the property of the house to which the individual belongs. This was the case in original customary law and presently this property serves the needs of a specific individual. Personal property usually consists of clothing and other items of a personal nature (such as a walking stick, a snuffbox or a necklace).

The individual has the power to use and dispose of the property as he or she pleases. In his or her use of the property, however, customary law prescribes that the family head has to be consulted. This is not a legal obligation but rather a moral one.

4. THE POSITION OF LAND

(SUMMARY FROM: IP Maithufi 'The law of Property' in Bennett (ed): 2002: 53-70)

4.1 INTRODUCTION

Traditionally rights to land in customary law relate to the use of land for residential and cultivation (arable) purposes. Various legislative enactments, some of which were intended to modify the customary law relating to land use, were passed to provide for the acquisition, use and disposal of land in certain areas set aside for occupation for blacks in South Africa.

4.2 THE POSITION OF THE TRADITIONAL LEADER OVER LAND

Colonialism and Apartheid attempted to conceptualize customary law on land through euro-centric legal categories and as such it has been described as follows "All land occupied by a tribe is vested in the chief and administered by him as head of the tribe. This he does through his sub-chiefs and headman, who regulate the distribution and use of land in their respective areas. The land is not his personal possession with which he can deal as he pleases. None of the land belongs to the chief, nor can he dispose of it except gratuitously and to members of his own tribe". (Quoted in Maithufi in Bennett ed :2002: 56)

4.2.1 ALLOTMENT OF LAND

According to Maithufi, "as head of the community, the traditional leader, in consultation with his councils, allotted portions of land to families. A family head is normally allotted residential and arable land and once allotted, he or she also acquires access to natural resources on the commonage, for instance grazing land, game animals, medicinal plants, wood and other natural resources". (Maithufi in Bennett ed : 2002: 57)

Maithufi further states that "Although the person allotted land occupies it exclusive to the rights of others, he cannot be described as owner in the Western sense of the word, as he

or she does not have the power to sell it". [*Gaboutloeloe v Tsikwe* 1945 NAC (C & O) 2; *Lekoma v Dikgole* 1947 2 PHM 45 (GW)]

Maithufi goes further and argues that "Be that as it may, it appears that he or she has the most extensive right in law as he or she may be regarded as 'owner'. This is evident from *Ratsialingwa v Sibasa* 1948 (3) SA 781 (A) 791-792 where the following remarks were made: "It seems to me that one must start from the principle that if a system of law recognises that a man may own property, the property which he has received by a recognised system of succession, or which he has acquired by lawful transaction belongs to him, subject only to such rights of other persons as the system of law recognises."

Maithufi maintains that "once land has been allotted to a family, its use and enjoyment vest in the members of the family and not the traditional leader. The right to use and enjoy is controlled by the family head and is transferable in terms of customary law. (Maithufi in Bennett ed :2002: 57)

According to Maithufi, "the right to the use and enjoyment of land may, these days, be alienated by the holder thereof. The rule that such use and enjoyment may not be alienated for consideration is not strictly adhered to. A rule has developed that such alienation has to be authorised by the traditional leader and his council and the buyer has to be acceptable to the community" (Maithufi in Bennett ed :2002: 57; (*Lekoma v Dikgole* 1947 2 PHM 45 GW).

4.2.2 TERMINATION OF RIGHTS

According to Maithufi "A traditional leader acting in consultation with his or her council may terminate the individual's right to allotted property according to customary law. A right to allotted property may be terminated for general public purposes and any person having their rights terminated would be entitled to be compensated with land elsewhere. The right may also be terminated as a result of the commission of a serious offence. In terminating the right the traditional leader has to act in consultation with his or her council and follow the rules of natural justice. (Maithufi in Bennett ed :2002: 57; *Mokhatle v Union Government* 1926 AD 71; *Mosii v Motseoakhumo* 1954 (3) SA 919 (A); *Masanya v Seleka Tribal Authority* 1981 (1) SA 533 (T); *S v Mukhekhwevho*, *S v Ramakhuba* 1983 (3) SA 498 (V); *Saliwa v Minister of Native Affairs* 1956 (2) SA 310 (A).

4.3 LEGISLATION GOVERNING CUSTOMARY LAND RIGHTS

4.3.1 LAND REGULATIONS

Various legislative enactments were promulgated to regulate the occupation of land in terms of customary law. The occupation of land was and is still governed by the Land

Regulations. The regulations were promulgated in terms of Section 25 of the Black Administration Act 38 of 1927. The regulations contain provisions about land administration and two types of land tenure, viz. Permission to occupy and quitrent. These types of tenure were granted over land held in trust by the state or the development trust on behalf of a tribe or community.

The permission to occupy residential and arable land had to be authorised by the commissioner (presently the Magistrate) after consultation with the tribal or community authority. Occupation of land in contravention of this proclamation is prohibited. (Reg 47 (3) of Proc R188 of 1969; Reg 47 (5) of Proc R188 of 1969). In terms of these regulations a traditional leader has no power to issue permissions to occupy but has to be consulted. It is, however, impossible in practice to obtain a permission to occupy without the approval of the traditional leader.

The regulations also deal with title to quitrent land. This form of tenure is almost exclusively situated in the eastern cape and beyond the scope of the research brief. It would suffice to say that according to Maithufi, the regulations provide for the registration of a grant and transfer and cancellation of title deeds granted under quitrent tenure. Quitrent tenure confers a better right than a permission to occupy because it is registered in the deeds office. However, Maithufi also notes that in practice many titles were not transferred after the initial holder passed away. (Maithufi in Bennett ed: 2002: 58)

4.3.2 UPGRADING OF CUSTOMARY LAW LAND RIGHTS

The Upgrading of Land Tenure Rights Act of Act 121 of 1991 was passed with the main purpose being to provide for a procedure to upgrade both quitrent and permission to occupy to full ownership.

Van der Walt and Pienaar described the effects of this legislative measure as follows: “the Upgrading of Land Tenure Rights Act provides that tribes may obtain ownership of land which they hold according to customary law. Before the tribes rights are upgraded to ownership the land has to be surveyed, and once the tribe obtains ownership the land may not be disposed of non-tribe members for a period of 10 years. This provision was probably meant to discourage tribes from selling their land for short-term cash gains, and thereby losing their main source of income and place of residence. Because of the survey requirement and the cost of surveying the land not many tribal land rights have been upgraded in terms of this act. In 1995 the new government introduced legislation to amend this act mainly to ensure that customary – tribe land rights enjoy sufficient protection and security without being transformed into western-type individual ownership.” (Van der Walt and Pienaar page 392-393 quoted in Maithufi in Bennett ed: 2002: 59)

4.3.3 PROTECTION OF INFORMAL LAND RIGHTS

According to Maithufi, “land in customary law is controlled by the traditional authority. The traditional leader, in consultation with his councils, controls the use of the land and distributes it among the members of the community or tribe. The traditional leader cannot however deal with the land how he or she pleases as it is held on behalf of the community or tribe.” (Maithufi in Bennett: 2002: 59)

Although this is the position at customary law, the Interim Protection of Informal Land Rights of 31 of 1996 provides that people may not be deprived of an informal right to land without their consent except by expropriation. Any right that traditional leaders may have had to evict occupiers of land is thus restricted by this Act. The Act further provides that where land is communally owned and the community decides to dispose of the land, provision must be made for appropriate compensation to any person who is deprived of an informal right to land by such disposal.

4.4 CUSTOMARY RIGHTS TO PROPERTY

According to Maithufi, “Property rights in customary law may be acquired in various ways. The well-known methods of acquiring property in customary law are by means of allotment, succession and through certain customary law transactions relating to marriage. Ownership of property may be acquired by original means (appropriation of ownerless things, manufacture, cultivation and administrative allotments) and by derivative means (transfer of property on purchase or exchange of things).” (Maithufi in Bennett ed: 2002: 59)

4.4.1 ALLOTMENT

4.4.1.1 ALLOCATION OF LAND

According to Maithufi, “land is allocated by the traditional authority to family heads, who in turn allocate land to the constituent houses of a family. From this the impression might, however might, have been created that the right to use land may be granted to men only. Among the blacks of South Africa, married women are allotted land, as part of house property to cultivate and for residential purposes. The general principle is that whatever land has been allotted to her husband belongs to her house and has to be used exclusively for the benefit of such house”. (Maithufi in Bennett ed: 2002: 60)

Maithufi states further that nowadays land is also allocated to unmarried and divorced women. Thus land is also allotted to women in terms of customary law, and in particular, if such women are heads of households. Such women have complete control of the land so allotted in the same way as men. Thus the discrimination that allegedly existed in this respect has been terminated.

