ADVANCED INDIGENOUS LAW

Only study guide for

LCP4804

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FOREWORD

Dear Student

We are pleased to welcome you to the Advanced Indigenous Law (LCP4804) module. During semester 2 of 2018, you will study this tutorial letter as the **only study guide** for this module. As it stands, it is a draft study guide that is still in the process of completion. You will also notice that it is in the form of a **wrap-around**, which means that you will use it together with your prescribed textbook. Your prescribed textbook is **Himonga C and Nhlapo T (eds) (2014)** ***African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives.*** **Cape Town: Oxford University Press**. This is the final information on the prescribed material. You should be able to get the prescribed textbook from bookshops that sell UNISA textbooks. If, for some reason, it is unavailable, the bookshop should order it for you and will receive it within a few days.

Advanced Indigenous Law (LCP4804) provides an in-depth study of indigenous African law which was the first legal system which applied throughout the country before it was supplanted by Roman-Dutch law as the law of the land. We will explore the system's originality, uniqueness and distinctiveness after centuries of domination by the Western component of South African law. This is an ontological defect that we must dispel from our minds by gradually ridding customary law of all colonial and apartheid distortions and by re-integrating indigenous norms with constitutional values to attain customary law's envisioned version for the 21st century. To attain that, the Constitution enjoins the courts to apply customary law when it is relevant (section 211(3)). This requires us to study indigenous African law according to its own value system because it is no longer subject to the non-repugnancy caution of yesteryear. You will recall that, in the past, customary law was applied in a manner that it would not be repugnant to the principles of natural justice and public policy. This was a smart way of saying that customary law should not offend Western notions of morality. We all know that this was a function of the inequality between customary law and common law. Today section 39 of the Constitution treats these two components of South African law equally and section 211 of the Constitution recognises customary law.

You will notice that, as a wrap-around, this study guide goes hand in hand with the prescribed textbook, both of which must be studied together with the prescribed cases and statutes. Consequently, the study guide is not comprehensive and simply provides a guide through the textbook and other study material.

As a study guide, this tutorial letter (Tutorial Letter 102) is divided into learning units which are also divided into lectures. Each learning unit concludes with activities, feedback and self-assessment. These exercises assist you to reflect on the study material discussed in the lectures that constitute the particular learning unit. In most cases, the lectures will simplify the understanding of the relevant study material to facilitate the learning process. Towards the end of each learning unit, there is a brief lecture on the **Transformation of Customary Law** so that you are able to appreciate the legislative and judicial efforts to

decolonise customary law by infusing it with indigenous and constitutional values aimed at keeping customary law in line with the living African value system. Furthermore, you must stay up to date by doing the activities, reading the feedback and answering the self-assessment questions that are designed to prepare you for the assignments and examination. The **Counter Points** and **Pauses for Reflection** in the textbook highlight contentious areas and enhance your understanding of the concepts involved. **The Chapter In Essence** at the end of each chapter in the textbook is a good revision tool and summary if you have studied the chapter.

As your lecturers, we will be available to attend to your queries, which you must address to Prof DD Ndima, Cas van Vuuren Building 7-98, tel 012 429 8421 or e-mail ndimadd@unisa.ac.za or Ms N Nxumalo, Cas van Vuuren Building 7-72, tel 012 429 6499 or e-mail nxumana@unisa.ac.za.

Good luck!

PART 1

THEORETICAL AND STRUCTURAL OVERVIEW OF AFRICAN CUSTOMARY LAW

Learning unit 1

Historical overview of customary law

Study

You must study chapter 1 of the textbook.

Learning outcomes

This learning unit will equip you with the ability to:

- examine the history of customary law, from its pre-colonial origins through the colonial, union and apartheid eras up to the democratic era
- critically evaluate customary law rules, principles and concepts as they impact on the application and operation of South Africa's post-apartheid legal environment

Introduction

The following is a historical overview of the development of African customary law, its historical development from its pre-colonial stage, through the colonial, union and apartheid eras up to the democratic era. These represent the various ways in which customary law has been and still is affected by the political context and state power.

Lecture 1: The pre-colonial era (the period before 1652)

This part of the history is not in the textbook. It refers to a time when customary law reigned supreme and was applied in its original form underpinned by an indigenous frame of reference. Its unadulterated value system was anchored in the philosophy of *ubuntu* which was the measure of appropriateness for the conduct of all human beings. This version of *ubuntu* developed attributes such as communal living, group solidarity, responsibility, accountability, generosity, a sense of belonging, the ethos of cooperation, and the ethic of reciprocity. *Ubuntu* means humanness and humanity in the African sense. Any human conduct that was not underpinned by *ubuntu* was inhuman and unacceptable. The institutions of *ubuntu* discussed in the textbook include *ukufakwa ukulobola, isondlo, ukwethula* and *ukwenzelela,* all of which display the centrality of the human element in the indigenous concept of obligations. To demonstrate the operation of the attributes of *ubuntu* in indigenous contracts, the *ukufakwa* institution will be discussed in chapter 10 below.

Lecture 2: The colonial era (the period 1652–1909)

Study

You must study:

- the textbook, pages 4–9
- Grant. "Human rights, cultural diversity and customary law in South Africa" (2006) 50/1 *Journal of African Law* 1 – see below:

You must learn the terms used in this lecture, the socio-political context of colonialism and the level of recognition accorded to customary law by the colonial authorities.

After the Khoisan people of the Western Cape had lost their kingdom to the Dutch settlers after 1652, the colonial era started in South Africa. We will refer to this period as the colonial period in the widest sense since the dispossession of the Khoisan people of their land presaged the dispossession of other indigenous groups in different parts of South Africa. The Khoisan people lost besides their kingdom(s) most of their social structures such as their customary law and languages. The following is Grant's account of the loss of their customary law experienced by the Khoisan people:

> The history of customary law in South Africa is well documented. When Britain occupied the Cape in 1806, the Roman-Dutch law, which had applied hitherto under the previous Dutch administration, was retained. Theoretically, under the previous administration [1652–1806], the indigenous Khoisan communities had continued to apply their own legal systems in respect of their personal relations. In practice, integration into settler society (albeit usually in subordinate positions as servants), the application of Roman-Dutch law to legal transactions with the Dutch settlers, and the prevailing attitude that indigenous systems were inferior, had in the course of the eighteenth century led to virtual obsolescence of those systems. While the Dutch had perpetuated an ambiguous policy towards indigenous law, neither abolishing nor specifically recognizing it, the British approach initially specifically excluded the application of indigenous law. One of the justifications for the policy of non-recognition of indigenous law was based on the principle of equality: that nobody should be subjected to an inferior system.

Until 1795, the rest of South Africa still enjoyed relative pre-colonial conditions as other groups still held their land. But when the British took over the Cape, the amaXhosa, who occupied the eastern parts of the country, were subjected to colonialism. Although the amaXhosa also lost most of their land to the settlers, unlike the Khoisan, they retained their social structures. Other parts of South Africa remained unaffected by colonialism until 1835 when the Voortrekkers migrated northwards. From then on, the indigenous peoples of the Free State, KwaZulu-Natal, Lesotho, Gauteng, Mpumalanga, Limpopo and the North-West Province gradually lost their sovereignty to the colonists. In each region, the colonists took over the land and imposed Roman-Dutch law. African customary law soon lost its position as the primary legal system of South Africa. If it was followed at all, it was subjected to the repugnancy clause.

Lecture 3: The union era (1910–1947)

Study

Study pages 9–13 of the textbook.

To understand this lecture, please read the following extracts:

> Regarding the status of Africans during the union and apartheid periods, Ngcobo J said the following in *Bhe v The Magistrate Khayelitsha*; *Shibi v Sithole*; *Human Rights Commission v President of Republic of South Africa* 2005 (1) BCLR 580 (CC) at paragraph 42:

The Native Administration Act [Act 38 of 1927] appointed the Governor-General (later referred to as the State President) as "supreme chief of all Africans". It gave him power to govern Africans by proclamation. The powers given to him were virtually absolute. He could order the removal of an entire African community from one place to another. The Native Administration Act became the most powerful tool in the implementation of forced removals of Africans from the so-called "white areas" into the areas reserved for them. These removals resulted in untold suffering. This geographical plan of segregation was regarded as a part of "a colossal social experiment and a long-term policy.