According to Van der Walt and Pienaar “this might mean that certain aspects of customary law, such as the inequality and the relatively poor position of women, might have to be amended in view of the principle of equality which is guaranteed. The courts will approach and interpret this apparent conflict between the application of customary

law and the guarantee of equality”. (Van der Walt and Pienaar at page 395 referred to in Maithufi in Bennett ed: 2002 :60).

Maithufi argues “that has been much generalisation about the position of women with regard to property, in particular land, in customary law. Various authors have and still insist that women do not have rights to property. Although this might have been the position, this has changed as customary law is not static and changes in accordance with changing conditions” (Maithufi in Bennett ed: 2002: 60) cases (*Mabena v Letsoalo* 1998 (2) SA 1068 (T); *Zondi v President of the Republic of South Africa* 2000 (2) SA 49 (N).

4.4.1.2 ALLOCATION OF OTHER PROPERTY

According to Maithufi “any kind of property may be allocated to a person in terms of customary law. A well-known example is the allocation of property by the family head to his children and wife or wives. Property given to a wife is allotted to her house. The property thus allotted is known as house property. Although in theory, the wife does not obtain control over such property, it belongs to her house and the property cannot be used without her consent or authorisation. Thus for all practical purposes she is the owner of the property.

Children traditionally may also be allotted only live stock in terms of Customary law. However, today, any kind of property can be given to children.

4.4.2 INHERITANCE

According to Maithufi, it is generally accepted that the principle of male primogeniture which is applicable to succession in customary law, applies equally to the inheritance of property. This principle implies that the eldest surviving male relative of the deceased succeeds to the status of the deceased and inherits all his property.

Such successor also becomes liable for the debts of the deceased irrespective of how much he inherited and was also responsible for the maintenance of the widow (s) and children of the deceased. His rights and responsibilities have been described as follows; “the heir steps into the shoes of his predecessor and inherits all the latter’s rights and liabilities past, present and potential in respect of the family and property of the house of which he is the heir.” (Maithufi in Bennett ed: 2002 :61)

According to Maithufi, although this might have been the position in original customary law, presently after the death of a person, the distribution of his or her property is determined at a family group meeting specially called for this purpose. The eldest surviving male usually the eldest son of the deceased, does play a significant role in determining the portions to be inherited by the other heirs. He is not, however the only person who inherits the deceased’s property to the exclusion of the other children of the deceased and the widow. Thus any kind of property may be acquired by means of inheritance in terms of customary law.

4.4.3 MARRIAGE

According to Maithufi, “marriage in African tradition in South Africa is characterised by the transfer of goods between the family of the respective spouses. The most important transaction that proceeds the marriage is the lobolo contract. This transaction involves an agreement to transfer goods by the prospective husband or his family, represented by his family head to the family head of the prospective wife. Ownership in such goods passes to the wives family head once the marriage is concluded”. (Maithufi in Bennett ed : 2002: 62)

Section 1 of the Recognition of Customary Marriage Act 120 of 1998 defines Lobolo as follows; ... the property in cash or kind whether known as *inlobolo*, *bogadi*, *bohali*, *xuma*, *lumalo*, *thaka*, *magadi*, *emabheka* or by any other name, which a prospective husband or the head of his family undertakes to give to the head of the prospective wives family in the consideration of a customary marriage.

4.4.4 OTHER METHODS OF ACQUIRING PROPERTY

According to Bennett “other methods of acquiring property are by appropriation (*occupatio*), manufacture (*specificatio*), cultivation and breeding, which are the original methods of acquisition of property. Another method is by means of transfer (*traditio*) which is classified as derivative.

4.5 CUSTOMARY LIMITED REAL RIGHTS

4.5.1 COMMUNAL PROPERTY

According to Maithufi a typical example of a customary limited real right is the right to grazing on communal land. Maithufi states that “every member of the community has a right to graze livestock on communal land specifically set aside for this purpose. This also includes the right to water for the livestock. Grazing areas, known as *meraka* amongst the Batswana, are normally situated a distance from the residential are. Members of the community are also entitled to fetch water from the sources within the communal area”. (Maithufi in Bennett ed: 2002: 63). Maithufi goes further and argues that “another limited real right is the right to gather natural products within the communal area. The right to water for human consumption is a typical example of these. Community members as well as strangers are allowed free access to water in the rivers within the communal area. Other rights relate to the gathering of wood, clay and natural products. Hunting rights also fall under this category”. (Maithufi in Bennett ed: 2002: 64)

4.5.2 LIMITED REAL RIGHTS OVER THE PROPERTY OF ANOTHER

According to Maithufi, “a person may also acquire a limited real right with regard to the property of another person’s livestock. An example of this is the *sisa*, *mafisa* or *ngqoma* contract. This is a transaction in terms of which a person places one or more of his livestock into the keeping of another, who has the right to use them in various ways. The

ownership in such livestock however remains with the depositor (owner). This person is entitled to only to the use of the livestock and undertakes to take care thereof as if he or she is the owner. He or she is also entitled to the produce thereof other than the off spring”. (Maithufi in Bennett ed: 2002: 64). Maithufi argues “the fact that the owner of the cattle can at any time take the cattle back without the keeper having any say in the matter makes it doubtful whether the keeper indeed acquires the right over the property, to the effect of limiting the right of the owner thereof. “(Maithufi in Bennett ed: 2002: 64)

4.5.3 THE WIDOW’S RIGHT TO THE PROPERTY OF HER DECEASED HUSBAND

According to Maithufi, “upon the death of her husband, although the heir acquires control over the property of the deceased, he is obliged to maintain the widow and allow her to remain and use the land allocated to her house. The widows right to the property may be described as a limited real right in respect of her late husband’s residential and arable (agricultural land). Her right to this property has been described variously in case law as a *usufruct*, *uses* and as *habitatio* (*Novelity v Ntwayi* (1911) 2 NAC 170; *Dyasi v Dyasi* (1935) NAC (C) & O 1; *Luke v Luke* 4 NAC 133 (1920); *Sijila v Masumba* (1940) NAC (C) & O 42).

The widow has the right to remain at her late husband’s residence and cannot be ejected therefrom but has no power to alienate it. This property cannot be alienated because in the normal course after death, this property will be inherited by her younger son. The widow’s right to this property is paramount to the rights of her children. (*Dodo v Sabasaba* (1945) NAC (C) & O 63). Where the heir abuses his trust, for example fails to support the widow or makes her position so unbearable that she is obliged to leave, the widow may eject the heir from the property. (*Dyasi v Dyasi* (1935) NAC (C) & O 1). (Maithufi in Bennett ed: 2002: 65)

4.6 PROTECTION OF CUSTOMARY PROPERTY RIGHTS

According to Maithufi, “the customary law provides for remedies in the event that a right to property is infringed. Such remedies entitle a person to damages from the wrong doer. The owner of crops may claim damages from the wrong doer. Damage caused to homestead’s also give rise to liabilities”. (Maithufi in Bennett ed: 2002: 65). Maithufi states that “customary law also recognizes a remedy similar to the *Mandament van Spoelie*; this entitles a person to vindicate his or her property from another in the case of unlawful dispossession. It would also appear that the various remedies are available in South African common law can be used in the protection of property held under customary law.

4.7 TERMINATION OF RIGHTS

According to Strydom “customary property rights may be terminated by alienation, abandonment, surrender to the authority, confiscation and destruction”. (Strydom Quoted in Maithufi in Bennett ed: 2002: 66). Termination may also occur as a result of the death of the holder or owner.

4.8 CONCLUSION

According to Maithufi “customary law will, as a result of the impact of the Constitution, have to undergo changes to comply, in particular, with the fundamental rights enshrined in the Constitution. The Court’s too, in the interpretation of principles of customary law in accordance with the constitution, are certain to bring changes to customary law. Thus customary law in South Africa is, and will constantly be, in a state of change to make it compatible with the Constitution”. (Maithufi in Bennett ed: 2002: 67)

Maithufi goes further and argues that “the pieces of legislation enacted thus far in an attempt to make customary rights to property (particularly rights to land) more secure, indicate that the aim is to grant more protection to individuals as opposed to group rights. The communistic nature of customary law may therefore change in future and customary law rights to property become individualistic. Attempts will obviously have to be made to make customary property rights more secure than they are at present.” (Maithufi in Bennett ed: 2002: 67)

5. TRADITIONAL LEADERSHIP

(SUMMARY FROM: LP Vorster, ‘The Institution of Traditional Leadership’ in Bennett (ed): 2002: 127 –140)

Bennett argues that “all the conflicts and inconsistencies that beset traditional leadership under colonialism and apartheid have been transferred to the new democratic dispensation in South Africa. In terms of Section 211(1) of the Constitution the institution, status and role of traditional leadership are recognised, subject to the constitution. This is a conspicuous anomaly, since democracy implies periodic and popular elections while traditional leadership is inherited. More over, the recognition of the institution of traditional leadership seems to be in conflict with the non-discrimination clause of the constitution, because the office is mainly preserved for men only.” (Bennett; 1995: 70)

According to Vorster (presently there are 6 six kings, 5 paramount chiefs, 5 deputy paramount chiefs, 771 chiefs and more than 13000 so – called head men. There are also 776 recognized traditional authorities, which continued to function in terms of Section 211 (2) of the Constitution. (Vorster in Bennett ed: 2002:129)

5.1 THE INSTITUTION OF TRADITIONAL LEADERSHIP

Section 211 (1) of the constitution refers to ‘the institution, status and role of traditional leadership, according to customary law’. The constitution qualifies the recognition of the institution of traditional leadership in two important respects. The recognition must be in accordance with customary law and is subject to the constitution. Again, customary law is not defined in the constitution. Section 211(2) makes reference to a system of customary law, including amendments, or repeal of, legislation and customs. This seems to indicate a version of customary law as it has transformed over time by legislation and court decisions. This would imply that the institution of traditional leadership according to customary law will also include the provisions of Black Administrations Act and the Black Authorities Act.

The recognition of the institution of traditional leadership is also subject to the constitution as a whole, and thus also to the provisions of Bill of Rights contained in Chapter 2 of the Constitution. In this regard the following sections of the constitution are implied:-

- Section 8.1 which makes the Bill of Rights applicable to all law including customary law, and which binds all organs of state, including traditional authorities;
- Section 9 which forbids unfair discrimination by the state and private persons on various grounds, including race, gender, disability, culture and birth;
- Section 39 (2) which binds the court in the development in customary law to the promotion of the “spirit, purport and objects of the Bill of Rights”;
- Sections 40 and 41 which provides for co-operative government on all levels of government, in particular also between municipalities and traditional authorities on a local level.
- Section 151 which limits the locals sphere of government through municipalities, placing a question mark on the scope of Section 211(2) which provides for the continued existence of traditional authorities and local government.
- Section 212 which allows for national legislation to make provisions “ for a role for traditional leadership as an

institution at local level on matters affecting local communities”.

5.2 TRADITIONAL LEADERSHIP AND DISCRIMINATION

According to Vorster “the Institution of Traditional Leadership among the Bantu-speaking people of South Africa is embedded in a social system of patriarchy. This implies that the position of traditional leadership is limited to male members of the family; in fact it is limited to the eldest son of the principal wife. In this regard the position of the successor is determined by the following factors;

- ◆ The status of the principal wife;
- ◆ gender (male);
- ◆ Firstborn son (principle of primogeniture in respect of males);
- ◆ Physical ability.

At the time of succession the successor is perceived to represent the most senior living link with the ancestral world of the ruling family. However, one should keep in mind that recognition of the institution of traditional leadership is qualified by the constitution. In terms of Section 9 (5) any discrimination on one or more grounds listed in the Section 9 (3) is to be regarded as unfair unless it is established that the discrimination is fair”.

Vorster is of the opinion “that the practice of male succession to the position of traditional leader would constitute unfair discrimination in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. Vorster goes further and argues that “should this be the case, the political background to the negotiation about the constitutional recognition of the institution of traditional leadership belongs to history. In that event the institution of traditional leadership is most likely to be transformed beyond its cultural and ancestral roots, and the right to culture would in this regard mean very little in substantial terms and may result in cultural alienation, if not domination”. (Vorster in Bennett ed: 2002: 132)

5.3 CATEGORIES OF TRADITIONAL LEADERS

There are various categories of Traditional Leaders such as King, Paramount Chief, Chief and Ward Head. There are also a number of traditional councilors that are not ward heads but who play an important role in the institution of traditional leadership

The position of a traditional Monarch as a category of traditional leader is provided for in Section 143 (1) of the Constitution. This section allows a provincial constitution to make provision for the institution, role, authority and status of a traditional monarch.

In terms of the Independent Commission for the Remuneration of Public Office – bearers Act number of 92 of 1997 an office – bearer includes any traditional leader. Section 5 of the abovementioned act provides for salaries and allowances of traditional leaders to be determined by the President after consultation with the Premier concerned. Salaries of traditional leaders are determined with due regard to the “role, status, duties, functions and responsibilities of different categories of different leaders”.

5.4 FUNCTIONS OF TRADITIONAL LEADERS

According to Vorster, the functions of traditional leaders include customary as well as statutory functions. Customary functions includes: performance of various rituals such as rain rituals, initiation rights and agricultural feasts. Statutory functions are derived from the Black Administration Act 38 of 1927 ss Section 12, 20. And the Black Authorities Act 68 of 1951 s 3.

According to Vorster in terms of Regulation 9 of Proc R110 of 1957 which prescribes the duties, powers, privileges and conditions of service of chiefs and head men, the functions of traditional leaders include: local government matters such as public health; registration of person as tax payers; collection of taxes; registration of births and deaths; the taking of census; the prevention and eradication of animal diseases by dipping or other means; the cultivation of land and the use of commonages; the preservation, repair or restoration of beacons, fences and gates; the prevention, detection and punishment of crime; the eradication of weeds; the preservation of flora and fauna and of water supplies; the protection of public property and of monuments; and the rehabilitation of land and the prevention of soil erosion; veld fires and overstocking.

Other duties and functions include;

- ❖ The constitution of a traditional council (Regulation 2)
- ❖ The promotion of the interest of the tribe (Regulation 3)
- ❖ The maintenance of law and order (Regulation 4)
- ❖ Enforcement of law (Regulation 9)

Traditional leaders also have the duty to report various matters to the government (Regulation 11), and also their communities about new law (Regulation 10) and to impound stray stock (Regulation 21). They also have to prevent the sale of noxious or poisonous substances or love philtres and to suppress the practice of witchcraft in their area (Regulation 13).

Traditional leaders should not absent themselves from their areas of jurisdiction without approval of the local magistrates (Reg 28 of Proc 110 of 1957). Neglect of duties may result in an official inquiry by the local Magistrate (Reg 31 of Proc 110 of 1957).

Traditional leaders are also expected to be present at meetings of traditional authorities (Reg 8 of 1 of Reg 2779 of 1991).

Although traditional leaders are supposed to perform the aforementioned functions, their administrative duties have dwindled with the passage of time. Government departments such as agriculture and home affairs, spread their wings into rural areas – establishing detached offices and agencies. As a result traditional leaders are not expected to perform the relevant functions any longer. They were in any event never fully equipped to provide substantial services.