Regarding the status of customary law during the same period, Schreiner JA held in *Ex parte: Minister of Native Affairs – In re Yako v Beyi* 1948 (1) 388 (A):

I find no support in the language of Act 38 of 1927 for the president's [president of the Native Appeal Court] view that native law should be treated as prima facie applicable in cases between natives. On the contrary, the indications are rather that common law was to be followed unless the native commissioner in his discretion saw fit in a proper case to apply native law. That view is supported by the general shape of the sub-section, which does not provide that the native commissioner shall have the discretion to apply common law or native law. Framed as it is, it appears to me that the sub-section assumes that the native commissioner should in general apply common law and on that assumption empowers him in a proper case to apply native law.

Lecture 4: The apartheid era (1948–1990)

Study

Study:

- the textbook, pages 13–17
- the Black Authorities Act, 68 of 1951
- *Tongoane v National Minister for Agriculture and Land Affairs* 2010 (6) SA 214 (CC); 2010 (8) BCLR 741 (CC)

You will note that in all material respects the apartheid period was a continuation of the colonial period. This includes the status given to customary law and the restrictions in its operation imposed by the repugnancy clause. In this regard, see:

- the **Counter Point**, **Degradation of customary law in the legal system** on page 14 of the textbook, particularly
- the **Pause for Reflection** on page 15, **Forced removals and resource insecurity**, and
- **Pause for Reflection** on page 16 of the textbook, **The colonial, union and apartheid eras give birth to different forms of customary law**.

Lecture 5: The transitional era (1990–1996)

Study

Study the following texts:

- the textbook, pages 17–22
- the Constitution of the Republic of South Africa, 1993, (the interim Constitution) especially sections 181–184 regarding the recognition of traditional leadership and its institutions, including customary law
- certification of the Amended Text of the Constitution of the Republic of South Africa, 1996 1997 (2) SA 97 (CC); 1997 (1) BCLR 1 (CC).

You will notice a marked shift from the two previous historical periods as the winds of change were blowing hard over the whole of South Africa. Of particular note is the impact of this era on customary law, black people, women, children and traditional leaders. All these groups suffered the indignities associated with the non-recognition of their law and culture. Previously settled issues such as patriarchy, racism, sexism and inequality, suddenly became hotly contested issues.

Lecture 6: The democratic era (1994 to date)

The democratic era is not treated in the textbook. We include it as an introduction to the whole of this module.

Study

Study the following texts:

- The Constitution of the Republic of South Africa, 1996, particularly:
  - chapter 12 – the recognition of traditional institutions including customary law
  - the preamble – to get a proper background
  - chapter 1 – for constitutional values
  - chapter 2 – for fundamental rights
  - section 15 – the recognition of various cultural and religious institutions
  - sections 30 and 31 – the recognition of the right to culture and cultural participation

  - section 39(2) – for equating customary law with common law and subjecting them to constitutional values
  - section 235 – as the basis for self-determination for individual communities
- all the post-apartheid statutes that are prescribed under the different learning units in this module
- all the post-apartheid cases as prescribed under different learning units in this module

Lecture 7: Transformation of customary law

- Indigenous values

  Indigenous institutions including traditional leaders, indigenous law and culture, regained recognition in South Africa.

- Constitutional values

All components of South African law, including customary law, apply to all races subject to the founding values of equality, human dignity and freedom.

Activity 1.1

Evaluate the operation of *ubuntu* as a measure of the propriety of human conduct in South Africa before it was interrupted by colonial intervention.

Feedback 1.1

The propriety of human conduct was redeemed by the evidence of ubuntu *that lay at the root of one's actions. In the* ubuntu *institutions listed above, the centrality of humanness lies at the heart of the social activities of each individual. Each institution was redeemed by its tendency to enhance the human condition of certain individuals or groups such as* ukufakwa isondlo.

Even an individual's liability for wrongful conduct was measured by the level of "ubuntuness" with which it was performed. The heart of the perpetrator was examined to establish if ubuntu *was the basis for his or her actions. For example, a person who killed a rapist to save a child was saved by the humanness of his actions. Likewise, the person who killed a dog that targeted lambing ewes and killed newborn lambs would not have been prosecuted. Both these actions would have been considered as praiseworthy because the community would be rid of the perpetrators.*

Colonialism put an end to this line of reasoning. The Western concept of law shifted the centre of attention from the heart to the mind. Under the Western system, it was no longer the humanness in the perpetrator's heart that was examined to establish liability, but the perpetrator's state of mind. Was he or she at fault? became the question. If he or she were indeed at fault, the next question would be: was the action intentional or negligent? Both these questions are directed at the perpetrator, not at the impact of the action on humanity.

Self-assessment 1.1

Write an essay in which you demonstrate the impact of each of the listed traditional institutions, namely ukufakwa ukulobola, isondlo, ukwethula *and* ukwenzelela *in enhancing the human condition.*

Activity 1.2

Trace the impact of the colonial intervention on the lives, land and the law of Africans from 1652 to the 1830's in South Africa.

Feedback 1.2

The fate of the Khoisan people with regard to the colonial dispossession of their land, the destruction of their sovereignty and the distortion of their laws soon became the fate of all other indigenous groups. These groups eventually found that African values were legally invalid because they ran counter to the Western morals of public policy and natural justice. To be valid, African customs had to be consistent with Dutch customs, not vice versa.

Self-assessment 1.2

Write a critique of Grant's exposition of the suppression of Khoisan customary law as a precursor to the subjugation of South African indigenous law to Roman-Dutch Law.

Activity 1.3

According to your interpretation of the above extract from the judgment of Schreiner JA, what used to be the relationship between customary law and common law in the South African legal system?

Feedback 1.3

Schreiner JA interpreted section 11(1) of the Black Administration Act (BAA), which reads:

> *it shall be in the discretion of the Commissioners' Courts in all suits or proceedings between Blacks involving questions of customs followed by Blacks, to decide such questions according to the Black law applying to such customs except in so far [as] it shall have been repealed or modified: provided that such Black law shall not be opposed to the principles of public policy or natural justice …*

Hence, the judge insists that the president of the Appeal Court for Commissioners' Courts was given the discretion to apply customary law in proper cases that called for such special treatment; otherwise he was mandated to apply the common law to cases involving Africans. This means that the BAA did not give customary law the status of a law to be applied in cases between Africans. Instead, it gave the Commissioners' Courts the discretion to apply customary law only in special cases where the interests of justice called for it. Therefore, the president of the Appeal Court for Commissioners' Courts erred in holding that such courts were mandated to apply primarily customary law instead of common law, which was the law of the land.

Self-assessment 1.3

Study the **Counter Point** *on page 14 of the textbook together with the above feedback and evaluate the degradation of customary law under apartheid.*

Activity 1.4

Study the extract from Ngcobo J's judgment in the *Bhe* case and write a reasoned opinion as to who caused black people's poverty in South Africa and how they did it.

Feedback 1.4

As the extract makes it clear, the union government promulgated the BAA as a tool to establish a separate administration for blacks and to create instruments to ensure the systematic impoverishment of black people. It established the office of the Governor-General as the "supreme chief of all Africans" in the country and gave him absolute power to drive them off their land without compensation and to resettle them on unproductive and barren land. This administration created false geographical divisions called "white areas" from which black people were forcibly removed. This colossal social experiment called segregation had the desired results: it caused untold suffering for the back people and impoverished them.

Self-assessment 1.4

Study the extract from Ngcobo J's judgment in the Bhe case and Feedback 2.4 above. Then propose your own solution to the persisting problem of the landlessness of black people in South Africa. State whether it would be fair to require them to pay for the return of their ancestral land.

Activity 1.5

What is the importance of the transitional period in South African history?