Vorster argues that although “wall to wall municipalities have been established including traditional authority areas ... traditional leaders can perform a meaningful consultative role in the new municipal regime, but they have no real executive functions. A new role will have to be carved out for them under the new local government dispensation”. (Vorster in Bennett ed: 2002: 134).

5.5 TRADITIONAL AUTHORITIES

In terms of Section 211 (2) of the Constitution existing traditional authorities that observe a system of customary law may continue to function subject to any appropriate legislation and customs. There are approximately 776 officially recognised traditional authorities in the rural areas of South Africa.

Traditional authorities represent a transformation of the traditional council system. The Black Authorities Act make provision of the establishment Tribal Authorities in respect of recognised tribe with new regard to local law and customs. The powers, functions and duties of a traditional authority included:

- ❖ The administration of the affairs of the tribe;
- ❖ Assistance and guidance to the traditional leaders in connection with the performance of his functions;
- ❖ The exercise of such powers and performance of such function and duties in terms of local law and customs or in terms of any regulation;
- ❖ Advising and assisting the government in connection with matters relating to the material, moral and social well being of the local community, including the development and improvement of land under its jurisdiction (S 4 of Act 68 of 1951);
- ❖ The appointment of such employees as it may be necessary in, including a treasurer;
- ❖ A keeping of a minute book;

- ❖ The approval of the tribal budget and control of expenditure;
- ❖ The approval of tribal levies.

According to Vorster “the continued existence and functioning of traditional authorities as a form of local government seems to be in conflict with Section 151 (1) of the constitution which makes provision for municipalities as the locals sphere of government in South Africa. The continued existence of traditional authorities is subject to any legislation, which includes the constitution, as well as other legislation dealing with local government. In terms of Section 212 (1) of the constitution national legislation may provide a role for traditional leadership as an institution at a local level on matters affecting local communities”. (Vorster in Bennett ed: 2002:135)

Vorster argues that “an example of National Legislation dealing with local government is the Local Government; Municipal Structures Act 117 of 1998. In terms of Section 81 traditional authorities may participate through their leaders in the proceedings of a municipal council. Traditional Leaders must be allowed to attend and participate in any meeting of the Council. The number of traditional leaders that may participate in the proceedings of municipal councils may not exceed 20% of the total number of councilors. In the case where the municipal council has less than 10 councilors, only one traditional leader is allowed to participate in the proceeding of the council. The MEC for local government in a province has the duty to identify the traditional leaders who may participate in the proceedings of the municipal council. A traditional leader who participates or has participated in the proceedings of a municipal council in terms of Section 81 is subject to the code of conduct for municipal councilors in terms of Item 15 of Schedule to the Local Government’s Municipal Systems Act. 32 of 2002.

Traditional authorities are represented indirectly in a limited way on municipal councils through traditional leaders. Traditional leaders may attend and participate in the proceedings of meetings but they have no voting rights on matters to be decided by these councils. Their right to participate in any meeting of the council apparently does not extend to participation in the proceedings of council committees for a council is defined as consisting of elected members only (Definition of Council in s 1 of Act 117 of 1998 – s 157 of Act 108 of 1996). Although traditional authorities may participate in the proceedings of a municipal council, their representatives are not elected members of the council.

According to Vorster “in matters which directly affect the area of a traditional authority, for example a proposed development project or the re-zoning of land, the municipal council must give the traditional leader of that authority and an opportunity to stress a view on the matter before a decision is taken. (S 81 (3) of Act 117 of 1998). The council is not necessarily bound to the views of the traditional leaders. It should also be noted that the right to express a view on such a matter belongs to any traditional leader whose area is directly affected by a decision of the council, irrespective of whether such traditional leader has been identified by the MEC to participate in the proceedings of the municipal council (S 81 (2) of Act 117 of 1998). (Vorster in Bennett ed: 2002; 136)

5.6 NEW INSTITUTIONS OF TRADITIONAL LEADERSHIP

The constitution provides in Section 212(2) for the establishment of provincial houses and a national house of traditional leaders. These are new institutions of traditional leadership, extending the role of traditional leaders beyond their traditional areas of jurisdiction.

The National House of Traditional Leaders is composed of 3 representatives nominated by the various provincial houses of traditional leaders (S 4 (1) of the National House of Traditional Leaders Act of 1997). In terms of Section 71 of the National House of Traditional Leaders Act the objectives and functions of the National House are:

- ❖ To promote the role of traditional leadership within a democratic constitutional dispensation;
- ❖ To enhance unity and understanding among traditional communities;
- ❖ To enhance co-operation between the National House and the various Provincial houses with a view to addressing matters of common interest.

The National house may also advise the National government and make recommendations relating to matters concerning traditional leadership, the role of traditional leaders, customary law and customs of communities. It may also investigate these matter and make the information available (S 7 (2) of Act 10 of 1997).

The various provinces with traditional leaders were empowered to establish houses of traditional leaders. In KwaZulu-Natal the KwaZulu-Natal Act on the House of Traditional Leaders 7 of 1994 was promulgated to establish the House of Traditional Leaders. The North West Province Act 12 of 1994 provided for the establishment of the House of Traditional Leaders for the Province of the North West.

Section 4 of the KwaZulu-Natal Act sets out the powers, functions and duties of the house as follows:

- ❖ To advise and make proposals to the Provincial Parliament or Cabinet, and to comment and to make recommendation on any draft Bill or proposed action in respect of matters relating to Traditional Authorities and indigenous and customary law with special regard to:
 - ❖ The status powers and functions of traditional authorities;
 - ❖ Organization of tribal and traditional authorities;

- ❖ Indigenous land system and all related matters;
- ❖ Zulu traditional and customary law or all inheritance family and marriages;
- ❖ Tribal courts and the system of jurisdiction, enforcement and/or sanction of zulu traditional and customary law;
- ❖ Taxation by traditional authorities and in tribal and traditional communities;
- ❖ Zulu custom and traditions or any other matter having a bearing thereon.

The powers and functions of the House of Traditional Leaders of the Province of North West include advising on, and making proposals in relation to, the following matters:

- ❖ The powers and functions of traditional authorities;
- ❖ The establishment and dissolution of community authorities;
- ❖ The appointment recognition deposition and discipline of traditional leaders;
- ❖ The delegation and devolution of powers and functions of traditional authorities;
- ❖ Administration of justice within the areas of jurisdiction of traditional authorities;
- ❖ The remuneration and privileges of traditional leaders;
- ❖ The co-ordination of the developmental activities of provincial government and institutions within the areas of jurisdiction of traditional authorities;
- ❖ Any other matter which may be referred to the House by the Premier or by the Provincial legislature (Section S 6 (1) Act 12 of 1994)

6. COURTS AND CUSTOMARY LAW

(SUMMARY FROM: DS Koyana and JC Bekker, ‘The Courts’ in Bennett (ed): 2002: 141 –156)

Various courts are entitled to apply indigenous law in South Africa. These are the Constitutional Court, High Court, Magistrate’s Court, Court of Traditional Leaders and the Small Claims Court.

6.1 THE CONSTITUTIONAL COURT

The Constitutional Court being the highest Court in the land is entitled to apply Customary Law and in fact will play an extremely important role in deciding what aspects of customary law are unconstitutional and defining the boundaries of what is possible and what is not.

6.2 THE HIGH COURT

The High Court has inherent jurisdiction to try any Civil or criminal matter. In the application of indigenous law it is also limited by Section 1 of the Law of Evidence Amendment Act 45 of 1988.

6.3 THE MAGISTRATE’S COURT

6.3.1 AS COURT OF FIRST INSTANCE

As court of first instance a Magistrate may, within the limits of his or her jurisdiction hear any civil dispute arising out of customary law. The application of customary law in a Magistrate’s Court, is, however regulated by Section 1 of the Law of Evidence Amendment Act 45 of 1988.

6.3.2 AS COURT OF APPEAL IN CIVIL MATTERS

Any party to suit in which a traditional leader has given judgment may appeal to the court of the Magistrate which would have had jurisdiction, had the proceedings in the first instance being instituted in the latter Court.

The Magistrate’s 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. A confirmation, alteration or setting aside of a judgment is deemed to be a judgement of the Magistrate’s Court for the purpose of execution of the judgment. (S 29 (A) of the Magistrate’s Courts Act 32 of 1942). The traditional leader must furnish his reasons for judgment either in person or by deputy. The traditional leader’s reasons become part of the record. If the traditional leader fails to furnish reasons the Magistrate

may order him to do so and may, in his discretion, dispense with the reasons. (Regs 10 (1) (D) and 11 of GN R2082 of 1967).

6.3.3 AS COURT OVER APPEAL IN CRIMINAL MATTERS

Section 20 (6) of Act provides that any person who has been convicted by a traditional leader may appeal against the conviction or sentence to Court of the Magistrate in whose area the trial took place (S 309 A of the Criminal Procedure Act 51 of 1997)

In hearing the appeal the Magistrate must hear and record such available evidence as may be relevant to the question in issue. He may thereupon confirm, set aside or vary the conviction and sentence, or else give such judgment as he thinks the traditional leader should have given in the first instance.

6.3.4 PROCEDURE ON APPEAL

The rule provides that any person who wishes to appeal (known as the Appellant) must within 30 THIRTY days from the date of pronouncement of judgment, in person give notice of appeal to the traditional leader who delivered the judgement to the Respondent or Complainant and to the Clerk of the Magistrate's Court (Reg 2 of the Regulations of Criminal Appeals G N 45 of 1961).

The appeal must be conducted and tried as if it were a criminal trial *de novo*, except that the appellant is not called upon to plead to the charge. In giving judgment the Court does not convict or acquit the appellant and either confirms or quashes or varies the conviction and sentence.

6.4 SMALL CLAIMS COURT

The small claims court may take traditional notice of customary law in terms of S 1 of the Law of Evidence Amendment Act 45 of 1988. The small claims courts would be entitled to adjudicate in disputes arising from customary law.

6.5 CIVIL COURTS OF TRADITIONAL LEADERS

There are no Traditional Courts. The Black Administration Act number 38 of 1927 does not create such courts but makes provision for conferring of jurisdiction on a traditional leader. Jurisdiction is conferred upon a traditional leader or head man and not on his court. In terms of Section 12 (1) (a) of the abovementioned act, the Minister may, authorise any traditional leader recognised or appointed as such under the act to hear and determine civil claims arising out of customary law or and custom brought before him by blacks against blacks residing within his area of jurisdiction. The Minister also has the power to revoke such authority and may, also, at the request of the traditional leader authorise a deputy of that leader to exercise traditional powers for the settlement of disputes of this nature.

In terms of Section 8 (5) of the Recognition of Customary Marriages Act 120 of 1998 a traditional leader may mediate in any dispute or matter arising prior to the dissolution of a customary marriage by a court (S 8 of Act 120 of 1998). Marriages can only be dissolved by a competent court.

Traditional leaders may only adjudicate upon a matter if the Defendant is resident in their area of jurisdiction (*Zulu v Mbatha* 1937 NAC (N & T) 6). Traditional leaders may only determine disputes involving customary law (S 12 (1) of Act 38 of 1927). If the matter concerns common law, action should be instituted in the Magistrate's Court or the High Court.

The procedure in these courts must be in accordance with the recognised customs and laws of the tribes concerned (Reg 1 of the Rules of Court of Chiefs and Headmen in Civil Matters, GN R2082 of 1967). No legal practitioner may appear or act for any party in a traditional authority court (Reg 5).

The traditional leader must prepare, or cause to be prepared, a written record of the proceedings (Reg 6) and register it with the Clerk of the Magistrate's Court (Reg 7). The judgment must be executed in accordance with the recognised customs and laws of the tribe. If the judgment cannot be honoured, the judgment creditor may apply to the Clerk of the Court for the enforcement of the judgment in which event the enforcement will be the same as that prescribed for the enforcement of judgments in Magistrate's Courts (Reg 8).

The question arises whether a traditional leader may inflict punishment for contempt for his court. Section 8 of the Natal Code of Zulu Law (Proc R 151 of 1987). Section 8 of the KwaZulu-Natal Act on the Code of Zulu Law 16 of 1985 is similar and provides that a chief in KwaZulu - Natal may impose a fine not exceeding R 50-00 upon any person guilty of contempt of Court. A traditional leader has inherent jurisdiction to punish for contempt committed in open court. In *R v Vass* 1945 GWLD 34 it was held that traditional leaders could so punish an offender even if he was not resident in the traditional leader's area of jurisdiction.

6.6 CRIMINAL COURTS OF TRADITIONAL LEADERS

Blacks are subject to the same criminal courts and are tried in the same way for crimes committed by them as members of other populations are. There is, however one type of court that deals only with the Black accused. That is the traditional leaders court for criminal matters.

6.7 JURISDICTION

Section 20 (1) (A) of the Black Administration Act provides that the minister may confer upon any black traditional leader jurisdiction to try and punish any Black who has committed, in the area under the control of the traditional leader:

- ❖ Any offence at common law or under customary law, other than an offence referred to in the Third Schedule to the Act) (the third schedule is a list of most serious common law offences, example murder and robbery);
- ❖ Any statutory offence other than an offence referred to in the third schedule of the act, specified by the minister. Unlike the case in a traditional leader's civil court jurisdiction is not limited to customary law crimes.

It is open to the minister to confer jurisdiction on traditional leaders to try a black for any offence, even if is not punishable under customary law. The creation of a traditional leader's court does not exclude the jurisdiction of the ordinary criminal courts.

Section 20 (2) of the Act provides that a traditional leader may not inflict punishment involving death, mutilation, grievance bodily harm or imprisonment, or a fine in the excess of R 100-00 or two head of large stock or ten head of small stock, or imposed corporal punishment.

The procedure at the trial of any offence under these provisions, the manner of the execution of any penalty imposed, and the appropriation of fines must, save in so far as may be specified as regulations made by the minister, being in accordance with customary law. Section 20 (2). A traditional leader may not convict and sentence an accused in his absence (*Rex v Mazibuko* 1945 NPD 276).

6.8 EXECUTION OF JUDGMENT

The Act lays down that the execution must be in accordance with the recognised customs and laws of the tribe. In criminal cases, a traditional leader or head man or traditional leader's deputy who fails to recover a fine from a person convicted by him, may arrest such person and have him brought before the magistrate of the district within 48hours of such arrest (S 20 (5) a). The magistrate may then order such person to pay the fine imposed by the traditional leader failing which payment he may sentence him to a term of imprisonment for a period not exceeding 3 months. (S 20 (5) b). In the latter event he must issue a warrant for the detention of the person in a prison (S 20 (5) c). It will be noted, therefore, that while the enforcement of judgment and orders continues to be in accordance with the recognised customs and laws of each of the many tribes, the actual machinery for such enforcement is borrowed from that applicable in the Magistrate Court Act number 32 of 1944.

6.9 THE COURTS OF WARD HEADS

In terms of Sections 12 and 20 of the Black Administration Act, Criminal and Civil jurisdiction may be conferred only on chiefs and headmen where there are no chiefs. The courts of ward heads within a chiefdom are therefore not officially recognised. In rural

(tribal) areas they are courts of first instance. Unfortunately no figures are available, but a large number of cases are heard in these courts – more than in the official courts of the chief and headmen. The ward heads owe their position to the fact that every tribal area is divided into wards under the control of a local ward head. He is formerly appointed by the chiefs or merely recognised, because the position is invariably hereditary.

Among the Tswana the ward heads are assisted by the *lekgotla* an informal group of advisers, consisting of a senior relative and heads of other family groups in the ward. The ward head is entrusted with the administration of justice in his area of jurisdiction. In practice, he would preside over a court, but always assisted by members of the *lekgotla*. He must refer more serious cases to the chief's court. In civil matters a party who is not satisfied with a decision of the ward head's court may take the matter on appeal to the chief's court.

The ward head would usually hear only cases involving disputes between ward members. He does not have criminal jurisdiction nor powers to impose corporal or forms of punishment, apart from a fine for contempt for his court. All criminal cases will however, will be investigated by the ward head and his council before being referred to the chief's court.