Feedback 1.5

For the first time in more than 350 years, South Africans experienced the participation of all races in public affairs when formerly imprisoned and exiled leaders met with former apartheid leaders to map out the path to a new South Africa. When the interim Constitution took effect on 27 April 1994, customary law ceased to be a sub-system of common law and once again was applied according to its value system. Like any other law, was subject to only the Constitution.

Self-assessment 1.5

Study the Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996 1997 (2) SA 97 (CC); 1997 (1) BCLR 1 (CC) and comment on its importance for customary law.

Activity 1.6

How does one distinguish between apartheid customary law and its democratic counterpart?

Feedback 1.6

Apartheid customary law is described by Schreigner JA in in Ex parte: Minister of Native Affairs – In re Yako v Beyi *1948 (1) 388 (A). See Feedback 1.3 above where the customary law of the democratic South Africa is described by the Constitutional Court in* Alexkor v The Richtersveld Community & Others *2004(5) SA 460 (CC) paragraphs 50–53. See learning unit 2, lecture 2 below.*

Self-assessment 1.6

Study section 39(2) of the Constitution and comment on why it was necessary to treat customary law and common law together in this provision?

Conclusion

In learning unit 01 you learnt about the different historical periods during which customary law developed. We traced them from customary law's heyday of unadulterated indigenous values, through the tortuous distortions under the repugnancy jurisprudence of the colonial, union and apartheid periods, to the system's rebirth during the transitional and the democratic periods. You are now in a position to discuss customary law under the *ubuntu* principle, as well as its demise under the repugnancy clause and its resurrection under the democratic Constitution.

Learning unit 2

The nature and concept of customary law

Study

You must study the following texts:

- chapter 2 of the textbook
- chapter 12 of the Constitution of the Republic of South Africa, 1996
- section 1 of the Recognition of Customary Marriages Act, 120 of 1998
- section 1 of the Reform of Customary Law of Succession and Regulation of Related Matters Act, 11 of 2009

Learning outcomes

This learning unit will:

- enable you to define customary law in both a colonial and a post-apartheid context
- examine the norms and principles pertaining to the nature and characteristics of indigenous law and culture
- critically evaluate the concepts of indigenous law through an advanced study of cases, statutes and textbooks on the transformation of this system under the South African Constitution

Introduction

This learning unit deals with the nature, characteristics and conceptualisation of post-apartheid customary law in South Africa. These customary law features are examined. Selected statutes and judgments, together with the textbook, are helpful in defining the nature and the concept of customary law. If properly understood, these features should reveal the originality and uniqueness of customary law as a distinct legal system that is founded on its own normative value system. Herein lies the great shift in South Africa's legal ontology: customary law must now be seen as a distinct component of South African law that looks through its own lens, not the lens of common law.

Lecture 1: Definition and concept of customary law

In order to grasp the concept of customary law, see section 1 of the Recognition of Customary Marriages Act, 120 of 1998, which provides the following:

> "customary law means the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those people".

The same definition is given in section 1 of the Reform of Customary Law of Succession and Regulation of Related Matters Act, 11 of 2009.

Lecture 2: The nature and concept of customary law

Study

Study *Alexkor v The Richtersveld Community & Others* 2004(5) SA 460 (CC) where the Constitutional Court defined the nature and concept of customary law as follows:

> "[50]. The nature and the content of the rights that the Richtersveld Community held in the subject land prior to annexation must be determined by reference to indigenous law. That is the law which governed its land rights. Those rights cannot be determined by reference to common law. The Privy Council has held, and we agree, that a dispute between indigenous people as to the right to occupy a piece of land has to be determined according to indigenous law "without importing English conceptions of property law".
>
> [51]. While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common law, but to the Constitution. The courts are obliged by section 211(3) of the Constitution to apply customary law when it is applicable, subject to the Constitution and any legislation that deals with customary law. In doing so the courts must have regard to the spirit, purport and objects of the Bill of Rights. Our Constitution does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill [of Rights].
>
> It is clear, therefore that the Constitution acknowledges the originality and distinctiveness of indigenous law as an independent source of norms within the legal system. At the same time the Constitution, while giving force to indigenous law, makes it clear that such law is subject to the Constitution and has to be interpreted in the light of its values. Furthermore, like the common law, indigenous law is subject to any legislation, consistent with the Constitution, that specifically deals with it. In the result, indigenous law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law.
>
> [52] It is important to note that indigenous law is not a fixed body of formally classified and easily ascertainable rules. By its very nature it evolves as the people who live by its norms change their patterns of life.
>
> [53] In applying indigenous law, it is important to bear in mind that, unlike common law, indigenous law is not written. It is a system of law that was known to the community, practised and passed on from generation to generation. It is a system of law that has its own values and norms. Throughout its history it has evolved and developed to meet the changing needs of the community. And it will continue to evolve within the context of its values and norms consistently with the Constitution."

Lecture 3: The difference between living customary law and official customary law

Study

To understand the nature and characteristics of customary law, you must study the following extracts from *Pilane v Pilane* 2013 (4) BCLR 431 (CC) where the nature of customary law is explained.

> "[34] It is well established that customary law is a vital component of our constitutional system, recognised and protected by the Constitution, while ultimately subject to its terms. The true nature of customary law is as a living body of law, active and dynamic, with an inherent capacity to evolve in keeping with the changing lives of the people whom it governs.
>
> [35] Our history, however, is replete with instances in which customary law was not given the necessary space to evolve, but was instead fossilised and "stone-walled" through codification, which distorted its mutable nature and subverted its operation. The Constitution is designed to reverse this trend and to facilitate the preservation and evolution of customary law as a legal system that conforms with its provisions."

Lecture 4: Transformation of customary law

- Indigenous values

  At the highest level of the judiciary, the Court lays down that living customary law is the dynamic and evolving version that the people use in their daily social practice.

- Constitutional values

  The Court has unequivocally succeeded in forging the relationship between the living customary law and the Constitution. This puts to rest the fears of sceptics who objected that there would be conflict between customary law and the Constitution.

Activity 2.1

What does the definition in section 1 of the Recognition of Customary Marriages Act, Act 120 of 1998, mean? "Customary law means the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those people."

Feedback 2.1

It means that the customary law of a community is its living law in the sense that it must "form part of the culture of those people". As the culture of the Tsonga people differ from that of the Tswana people, so do their customary laws. This has an impact on the application of the doctrine of judicial precedent in customary law. For example, the decision in Mayelane v Ngwenyama and another *2013 (8) BCLR 918 (CC), which is based on the Xitsonga custom that requires the consent of the main wife before her husband can*

contract a further marriage. The consent of the main wife "form(s) part of the culture of those people". It does not necessarily "form part of the culture of the Tswana, Zulu, Sotho, Xhosa or Khoisan people". But even if none of the latter cultures endow the main wife with the right to consent to her husband's contracting a further marriage, in terms of the equality and dignity clauses of the Constitution as expounded in the Mayelane principle, in future no husband will be able to contract another marriage without the consent of the main wife. Because of the Mayelane *judgment, the consent requirement is now part of customary law jurisprudence in South Africa as a whole.*

Self-assessment 2.1

Analyse par 34 and 35 of the Pilane *case above and give an appraisal of the characteristics of living customary law compared to those of official customary law.*

Activity 2.2

Write a critical evaluation of the manner in which the constitutionally envisioned customary law of the 21st century is realised in *Alexkor Ltd and Another v Richtersveld Community and Others* 2003 (12) BCLR 1301 (CC).