The jurisdiction of the ward head is limited to persons living within his ward. Where a dispute arises between the members of different wards, it is customary that such a case is heard by the ward head of the Defendant

6.10 CONSTITUTIONALITY OF THE RULES OF TRADITIONAL LEADERS COURTS

The constitutionality of these courts came under scrutiny in *Bangindawo v Head of Nyanda Regional Authority; Hlantlalala v Head of Western Tembuland Regional Authority* 19 1998 (3) BCLR 314 (Tk). This judgment did not relate to ordinary traditional authority courts, but to the regional authority courts established in terms of the Transkei Traditional Authority Courts Act 13 of 1982. The judges did not in these cases consider the constitutionality of ordinary traditional authority courts. In the *Bangindawo*, Madlanga J considered the simplified, non-technical procedures of customary law and pointed out that it was useless for the applicants to list the elaborate facilities in the Western Law procedural system which are absent in the traditional courts. That was paramount to comparing apples with oranges.

Madlanga J also rejected the contention, that the adjudication of cases by paramount traditional leaders and headmen resulted in the absence of the impartiality and independence as required by the Constitution, the traditional leaders, are part of the executive arm of government, receiving salaries and pensions from the government. He concluded that the imposition of western conceptions of Judicial impartiality and independence would strike at the heart of the African legal system, and amount to abhorrent subjection of African matters to public policy that did not necessarily accord with the public policy of the Africans (at 327D-F).

In a subsequent case of *Mhlekwana v Head of the Tembuland Regional Authority; Feni v Head of Western Tembuland Regional Authority* 2000 (9) BCLR 979 (Tk), Van Zyl J overruled Madlanga J and upheld the contention that, traditional leaders chairing these courts were apart of the executive arm of government and should not preside over cases as they could not be impartial and independent.

Van Niekerk in 'Indigenous law, public policy and narrative on the courts' (2000) *THRHR* 403 warns that South African judges should be sensitive to the diverse values of different cultures which comprise the South African Community and he suggests that judgments be guided by the narratives of those whose lives are governed by customary law.

In both the *Bangidawo* and *Mhlekwana* cases, the Traditional courts were also attacked for the prohibition of legal representation which is in conflict with the constitutional provisions relating to an accused person's right to legal representation. The applications were directed at the Transkei Regional Authority Courts which give paramount chiefs the same powers as magistrates, and it was therefore possible for the applicants to argue that there is a difference between the court of traditional leaders and headmen are empowered to try only petty cases.

It has been suggested by Koyana and Bekker that, Van Zyl J actually threw the baby out with the bath water. The Regional Authority Courts were ruled to be unconstitutional and they have since be formally called upon by the Department of Justice to stop operating all together.

In both cases it was held that the prohibition of legal representation was unconstitutional. The Judges were influenced by the fact that Regional Authority Courts were statutory courts on a par with the Magistrates court.

6.11 APPLICATION OF INDIGENOUS LAW AND THE REPUGNANCY CLAUSE

Customary law is recognised subject to the Constitution, and more specifically to the Bill of Rights. The repugnancy clause remains in place as ever before. It is presently contained in Section 1 (1) of the Law of Evidence Amendment Act 45 of 1998. Its application is further secured by Section 211 (3) of the Constitution which directs the court to apply customary law subject to the constitution and to existing legislation like the repugnancy clause in the Law of Evidence Amendment Act.

With regard to the repugnancy proviso, Van Niekerk concludes, "should it be employed, as in the past, to impose western values of the indigenous legal order, or to avoid the application of indigenous law, the use of the clause might lead to the stagnation and eventual disappearance of a system of law by which millions of South Africans lived" (Van Niekerk (2000) *THRHR* 403)

7. PROCEDURE & EVIDENCE

(SUMMARY FROM: RB Mqoke & LP Vorster 'Procedure and Evidence' in Bennett (ed): 2002: 157 –175)

7.1 THE TRADITIONAL COURT PROCEDURE

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

Authors on the topic distinguish between the court of a ward head and the court of a chief. Only a chief's court is formerly recognised by legislation. (Headmen appointed in terms of s2(8) of Act 38 of 1927) had the same jurisdiction as a Chief to hear cases. Such headmen are to be distinguished from ward heads operating under the jurisdiction of chiefs.

A chief's court is not a court of record, and therefore it does not keep a written record of court proceedings. A chief's court for the purpose(s), of the Criminal Procedure Act 51 of 1977 is neither a higher or lower court. According to indigenous law, the ward head's court is the lowest court and the chief's court is the senior or highest court.

The trial procedure in traditional courts is basically same for both the ward head's and the chief's court and the court procedure for civil and criminal actions does not differ. Although the terminology for both civil and criminal actions is the same, a distinction is made between the Plaintiff (civil action) and Complainant (criminal action), and between Defendant (civil action) and a Accused (criminal action).

Civil actions are instituted in a traditional court only when the disputing parties and families could not reach an agreement and such cases usually involved matters in which a family group's rights and powers have been infringed upon. These actions could be claims for: seduction; adultery; the dissolution of marriage; damage to property and contractual debts.

In tribal law a complainant can approach the tribal authority with his or her complaint and the authority would then take the matter further. Criminal actions are usually instituted by the traditional authority against an offender and if such an offender is found to be guilty then the offender is punished. Punishment can only be in the form of a fine. Previously it could also have been in the form of corporal punishment. This is an example of how the Constitution and in particular the unconstitutionality of state sponsored corporal punishment has impacted on the powers of traditional authorities.

If an act gives rise to both a civil and a criminal action both aspects are dealt with in the same hearings. Examples are assault and theft. In such cases the court may impose punishment and award damages to the injured party.

7.2 THE LODGMENT PROCEDURE

In civil matters the Plaintiff's group first tries to negotiate with the Defendant's family to reach settlement. Where negotiations do not result in settlement Plaintiff's group will report the matter to the ward head. If the Defendant and the Plaintiff live in the same ward, their ward head will set a date for the trial and will notify the Defendant. If they do not live in the same ward the Plaintiff's ward head will send the Plaintiff together with a representative of the ward, to the ward head of the Defendant in order to report the matter to the latter. The ward head of the Defendant will then set a date for hearing. The general principle is that a case is heard at the court of the Defendant's ward.

On the day of the hearing, both parties and their witnesses should be present. The case may not be heard in the absence of one of the parties. If one of parties cannot be present and offered apologies prior to the proceedings the case is postponed. If a party is absent without an excuse, the case is postponed and the absent party is warned to be present when the case is heard again. If a party is absent without an excuse for the second time, he or she is generally brought to the Court by court messengers and may be punished for contempt of court.

If one of the parties is not satisfied with the decision of the ward head's court he or she may ask that the case be referred to the chief's court. The dissatisfied party and the representative of the ward head's court will then report the case to the chief's court. The ward head's court may also refer the case to the chief's court if it is complicated. At the chief's court there is usually a person who receives these cases and who sets a date for trial on the chief's behalf. The procedure in the chief's court is the same as that in the ward head's court.

In a criminal case, the general procedure is that the family of the aggrieved person reports the case to the local ward. In exceptional circumstances the complaint may be lodged directly with the chief's court. The ward head will then investigate the matter and report to the chief. If the complaint is founded, the chief sets a date for trial and the parties concerned are notified accordingly. Each party must see to it that its witnesses are present on the day of the trial. In criminal cases the traditional procedure applies, to such an extent that it is not in conflict with public policy and natural justice. It has therefore been decided in the High Court that a person may not be sentenced in his or her absence (*R v Buthelezi* 1960 (1) SA 284 N) and a chief may not administer justice in a case in which he himself is the complainant.

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 R 2082 of 1967) and such a party may even be sentenced in his or her absence. This is what is called Judgment by Default. In such a case a party may not be punished for contempt of court as well (*S v Khuzwayo* 1969 (1) SA 70 N). In terms of

Rule 2 when the Defendant fails to appear on the date set for the hearing and the notice is served on him personally when he is within the chief's area of jurisdiction, the chief may, upon the request of the Plaintiff, give judgment in favour of such Plaintiff for an amount, or such other relief not exceeding the amount or relief claimed by the Plaintiff and the costs of the action.

In terms of sub-rule (2) the Defendant may apply for the dismissal of the Plaintiff's claim if the latter fails to appear on the date and time of the hearing. However the dismissal is not fatal as the Plaintiff is free to institute the action afresh in the chief's court or magistrate's court. In *Kulu v Mthembu* 1954 NAC (NE) 5, the Defendant applied for condonation of late noting of appeal against a default judgment instead of applying for the rescission of judgment the court held that a party should exhaust all available remedies in a lower court before appealing to a higher court. The court also warned that the courts of law should not refuse to rescind where there is a doubt as to whether the default may have been wilful. In the result the Defendant was advised to apply to the chief for a rescission of default judgement.

7.3 THE TRIAL PROCEDURE

The main principles of the traditional court may be summarized as follows:-

7.3.1 ONUS OF PROOF

The general principle is that the onus is on the accused to prove his or her innocence in court. It often happens that an accused pleads guilty in a non-traditional court (such as a magistrate's court) when asked to plead, and then wishes to lead evidence to prove his innocence. The question of onus of proof is usually not an issue. However, in stock theft cases where animals stolen were last seen in the vicinity of the accused's homestead, the owner of the homestead was required to explain where the animals were gone. This is the so-called Spoor Law.

7.3.2 PUBLIC AND OPEN HEARINGS

The sessions of traditional courts are held in public. No trials are held in camera. All court sessions are open to members of the public and may be attended by any adult person even strangers. In former times, only adult men were allowed to attend court sessions, but in many rural areas today, adult women are free to attend these sessions as well. 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.

7.3.3 PARTIES MUST BE PRESENT

A general rule whereby all parties must be present during the trial applies. Judgment by default was historically unknown. This principle still applies in most traditional courts despite the statutory provisions to the contrary.

7.3.4 LACK OF FORMAL LEGAL REPRESENTATION

Legal representation was traditionally unknown. However, nobody appears in court without assistance. Every person no matter what his or her age or sex is assisted by relatives. Parties have to see to it that their witnesses are also present. Witnesses may not be related to the parties concerned. For this reason neighbors are often the main witnesses in a case. Nowadays it happens that parties are assisted in court by neighbor (non-relatives) where no relatives are readily available.

7.3.5 PROCEEDINGS CONDUCTED ORALLY

All proceedings were traditionally conducted orally, and no written records of cases were kept. Today all chief's courts keep a court record in which basic information regarding a case must be recorded. Legislation also requires that the judgment of a chief's court be registered with the local magistrate. The case must be reported in quadruplicate (4 fold) immediately after judgement. This report must contain: the names of the parties, the particulars of the case, the judgment and 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. (Rule 6 and 7, GN R2082 of 1967)

In an appeal against the chief's judgment in the magistrate's court the written record is very important in so far as the pleadings and judgment in a chief's court are concerned. (*Khumalo v Khumalo* 1953 NAC (NE) 4). It has been held that the written record of the chief's court should be presumed to reflect the true elements of the trial before him. If it is alleged to be incorrect, it can only be corrected on application to the magistrate and on notice to the chief and other party. The magistrate will be required to investigate and decide the issue (*Ntshingilili v Mncube* 1975 AC (NE) 100; *Am v Kuse* 1957 NAC (S) 92). If the correctness of the chief's written record is not challenged, the Defendant's admission in the chief's court stands (*Malufahla v Khalankomo* 1955 NAC (S) 95).

Kindly note the following with regard to procedure and evidence:

- ❖ The chief is judge-in-council and although the chief or ward head delivers the judgment, he is guided by the opinions and the advice of those present, and particularly of those of the court or council members present. Judgment usually is a summary of the consensus opinion of those present.
- ❖ The court proceedings are fairly informal. The proceedings however, follow a specific pattern. First the Plaintiff or Complainant states his or her side of the matter, and then follows a reply of the Defendant or accused. Usually a few questions are asked by the council members and some of those present to clear up of securities. Then follows the evidence of the witnesses of the Plaintiff/Complainant. The witnesses are

questioned by those present. The evidence of the witnesses of the Defendant or accused is heard and questioned and the Plaintiff or Complainant and the Defendant or accused may give further explanations or question each other. The matter is then discussed by those present followed by the views of the council members present on the facts and issues in dispute. Thereafter, judgment is given and usually a consensus Judgment is considered ideal. Often, therefore, the matter is discussed until council members have reached consensus.

Although the proceedings are informal, they always take place in an orderly manner. Person's who misbehave are called to order and receive a warning. If they continue to misbehave they may be removed from court and may be even fined summarily for contempt of court.

- ❖ Nobody should be a judge in his or her own case. A case involving a ward head is heard by another ward head, or the case is referred to the chief. A case involving the chief is heard by a senior relative of the chief and usually by a brother of his father.
- ❖ 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.
- ❖ In former times, asylum was known. A person affected by a court order could escape punishment by fleeing to a certain place, for instance to the house of the chief's mother or to the house the tribal wife.
- ❖ Mendacity is not punishable. Even though a person may not be punished simply because he has told a lie, his evidence is still considered less reliable. There is no oath taken by either the parties or their witnesses.
- ❖ Prescription of a debt or a claim is unknown (that is a debt case – does not become invalid or unforceable through lapse of time). However, Rule 3 of GN R2082 of 1967 allows for magisterial inprevention in the event of an unreasonable delay in the hearing of an action in the chief's court.
- ❖ The court proceedings are inquisitorial in nature. This means that it is the courts duty to try and establish the truth through questioning and cross-examination. In most traditional courts there is a specific person whose duty is to announce the matter

before the court and to present evidence to the court. Therefore in principle no evidence is excluded. Also parties and their witnesses are given ample opportunity to submit evidence to the court. The court must be satisfied that there is sufficient evidence to get the facts of the case. The court is also competent to hold *in situ* (that is, at the place where the offence took place) investigations, this is similar to *in loco* inspections in the magistrate and high court rules. The court may even make use of extra traditional methods of proof, such as pointing out by a diviner (Nyanga or Ngaka) in order to establish the truth. It therefore is said that time cannot stand in the place of truth.

7.3.6 THE SENTENCE OR JUDGMENT

One of the most important functions of the modern court as a legal instrument 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.

A feature of judgments by a traditional court is that each case is judged on his merits. The court is therefore is not bound to previous judgments on comparable cases. The court comes to a decision after considering all the relevant information including judgements on comparable cases and the status of the parties before the court.

In criminal cases, judgment may mean punishing the accused. This punishment can take the form of a reprimand, a warning, corporal punishment, a fine, the attachment (seizure) of property, and, in former times, even banishment from the tribal area and the death penalty.

In civil cases judgment may mean rejecting or accepting the Plaintiff’s claim. If the Plaintiff’s claim is accepted, the Defendant is usually asked to compensate for the Plaintiff’s damage.

Writers point out that in indigenous law there is not always a clear difference between civil and criminal cases, nor there is a distinction between civil and criminal elements of a case. Judgment pertaining to a case with a criminal and civil element will therefore also comprise an element of punishment and an element of compensation.

Various factors are taken into account in determining the amount of compensation to be paid. For certain offences such as seduction and adultery, there is, in most cases a fixed amount of compensation. Although the court may amend this amount, it does not easily do so.

In cases where there is no fixed amount for compensation prescribed by tribal law, the court takes account of factors such as the status and economic situation, circumstances of the parties when the offence took place. An affluent person or a person of royal descent

may therefore expect to pay a higher amount of compensation than other people. This is so because such people are expected to set an example to the community.

Sometimes a court orders additional property 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 monies were used. This levy may be regarded as a compensation to the court for time its members have spent on the case. Another explanation is that these are goods that are given in order to close the court proceedings.

In former times, a goat, and even a head of cattle if the case took along time, was given. The animals were 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 (disagreement) that still existed among the litigants was removed in a visible and concrete manner.