Feedback 2.2

The judge in the case of Alexkor Ltd and Another v Richtersveld Community and Others *2003 (12) BCLR 1301 (CC) gave a landmark definition of the customary law of the 21st century when he unequivocally stated the jurisprudential equality of customary law and common law. He finally jettisoned the repugnancy clause by decrying the previous practice of viewing the former through the lens of the latter. Henceforth customary law must be conceptualised according to its own normative values and epistemological underpinnings, unlike the previous practice of evaluating it against Western standards of propriety by avoiding repugnancy to so-called "public policy and natural justice", which is a euphemism for Western moral standards. The present position was explicitly laid down by Hlope JP in Mabuza v Mbatha 2003 (7) BC LR 743 (C) par 32:*

> *In conclusion, the test is not, in my view, whether or not African Customary Law is repugnant to the principles of public policy or natural justice in any given case ... The former approach which only recognises African law to the extent that it is not repugnant to the principles of public policy or natural justice is flawed. It is unconstitutional.*

Self-assessment 2.2

Study the Alexkor *case thoroughly and then revise the above extract from it [paragraphs 50–53]. Explain in not more than one typed page how, as a post-apartheid judge, you*

would determine if customary law or a colonial statute allocated disputed land to a mining corporation and forcibly removed the indigenous community from their ancestral land to make way for the operations of the mining corporation. The displaced indigenous community want their ancestral land back.

Activity 2.3

You must study paragraphs 34 and 35 of the *Pilane* case above and evaluate them in your own words to illustrate the nature and characteristics of customary law as a distinct component of the South African legal system.

Feedback 2.3

This is an unequivocal exposition of customary law as a distinctive component of the South African legal system, a component that is alive in social practice (living customary law) as opposed to the past when it was locked up in official records that expressed customary law as a code for administering black people (official customary law rather than the rules regulating their daily affairs). This state of affairs was normalised by the Constitution that freed customary law from the stagnation of apartheid precedents and returned it to its adherents as a living and dynamic system with its own value system to be practised consistently with constitutional norms.

Self-assessment 2.3

Use the current case law that you have studied in this learning unit to analyse the nature and characteristics of the customary law of the 21st century.

Conclusion

In this learning unit, we defined customary law and examined, analysed and evaluated its characteristics, nature and concept. We also noted the distinction between living and official customary law, and observed that in the event of a conflict between the two, the former prevails over the latter.

Learning unit 3

Ascertainment and Proof of Customary Law

Study

You must study chapter 4 of the textbook.

Learning outcomes

After learning this learning unit, you should be able to:

- summarise the process of ascertainment and proof in customary law
- identify and prove a customary law rule from the sources of a traditional community that knows its unwritten laws from its oral traditions and social practices
- ascertain the binding norms that govern traditional communities
- detect if and ascertain when past norms have been overtaken by current living law norms that run consistent with constitutional values

Introduction

This learning unit handles the complex ways in which African customary law is ascertained in order to get the applicable version and prove it. Various statutes that have regulated these processes in different historical periods are examined against the current constitutional provisions.

Lecture 1: Ascertainment of customary law: the traditional framework

The traditional framework for the ascertainment of customary law: community narratives and discourses as sources of customary law rules apply. The **Pause for Reflection** on page 50 of the textbook illustrates this process in a traditional setting.

Lecture 2: Ascertainment of customary law: the statutory framework

Study

You must study the ascertainment of customary law under the colonial and apartheid statutory framework. See the textbook, pages 52–54.

Section 11(1) of the Black Administration Act, 38 of 1927, reads:

> Notwithstanding the provisions of any other law, it shall be in the discretion of the Commissioners' Courts in all suits or proceedings between Blacks involving questions of customs followed by Blacks, to decide such questions according to the Black law applying to such customs except in so far [as] it shall have been repealed or modified: provided that such Black law shall not be opposed to the principles of public policy or natural justice: provided further that it shall not be lawful for any court to declare that the custom of *lobolo* or *bogadi* or other similar custom is repugnant to such principles.

You must take note of the underlined sentences or phrases as they indicate the ascertainment of customary law during the union and apartheid periods. Compare them with the ascertainment of customary law towards the end of apartheid as expressed in section (1) of the Law of Evidence Amendment Act, 45 of 1988, which reads:

> Any court may take judicial notice of the law of a foreign state and of indigenous law in so far as such law can be ascertained readily and with sufficient certainty: Provided that indigenous law shall not be opposed to the principles of public policy and natural justice: Provided further that it shall not be lawful for any court to declare that the custom of lobola or bogadi or other similar custom is repugnant to such principles.

See the textbook, pages 54–58. Make sure that you can distinguish between the 1927 and the 1988 versions of the ascertainment provisions.

Lecture 3: Ascertainment of customary law: the constitutional framework

Study

Study the textbook, pages 52–69.

For the ascertainment of customary law under the Constitution of the Republic of South Africa, 1996, see section 211(3).

Study this lecture in conjunction with the following texts:

- *Mthembu v Letsela and Another* 2000 (3) SA 867 (SCA) para 40
- *Bhe v Magistrate Khayelisha and Others* 2005 (1) BCLR (1) (CC) para 109
- *Shilubana v Nwamitwa* 2008 (9) BCLR 914 (CC) para 56

Lecture 4: Transformation of customary law

- Indigenous values

  The case of *Bhe* endorses the application of the living law as the version that has been adapted over time and that is in line with social practice. In accordance with the view of

many post-apartheid South Africans, Ngcobo J held that there was no reason why the eldest daughter should not be the successor to her parent's estate. In this way, the need to appoint males was neatly sidestepped, resulting in the development of customary law. There was no need to borrow the Intestate Succession Act into customary law.

- Constitutional values

  The constitutional value of equality took centre stage in both the *Bhe* and the *Shilubana* cases. That marked the end of discrimination against women in South African customary law. Consequently, black women became the equals of black men in South Africa.

Activity 3.1

Study the Constitutional Court ruling in *Shilubana* and then indicate how you would ascertain a living customary law rule in a given situation.

Feedback 3.1

To ascertain a living customary law rule, one must study the particular tradition of the relevant community to discover its past practice. Past practice is the customary law of that community which has to be observed until it is replaced by a new practice. In such an event, the new practice will be the applicable rule. In Shilubana, *the past practice of preference for males in the traditional leadership appointment process was superseded by a new community practice following their decision to amend their law and adopt gender equality in line with the Constitution. This also happened in Mabena where past practice reserved the marriage negotiation process for elderly men and excluded junior men and women. The court found that a new practice had emerged in line with the constitutional values of equality and human dignity, allowing junior men and women to participate in the marriage negotiation process.*

Self-assessment 3.1

Study the cases of Maluleke *and* Mabuza *and evaluate the efforts made by the courts to ascertain the past practices before discarding them in favour of new living community practices. In your discussion, you must allude to the appropriateness of the latter practices in the post-apartheid environment.*

Conclusion

In this learning unit, you learnt about the various frameworks of ascertaining customary law. You also noted the difference between the previous and the current approaches to the ascertainment of customary law. In addition, you discovered that in order to ascertain the rule, one must find past practice that sometimes has been replaced by a new practice.

Learning unit 4

Internal conflict of laws

Study

You must study chapter 5 of the textbook.

Learning outcomes

This learning unit will enable you to:

- make a choice of the appropriate rule where several legal systems or different versions of law within one legal system compete for selection in a particular case by using applicable connecting factors
- distinguish between outdated conflict rules which applied under the old order and the current choice of law rules mandated by the Constitution

Introduction

Internal conflict of laws deals with principles of choice of law in cases where either common law or customary law may be the appropriate legal system. It also applies where different versions of customary law compete for selection in a particular matter.

Lecture 1: Conflict of laws under customary law

Study

You must study pages 72–74 of the textbook and note customary law's tendency to avoid conflict situations.

Lecture 2: Conflict of laws during the pre-constitutional period

Study

You must study pages 74–79 of the textbook and note the administration of conflict situations in the colonial, union and apartheid periods, especially the preference for official customary law mandated by the repugnancy clause in section 11(1) of the BAA and section 1(1) of the LEAA.

Lecture 3: Conflict of laws during the post-constitutional period

Study

You must study pages 81–88 of the textbook.

Lecture 4: Transformation of customary law

- Indigenous values

  Section 211(3) of the Constitution provides a conflict-of-law rule that stipulates that the courts must select customary law in cases relevant to it instead of common law. In this way, the Constitution promotes indigenous law.