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

7.3.7 THE EXECUTION OF THE SENTENCE OR JUDGMENT

The judgment of a traditional court must be executed in accordance with tribal law (S 20 (2) of the Black Administration Act of 1927) unless it is taken on appeal (S 20 (6); Rule 9, GN R2082 of 1967). The compensation or the fine, whatever the case may be must be paid as soon as possible after judgment has been given. The cattle, goats, or other property or amounts of money are taken to the courts were judgment was given. In the case of compensation the successful party is notified that the goods or livestock may be fetched. Sometimes this party then gives part of the goods or livestock to the court, to be used for serving food to its members. In this respect it should be remembered that in former times members of the court were not rewarded for there services.

Should a person refuse or neglect to pay the fine or compensation owing within a reasonable time, the traditional court order that the person’s property be confiscated. In such a case force could be used to confiscate the property. Some groups had a special messenger who performed this function. In such a case the fine and compensation were usually increased summarily.

The increase may be regarded as a fine for contempt of court. It was used for the maintenance of the messenger’s and, therefore and can therefore also be regarded as execution costs. The judgment debtor, that is, the person against whom judgment was given for payment of a fine or damage 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 were inforced directly after the court session. Today a sentence by a traditional court may be enforced only if no notice of the appeal was received within 30 (THIRTY) days after registration of the judgment with the local magistrate’s court. (S 20 (6) & (7) of Act 38 of 1927; GN R45 of 1961).

If the property to be confiscated is situated outside the area of jurisdiction of a traditional court, application must be made to the Clerk of the Magistrate's Court for execution of the sentence or judgment. (Rule 8 (3), GN R2082 of 1967). Also, today messengers of the traditional court are not allowed to use force in order to execute a sentence or judgment. Any interference with the messenger in the execution of his duty is considered a crime (Rule 8 (4), GN R2082 of 1967). However, no more goods may be seized and is laid down in the judgment.

Section 20 (5) of the Black Administration Act makes provision for another way in which to exact unpaid fines. If a traditional 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 (FOURTY-EIGHT) hours. If the magistrate is satisfied that the fine was imposed in a proper manner and finds that all, or part of it, is still outstanding, the magistrate may order that the fine be paid immediately. Failure to do so may lead to the guilty person being sentenced to imprisonment for a period not exceeding 3 (THREE) months.

7.3.8 THE INDIGENOUS LAW OF EVIDENCE

7.3.8.1 NATURE

Trials in traditional courts are still governed by the indigenous law of evidence (S 20, 2(2) of Act 38 of 1927; Rule 1 GN R2082 of 1967) provided that the rules applied are not in conflict with the principles of public policy and natural justice (S 1 of the Law of Evidence Amendment Act 45 of 1988). In the event of an appeal to a magistrate's court against the judgment of a traditional court, the general South African Law of Evidence would apply to the evidence given in the magistrate's court (*Nombona v Mzileni et al* 1961 NAC (S) 22). If the magistrate's court would come to another decision than that of the traditional court merely because of an impeaching rule of evidence regarding the admissibility of evidence and the measure of proof, it could lead to unfairness.

The indigenous law of evidence is based on custom and does not consist of formal rules in the ordinary sense of the word. These are customs, rather than rules, that are observed, and disregarding or violating them does not constitute a contravention of the law. The indigenous law of evidence is therefore fairly informal and is based largely on the reasonableness and effectiveness. The court is interested in the merits of the case, and technical grounds for a judgment are therefore unknown.

Two characteristics of the indigenous law of evidence are its inquisitorial procedure and its free system of evidence.

7.3.8.2 BURDEN OF PROOF AND EVIDENTIAL BURDEN

The burden of proof determines which party loses the case if the court does not have enough grounds in order to make a finding on an issue of fact. Such a situation is not inconceivable in indigenous law, because extra-judicial methods of proof are known.

These extra-judicial methods of proof in indigenous law have to do with referring the accused to a diviner (Ngaka; Inyanga), in order to make a finding.

Since the indigenous law of evidence is informal and free in nature, there is also no scientific reason concerning the burden of proof. The court decides on the merits of the evidence, which rendering of the facts is true..

As far as the evidential burden is concerned, the principle is that a party must prove its claims in the court. In a civil action, the Plaintiff's group must submit evidence which together with other evidence submitted to the court and evidence obtained through questioning by the court, proves its claims. Otherwise, judgment is given in favour of the Defendant, and the Plaintiff's claim is dismissed. Likewise, the Defendant's group must submit proof which, together other evidence before the court, rebuts the case against it and shows the claim to be unfounded. All evidence is judged merely on its merits and the court is not bound to technical rules of evidence. A party is therefore not required to prove an issue of fact conclusively. The court plays an active part in examining the parties and is therefore in a position to judge the rendering of the facts itself.

In criminal cases the principle is that a party must prove its claims at court. Sometimes it is said that the onus is on the accused to prove his or her innocence. This means that the accused is expected to submit evidence to the court that proves the charge to be unfounded. In indigenous law there is no prosecutor who submits evidence on behalf of the court. The court however plays an active part in the process of questioning and may even call witnesses. Circumstantial evidence is also used in sexual offences.

Concrete evidential material has especially strong evidential value, for instance a piece of clothing or some personal belonging of an offender shown to the court has special evidential value, since no person would entrust a personal belonging to 'stranger'. Concrete evidential material together with other evidence is often decisive proof.

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

The court itself may, through questioning or an inspection in loco produce evidence which can be considered together with other evidence. The members of the court council actively take part in questioning the parties.

Any person present in court may submit further evidence to the court in support of the evidence given, or to query it, and may even question the parties and their witnesses. After a witness has given evidence and has been questioned, he or she may be called again at any stage in the process to give further explanations on the grounds of new evidence. 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.

Customary has its own system of dealing with admissions, judicial notice and presumptions.

In former times the assistance of a traditional healer could be called. If the facts of the case were difficult to prove the court would send the parties accompanied by two or more messengers to Nyanga. Today members of the tribal police are used for this purpose. It is the task of the Nyanga by means of extra-judicial methods such as the throwing of bones or other tests, to determine if the accused is guilty of the charges against him or her. The finding of the Nyanga is conveyed to the messengers. This can be done by shaving the hair of the accused in order to indicate his or her guilt. These messengers convey the finding of the Nyanga to the court. The Nyanga himself or herself does appear in court to give evidence. The finding of the Nyanga is excepted as decisive evidence by the court; that is no further evidence is required all that remains to be done is for the court to give judgment.

With regard to competence to give evidence or to testify the general principle is that all persons except if insane or intoxicated are competent to testify in an traditional court. Even a young child who can remember and relate an incident and who can identify persons can testify in court. A person who is too intoxicated to testify is first allowed to get sober. If this happens, the case is usually postponed.

A wife may testify for or against her husband and the converse is also true. A husband may testify for or against his wife. The court will however weigh such evidence carefully. Such evidence must usually also be corroborated by other evidence. Chiefs and ward heads may not act as witnesses in a case. The same principle applies to members of the court council. However, they do not have to withdraw themselves from a case merely because they know something about the case concerned. They must convey their evidence to the court. In former times a chief was not allowed to testify in public. The chief usually testifies in private to the chief councilor, who passed this information onto the court. When considering this procedure you must bear in mind that in indigenous law no case is decided by an individual. The chief and the ward head, together with the members of the court council, decide a case so that the outcome of the case cannot be influenced by a certain individual's prior knowledge of the case.

In a traditional court evidence is not given under oath therefore perjury is unknown. No actions is taken against a party or a witness who tells lies; if they do tell lies, it would merely harm their case.

In court evidence is given orally in the presence of the parties concerned and subject to questioning. Each party and all the witnesses are given full opportunity to testify at their discretion to the court, without interruption. The court patiently listens to the evidence and will seldom reprimand a person to limit evidence strictly to the case in hand. If, however, a person states his case in a very long – winded manner, without being specific he will be asked to 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 with due allowance for all the facts of

the matter as well as the motives of the witnesses. If later it appears that a person is wasting the courts time, he can be fined.

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