- Constitutional values

  All applications of customary law must be in accordance with the Constitution and/or the Bill of Rights. In this way, constitutional supremacy permeates South African law.

Activity 4.1

Study chapter 5 of the textbook and discuss the two kinds of conflict that occur in conflicts of laws.

Feedback 4.1

In the first place, a conflict of laws can occur between different versions of customary law, for instance, between the past version and the present version. This has to be resolved by deciding which version is appropriate in the circumstances, like in Shilubana. *In the second place, a conflict can occur between customary law and common law, like in* Alexkor.

Self-assessment 4.1

See ***This Chapter in Essence*** *– bullet points 2 to 4 on page 87 of the textbook.*

Make an analysis of how a conflict of laws was avoided during the pre-colonial (up to 1652) and the pre-constitutional (1652–1994) periods. Compare that with the situation in the post-constitutional period (since 1994).

Conclusion

In this learning unit, you learnt about the various approaches adopted to resolve a conflict of laws in the sphere of customary law in the pre-colonial, pre-constitutional and post-constitutional periods.

PART 2

PERSONAL LAW AND PERSONAL RIGHTS IN AFRICAN CUSTOMARY LAW

Learning unit 5

Customary marriage – requirements for validity

Study

You must study:

- chapter 6 of the textbook
- Recognition of Customary Marriages Act, 120 of 1998 (RCMA), section 3
- *Mabuza v Mbatha* 2003 (7) BCLR 43 (C)
- *Mabena v Letsoalo* 1998 (2) SA 1068 (T)
- *Maluleke v Minister of Home Affairs* Case no 02/24921 [2008] ZAGPHC 129 (9 April 2008) (unreported)
- *Mayelane v Ngwenyama and Another* 2013 (8) BCLR 918 (CC)

Learning outcomes

After learning this learning unit, you will be able to:

- define the nature and characteristics of a customary marriage
- establish the formal requirement for the formation of a customary marriage, its registration and its dissolution
- distinguish between "negotiated", "entered into" or "celebrated" under customary law

Introduction

This learning unit deals with the definition and formation of customary marriage and the formal requirements for its validity.

Lecture 1: Statutory requirements for the formation of a customary marriage

Study

You must study section 3 of the RCMA:

(a) (i) the age of spouse
(ii) consent to the marriage

(b) negotiated and entered into or celebrated according to customary law

The section 3(a)(i) and (ii) requirements are generally not problematic.

Most problems are encountered during the application of the requirements of section 3(b). *See Fanti v Boto and Others* 2008 (5) SA 405 (C); *Motsoatsoa v Roro* All SA 324 (GSJ); *Maluleke v Minister of Home Affairs* Case no 02/24921 [2008] ZAGPHC 129 (9 April 2008) (unreported); *Mabuza v Mbatha* 2003 (7) BCLR 43 (C); *Mabena v Letsoalo* 1998 (2) SA 1068 (T) and *Mayelane v Ngwenyama and Another* 2013 (8) BCLR 918 (CC).

Lecture 2: Any additional requirements?

There are no additional requirements.

If the essential requirements are met, the marriage remains valid, even if some ancient ritual was not observed. See the *Mabuza* case where the validity of the marriage was confirmed despite failure to observe *ukumekeza*.

In the *Maluleke* case too, the validity of the marriage was confirmed despite failure to observe *imvume*.

What is the role of the father of the groom in negotiating his son's marriage? He has no role to play if the groom is an adult and independent man. See the *Mabena* case where the role of the bride's mother to negotiate her daughter's marriage and to act as her guardian in the absence of her father was also approved.

Lecture 3: The requirements for the validity of a further marriage

What if a further marriage has been contracted without obtaining the section 7(6) judicial approval? A marriage remains valid even without the section 7(6) judicial approval, except that it is out of community. See *Ngwenyama* 2012(10) BCLR 1071 (SCA). This was endorsed in *Mayelane* 2013 (8) BCLR 918 (CC). If the further marriage was contracted without the consent of the husband's main wife, it is invalid. See *Mayelane* 2013 (8) BCLR 918 (CC).

Lecture 4: Transformation of customary law

- Indigenous values

  In *Mabuza, Mabena, Mayelane* and *Maluleke* living customary law was endorsed since current social practices prevailed over past practices. Thus customary law was developed without the assistance of common law or Western moral values.

- Constitutional values

  In *Mabuza, Mabena, Mayelane* and *Maluleke* the past patriarchal practices of suppressing women and youths were jettisoned once and for all. The constitutional values of human dignity, freedom and equality were affirmed in the endorsement of current practices which had evolved in line with these values.

Activity 5.1

Evaluate the SCA judgment in the *Ngwenyama* case.

Feedback 5.1

The SCA's approach was to examine the provisions of section 7(6) of the Recognition of Customary Marriages Act 120 of 1998 and to establish whether non-observance of them could have had any bearing on the validity of a customary marriage. This was in view of the fact that the validity of the customary marriage is usually regulated by section 3 of the Act and that section 7(6) regulates regimes of matrimonial property only.

- ***The reasons for judgment***

The SCA, according to Ndita AJA, concluded that section 7(6) of the Recognition Act was concerned with matters of matrimonial property only and had nothing to do with the validity of customary marriages which was regulated by section 3 of the Act. The SCA held accordingly that the non-observance of the section 7(6) did not affect the validity of the customary marriage. At most, such non-observance caused the customary marriage to be out of community of property. According to the SCA, the purpose of the Recognition Act is to protect all women, not just a particular woman. The SCA did not find it necessary to determine whether the consent of Mayelane, as the deceased's first wife, was required for the validity of Ngwenyama's marriage to the same husband.

The decision of the court

The Court upheld the appeal.

Own comment on customary values and the Constitution

The SCA's determination that the non-observance of the provisions of section 7(6) of the Recognition Act does not affect the validity of the customary marriage is to be commended as such matters are clearly dealt with by the provisions of section 3. Consequently, it held that the marriage of Ngwenyama to her deceased husband was valid despite the non-observance of the provisions of section 7(6) of the Recognition Act. It emphasised that the purpose of the Recognition Act is to protect all wives, not just the first wife. Because there was no suggestion that section 3 of the Recognition Act, which deals with issues of validity, was not complied with, there was no basis for invalidating the marriage.

However, the SCA's refusal to inquire into the impact of the lack of the first wife's consent to her husband's further marriage to another woman is to be lamented because the High Court had already found that lack of such consent was problematic. The SCA erred in holding that because the validity of Ngwenyama's marriage was not invalidated by the deceased's failure to comply with the section 7(6) provisions, it was therefore not necessary to investigate the role of the first wife's consent.

Self-assessment 5.1

Study the following cases carefully: Fanti v Boto and Others 2008 *(5) SA 405 (C) and* Motsoatsoa v Roro *All SA 324 (GSJ). Record what each court regarded as a requirement for a valid customary marriage.*

Self-assessment 5.2

Study the following cases carefully: Maluleke v Minister of Home Affairs *Case no 02/24921 [2008] ZAGPHC 129 (9 April 2008) (unreported) and* Mabuza v Mbatha *2003 (7) BCLR 43 (C). Record the reasons given by the court for deviating from past practice and adopting the new practice.*

Self-assessment 5.3

Evaluate the reforms brought about by the RCMA and highlight the developments it brought about with regard to the past status of the customary marriage.

Activity 5.2

Outline the Constitutional Court's efforts to make the consent of the first wife a requirement for the validity of a further Xitsonga customary marriage.

(i) Is this judgment binding on other communities in South Africa that do not subscribe to Xitsonga customary law?

Feedback 5.2

(i) This dispute emerged in the Mayelane *case where the Constitutional Court agreed that the Recognition of Customary Marriages Act does not make the consent of the first wife a requirement to the husband's further marriage. It looked at the Xitsonga customary law to determine if such consent is required by collecting evidence from the relevant community. Some community members confirmed that the consent of the first wife is indeed required, whereas others claimed that the first wife needed to be informed of the husband's intention to marry another wife. Because the community was not unanimous, the Constitutional Court developed Xitsonga customary law to make it a requirement that the consent of the first wife has be obtained if the husband intends to contract a further marriage.*

(ii) The definition of customary law in section 1 of the RCMA shows that customary law is the law of a particular community. Therefore, the requirement of consent of the first wife should not affect communities that do not have such a requirement. The Constitutional Court collected evidence from the Tsonga community only to prove the alleged consent. However, one must note that when developing this rule, the

Constitutional Court linked the requirement of consent to the constitutional values of the first wife's human dignity and the equality between her husband and herself. Therefore, the absence of the consent requirement in, say Tswana or Zulu customs, will not help any would-be husband in those cultures who would proceed to another marriage without his first wife's consent. The court will still require this consent because of the constitutional values of the first wife's human dignity and the equality between her husband and herself. The court will ask the following question: if marriage made you and your first wife equal partners, how can you make major changes to that partnership without her consent?

Self-assessment 5.4

Study the Mayelane *case carefully and isolate the dissenting judgments of Justices Jafta and Zondo from the main judgment. Taking into account the dynamics that would play out if the husband already has more than one wife when he decides to take another one, how would the requirement of consent operate? Make a critical evaluation of these judgments and point out whether you would align yourself with the main judgment or with either one of or both the minority judgments. Explain why.*

Conclusion

In this learning unit, you learnt about the definition of a customary marriage, the requirements for its validity, and the impact of the legislative and judicial interpretation on these requirements.

Learning unit 6

Consequences of customary marriage–personal and proprietary

Study

You must study:

- chapter 7 of the textbook
- Recognition of Customary Marriages Act, especially sections 6 and 7
- *Mabuza v Mbatha* 2003 (7) BCLR 43 (C)
- *Mabena v Letsoalo* 1998 (2) SA 1068 (T)
- *Maluleke v Minister of Home Affairs* Case no 02/24921 [2008] ZAGPHC 129 (9 April 2008) (unreported)
- *Gumede v President of the Republic of South Africa* 2009 (3) BCLR 243 (CC)
- *Ngwenyama v Mayelane* 2012(10) BCLR 1071 (SCA)
- *Mayelane v Ngwenyama and Another* 2013 (8) BCLR 918 (CC)

Learning outcomes

At the end of this learning unit you are expected to:

- describe the personal consequences of a customary marriage
- summarise the proprietary consequences of a customary marriage
- appreciate the consequences of a customary marriage in respect of children under the Constitution and applicable legislation.

Introduction

In this learning unit, you will learn about the personal consequences of a customary marriage; the changes in status and capacities of the spouses as a consequence of a customary marriage, especially the wife's improved capacities as she is now a major with a full capacity to act as opposed to her erstwhile status of being a perpetual minor during the colonial, union and apartheid eras. The learning unit also teaches you the proprietary consequences of the customary marriage as the spouses interact in respect of matrimonial property.

Lecture 1: Personal consequences of the customary marriage

Study

Study pages 110–121 of the textbook.

Lecture 2: Consequences of customary marriage in respect of children

Study

Study pages 110–118 of the textbook.

Lecture 3: Proprietary consequences of customary marriage

Study

Study pages 128–146 of the textbook.

Lecture 4: Transformation of customary law

- Indigenous values

  Respect for indigenous values was manifested in the judicial affirmation of Tsonga custom of the requirement of consent of the first wife to her husband's further marriage. Also the tacit judicial acceptance of the possibility of polygamy expressed respect for indigenous values.

- Constitutional values

  The centrality of constitutional values is conveyed in the post-apartheid judicial and legislative decisions about women and children and in the consideration of their rights, interests and property.

Activity 6.1

Is there an age of majority in customary law?

Feedback 6.1

*Study the **Pause for Reflection** on page 111 of the textbook and give your own comments.*

Self-assessment 6.1

*Study the **Pause for Reflection** on pages 113–115 of the textbook carefully and summarise the discussion in your own words.*

Self-assessment 6.2

*Study the **Counter Point** on pages 118–119 of the textbook carefully and summarise the discussion in your own words.*

Self-assessment 6.3

*Study all the **counter points** and **pauses for reflection** on pages 130–146 of the textbook and use them to improve your intellectual reflection on the module as a whole.*

Conclusion

In this learning unit, you learnt about the consequences of a customary marriage for the spouses, minors and children as well as proprietary consequences of a customary marriage for the spouses.

Learning unit 7

Dissolution of the customary marriage

Study

You must study:

- chapter 8 of the textbook
- Recognition of Customary Marriages Act, 120 of 1998
- *Gumede v President of the Republic of South Africa* 2009 (3) BCLR 243 (CC)

Learning outcomes

After working through this learning unit, the student will be able to

- describe the circumstances for dissolving a customary marriage and its various consequences.

Introduction

This learning unit deals with the various ways of dissolving a customary marriage and its consequences.

Lecture 1: Dissolving a customary marriage by divorce

Study

You must study the textbook pages 149–150.

Lecture 2: Dissolving a customary marriage by death

Study

You must study the textbook pages 153–154.

Lecture 3: Consequences of divorce

Study

You must study the textbook pages 154–156.

Conclusion

In this learning unit, you learnt about the circumstances in which a customary marriage can be dissolved by the court.

Learning unit 8

Customary Law of Succession

Study

You must study:

- chapter 9 of the textbook
- Reform of Customary Law of Succession and Regulation of Related Matters Act, 11 of 2009
- *Mthembu v Letsela and Another* 1997 (2) SA 936 (T)
- *Mthembu v Letsela and Another* 1998 (2) SA 675 (T)
- *Mthembu v Letsela and Another* 2000 (3) SA 867 (SCA)
- *Bhe v Magistrate Khayelisha and Others* 2005 (1) BCLR (1) (CC) *Nwamitwa v Philia and Others* 2005 (3) SA 536 (T)
- *Shilubana and Others v Nwamitwa* 2007 (2) SA 432 (SCA)
- *Shilubana v Nwamitwa* 2008 (9) BCLR 914 (CC)

Learning outcomes

This learning unit will help you to:

- apply the rules, principles and concepts regulating the customary law of succession in both the private and public spheres
- distinguish between succession and inheritance in customary law
- describe the legislative interventions of the pre-constitutional era
- appreciate the judicial reforms under the 1996 Constitution
- explain the role of the Reform of Customary Law of Succession and Regulation of Related Matters Act, 11 of 2009

Introduction

The law of succession treats the rules and customs relating to the field of succession as they developed in different historical periods. In the **Pause for Reflection** on page 59 of the textbook, you will notice the role of the pre-democratic authorities in distorting customary law through various misrecognition practices. This learning unit focuses on the transformation of customary law through constitutional, legislative and judicial decolonisation, re-Africanisation and re-indigenisation of the system to keep pace with social change.

Lecture 1: Succession and inheritance in customary law

Study

You must study the textbook, pages 161–167.

You must also study the following extracts from case law and a journal article:

Extract 1

In *Bhe v Magistrate Khayelisha and Others* 2005 (1) BCLR (1) (CC) at para 76 Langa DCJ held:

> The heir did not merely succeed to the assets of the deceased; succession was not primarily concerned with the distribution of the estate of the deceased, but with the preservation and perpetuation of the family unit. Property was collectively owned and the family head, who was the nominal owner of the property, administered it for the benefit of the family unit as a whole. The heir stepped into the shoes of the family head and acquired all the rights and became subject to all the obligations of the family head. The members of the family under the guardianship of the deceased fell under the guardianship of his heir. The latter, in turn, acquired the duty to maintain and support all the members of the family who were assured of his protection and enjoyed the benefit of the heir's maintenance and support. He inherited the property of the deceased only in the sense that he assumed control and administration of the property subject to his rights and obligations as head of the family unit. The rules of succession were consequently mainly concerned with succession to the position and status of the deceased family head rather than the distribution of his personal assets.

Extract 2

See Grant E "Human Rights, cultural diversity and customary law in South Africa" (2006) 50/1 *JAL* 1 at 16 where he says:

> The primary purpose of succession was to ensure the maintenance of the family unit by keeping family property in the family … Recast in terms of the concepts of Roman-Dutch law, however, succession became mere inheritance, the concept of family property was abandoned and any obligation of support was cast off. What is more, the fact that by its very nature customary law is different from Roman-Dutch law or English common law is misunderstood. While Western systems are based on written sources the validity of which depends on formal legal tests, customary law was originally unwritten. Its validity remains a question of social practice, to be tested by social observation. Customary law itself, and the culture in which it is based, is neither static nor uniform.

Extract 3

See also *Mthembu v Letsela and Another* 1997 (2) SA 936 (T); where Le Roux J held at 945:

> "It is common cause that in rural areas where this rule most frequently finds its application, the devolution of the deceased's property onto the male heir involves a concomitant duty of support and protection of the woman or women to whom he was married by customary law, and of the children procreated under that system and belonging to a particular house. It is clear from Bennett's opinion [attached to the respondent's heads of argument] that a widow in particular, may remain at the deceased's homestead and continue to use the estate property, and that the heir may not eject her at whim. He [Bennett] quotes numerous decisions of the Native Appeal Court in support of this proposition, and submits that accordingly, the customary law rule cannot be said to discriminate unfairly against women.

> This view of the rule relating to succession has much to commend it. If one accepts the duty to provide sustenance, maintenance and shelter as a necessary corollary of the system of primogeniture, a feature which has been called 'one of the most hallowed principles of customary law' – see Bennett TW *A source book of African customary law for southern Africa* (1991) 400), I find it difficult to equate this form of differentiation between men and women with the concept of 'unfair discrimination' as used in section 8 of the [interim] Constitution."

Lecture 2: Legislative interventions under colonial, union and apartheid administrations

Study

You must study the textbook, pages 167–171.

The following statutes provide the background for understanding the learning unit and should be read only:

- The Black Administration Act, 38 of 1927
- The KwaZulu Act on the Code of Zulu Law
- The Natal Code of Zulu Law

As colonial and apartheid instruments enforced over decades to distort customary law, these statutes have no contribution to make in the development of post-apartheid customary law. You will recall that without section 23 of the Black Administration Act, the male primogeniture problems in *Mthembu*, *Shilubana* and *Bhe* would not have arisen. The dispute in *Gumede* would not have hinged on this section as well as the provisions of the KwaZulu Act on the Code of Zulu Law and the Natal Code of Zulu Law. The latter codes provide that the husband is the owner of matrimonial property and the wife owes him the duty of respect. In the *Gumede* case, these provisions were found to be inconsistent with the constitutional right to equality and were declared invalid. Other than these negative and disruptive roles, there is no further role for these old order statutes.

Lecture 3: Legislative and judicial interventions under the Constitution, 1996

Study

You must study:

- the textbook, pages 173–185
- the Bill of Rights, especially section 9 (equality); sections 30 and 31 (culture); 39(2) (development law of customary law) and section 211 (recognition of traditional leadership and its institutions operating according to customary law) of the Constitution of the Republic of South Africa, 1996
- the Reform of Customary Law of Succession and Regulation of Related Matters Act, 11 of 2009
- *Mthembu v Letsela and Another* 1997 (2) SA 936 (T)

- *Mthembu v Letsela and Another* 1998 (2) SA 675 (T)
- *Mthembu v Letsela and Another* 2000 (3) SA 867 (SCA)
- *Bhe v Magistrate Khayelisha and Others* 2005 (1) BCLR (1) (CC)
- *Nwamitwa v Philia and Others* 2005 (3) SA 536 (T)
- *Shilubana and Others v Nwamitwa* 2007 (2) SA 432 (SCA)
- *Shilubana v Nwamitwa* 2008 (9) BCLR 914 (CC)

The focus is on the abolition of patriarchy, racism and sexism as the basis of the colonial and apartheid administrations.

Under the current constitutional dispensation, rules such as male primogeniture and unfair discrimination, were targeted for removal from the system. In the ***Mthembu*** cases, these rules survived for technical reasons because the conditions for tackling them were not proved. These were namely

- The death of the deceased took place before 27 April 1994. As a result, neither the interim Constitution (1993) nor the final Constitution (1996) could be applied.
- The validity of the marriage was not proved and, therefore, there was no widow who had to be protected against the claim of the deceased's father.
- Because the widow's marriage was not proved, the descendant, Tembi, was not legitimate. Therefore, the deceased was not survived by a legitimate issue whose claim could be supported against the claim of the deceased's father.
- The court refused to invalidate the male primogeniture rule that preferred males for the purposes of intestate succession. This was an ideal case to do so because the women concerned were not qualified to compete against the father of the deceased since the marriage was invalid.
- Section 1(4) of the Intestate Succession Act, 81 of 1987, which excluded black people from benefitting from the Intestate Succession Act, 81 of 1987, also survived as the constitutional provision of non-discrimination did not apply to pre-constitutional estates.
- Section 23 of the BAA, which regulated the administration of estates of black people, also survived because the constitutional provision of non-discrimination did not apply to pre-constitutional estates.

Hence, the estate went to the deceased's father as the most senior male relative.

The rule was examined again in the *Bhe* case. Here the claim was between the deceased's father and the deceased's two minor daughters who were represented by their mother. To give effect to section 9 of the Constitution, the Court had to invalidate the primogeniture rule and both section 23 of the BAA, which implemented this rule, and section 1(4) of the Intestate Succession Act, 81 of 1987, which excluded black people from being considered together with other races. This paved the way for the importation of the Intestate Succession Act into customary law estates.

Then the *Nwamitwa/Shilubana* cases came. The first two, namely *Nwamitwa v Philia and Others* 2005 (3) SA 536 (T) and *Shilubana and Others v Nwamitwa* 2007 (2) SA 432 (SCA), assumed that the supremacy of the Constitution and the equality clause did not mean that the primogeniture rule was unconstitutional. The inequality that prevented the

appointment of black females remained intact since there was no precedent for the appointment of a woman in a traditional leadership position in previous generations.

Finally, in *Shilubana v Nwamitwa* 2008 (9) BCLR 914 (CC), the primogeniture rule was declared unconstitutional even in the sphere of traditional leadership. The appointment of Philia Shilubana as a traditional leader was confirmed. Most importantly, the power of the Baloyi traditional authority to amend their customary law was affirmed. In this case, customary law was aligned with the Constitution.

Lecture 4: Transformation of customary law

- Indigenous values

  The original lineage of Hosi Fofoza was recognised and his daughter Philia Shilubana was appointed in the position of traditional leader which she was denied in 1968. By approving the amendment of the Valoyi customary law to allow the appointment of a woman as a traditional leader, the Constitutional Court restored the indigenous power traditional authorities had to legislate, maintain, repeal or amend their customs.

- Constitutional values

  The abolition of the colonial male primogeniture rule together with section 23 of the BAA, which implemented this rule, and section 1(4) of the Intestate Succession Act, 81 of 1987, which excluded black people from being considered together with other races, paved the way for the implementation of the right to equality in the distribution of customary law estates. Thus the constitutional values of human dignity, equality and freedom were affirmed by making all races, genders, males and females, children – both legitimate and illegitimate – equal for the purposes of getting child portions in the administration of the intestate estate of their parent.

Activity 8.1

Refer to extract 1 above and distinguish between succession and inheritance in customary law. Set out in detail what constitutes the former and explain how it differs from the latter.

Feedback 8.1

It is only in the first and the last sentences of extract 1 that Langa DCJ refers to the idea of inheritance. The rest of the extract is a description of the concept of the successor in customary law. You will note that although his rights as an individual are noted, the emphasis is on the successor's obligations as family head and his duties towards other family members. You must make sure that you understand the nature of this property, namely the collective nature of its ownership by all family members under the guardianship of the successor as he ensures equitable maintenance, support and enjoyment by all family members. You will definitely recognise the philosophy of ubuntu *which focuses on the security of the individual in the context of the family as a collective.*

Activity 8.2

Refer to extract 2 above and analyse Grant's observation of the impact of Roman-Dutch law in the transition of the customary law of succession from its indigenous African communal base to the individualistic Western concept of law.

Feedback 8.2

Grants reminisces on the good old days when customary law focused on keeping family property within the family and laments the negative effects of the Western concept of law and the imposition of Roman-Dutch and English law which distorted the nature and characteristics of African customary law. Garbed in Western clothes, African customary law stagnated in its written form and lost its dynamic oral nature that evolved in step with social change. In the case of Pilane, *Sikweyiya J described customary law as a living, dynamic and evolving system that changes constantly as society changes. Contrasting African customary law with common law is also apparent in the case of* Alexkor *in which the Constitutional Court warned against using a common law lens to look at customary law and advised that the latter system has its own values and norms which must be applied consistently according to the Constitution.*

Self-assessment 8.1

Make sure that you understand the collective nature of ownership in African customary law as described in extracts 1 and 2 above. Then you will be able to appreciate the positive appraisal of the primogeniture rule by Le Roux J in the first Mthembu case quoted as extract 3 above. You must then study the minority judgment of Ngcobo J in the Bhe *case where he protests against the abolition of the primogeniture rule by Langa DCJ, who wanted to borrow the Intestate Succession Act from the common law to improve African customary law.*

You must then make a detailed analysis of the point of Le Roux J and Ngcobo J who both tried to retain the primogeniture rule. Ngcobo J proposed to degenderise it to allow for the appointment of the eldest daughter in appropriate circumstances. These views will help to shape your analysis and make you aware of the need to develop African customary law separately from common law. You will conclude with a critique of Langa DCJ's decision to impose a common law solution despite the warning in Alexkor.

Activity 8.3

Study the *Shilubana/Nwamitwa* cases and note how the male primogeniture rule was eventually abolished in the traditional leadership appointment process.

Feedback 8.3

(a) Nwamitwa v Philia and Others *2005 (3) SA 536 (T);* Shilubana and Others v Nwamitwa *2007 (2) SA 432 (SCA) and* Shilubana and Others v Nwamitwa *2008 (9) BCLR 914 (CC).*

The facts of the case

Philia Shilubana of the Valoyi traditional community in the Limpopo Province of South Africa was not appointed as a traditional leader (hosi) of her people when her father died in 1968. Because she was a woman, she could not have been appointed owing to the unfair and discriminatory laws of the time. Her father's brother, Richard Nwamitwa, was appointed as traditional leader (hosi) instead. When he died in 2001, the Valoyi Traditional Authority passed a resolution to appoint Philia Shilubana as traditional leader (hosi) by relying on the constitutional provision for gender equality to adapt the rules of the community. This resolution amended the practice of the community according to which the eldest son succeeds his father as new traditional leader (hosi). Sidwell Nwamitwa, Richard Nwamitwa's son, sought to dispute Philia Shilubana's appointment by relying on past practice.

The legal questions that had to be answered by the Court

Did the customs and traditions of the Valoyi people allow the appointment of a woman as traditional leader? Could the Valoyi traditional authorities amend their customary law?

The decision of the Court

The matter was decided in favour of Sidwell Nwamitwa in both the High Court and the SCA in terms of the community's past practice.

Shilubana v Nwamitwa *2008 (9) BCLR 914 (CC)*

The case was eventually taken on appeal to the Constitutional Court.

The decision of the Court and reasons for judgment

In a unanimous judgment, the Court decided that Ms Shilubana was legally appointed as the legitimate traditional leader (hosi) of the Valoyi people. The Court emphasised the fact that customary law is a living system of law. As such it is not bound by historical precedent. Its flexibility allows it to evolve as its community changes. Once it was clear that the contemporary practices of the community have replaced its past practices, the latter no longer applied.

Because of this, the Constitutional Court deviated from prior decisions that had served as a test for determining the content of customary law even though they indicated long-standing and historical practices. Instead, the Court redefined customary law as a system that reflected the current practices of the particular community. Living customary law came to be defined with reference to the constantly evolving practices that indicate the current norms by which a community chooses to live.

The Constitutional Court held that the customary law regarding the appointment of a traditional leader (hosi) had legitimately evolved to allow for the appointment of a woman as a traditional leader and that this development was consistent with the Constitution. After finding that Philia Shilubana had been validly appointed, the Constitutional Court upheld the appeal thereby confirming her appointment as traditional leader of the Valoyi community.

Bear in mind that this was after the Valoyi community had decided to adapt its laws in accordance with the Constitution. Other communities are judged according to their own contemporary practices.

Own comment on customary law values and the Constitution

The Constitutional Court very well endorsed the community's right to develop their law, thus protecting their right to develop their culture. Although this is to be commended, the Court unfortunately destroyed the rule regulating the customary law of succession from one generation to another. The Constitutional Court ignored the fact that, according to customary law, lineage is important and that the position of successor must be held by someone capable of producing a Nwamitwa heir. In appointing Philia, the court should not have left future succession hanging in the air. It should have made it clear that it was doing so because of her status as a princess and should have added that, in order to uphold the lineage of the Nwamitwa royal line, the position would revert to a qualifying Nwamitwa prince/princess after her death. Therefore, although the court did a good thing by promoting gender equality, it unfortunately failed to promote culture.

Self-assessment 8.2

Study the Mthembu *cases and make detailed notes on how the male primogeniture rule survived in the various courts.*

Activity 8.4

Can the living law of succession still develop after the *Bhe* case and the RCLSRRMA imported the common law-oriented Intestate Succession Act to the customary law of succession?

Feedback 8.4

Yes. Study the ***Pause for Reflection*** *on page 175 of the textbook. You will notice that the Bhe case and the RCLSRRMA aimed to provide a solution in the event of a dispute, and not to deprive communities of their right to develop their law. The rights of the family of the deceased or of a local community to agree in a particular case to make an equitable distribution which is not inconsistent with the RCLSRRMA, were retained.*

Self-assessment 8.3

Study the RCLSRRMA together with the Bhe *judgment carefully and comment on how successfully racism, patriarchy and inequality were abolished by both the Court and the Act.*

Conclusion

In this learning unit, you learnt about the difference between inheritance and succession in customary law. You also learnt about the decolonisation of this system by developing it in line with the constitutional values of human dignity, equality and freedom.

Learning unit 9

Customary law of obligations (contracts)

Study

You must study chapter 10 of the textbook.

Learning outcomes

This learning unit will assist you to:

- appreciate the communitarian nature of the customary law of contracts and its distinct philosophical foundations
- describe the role of the community in the creation of binding commitments in traditional societies
- conceptualise the participation of negotiating individuals as representatives of families or communities

Introduction

The law of contract that regulates the indigenous concept and the binding nature of indigenous African obligations (contracts) is explored in this learning unit. The unique nature of indigenous values regulating agreements that are binding will be revealed. Whenever individuals undertook customary commitments, they did so as family heads. Regardless of whether commitments were undertaken by ordinary individuals or by families, they were always underwritten by their family heads. The traditional economy, in which the main currency of exchange was cattle, explains why only family heads could affect transfers from one family fund to another.

The operation of indigenous contracts such as *ukulobola, ukwenzelela, ukwethula, ukufakwa, isondlo* and *inqoma*, illustrates the communal context in which individuals undertook customary commitments. For example, the negotiation of an *ukulobola* agreement must be seen as a commitment by two family groups due to the collective nature of communal arrangements.

Lecture 1: Capacity to enter into binding customary law commitments

Study

Study the textbook, pages 186–188.

Make sure that you understand the role of the Constitution and legislation in capacitating individuals to act in customary law by providing for the right of equality for all and by fixing the age of majority.

Lecture 2: Customary law contracts: *ukwenzelela, ukwethula, isondlo/dikotlo, inqoma/mafisa/sisa*

Study

You must study pages 188 to196 in the textbook. Make a point of not only understanding them, but also distinguishing between them. The communal nature of their environment consists in locating an individual at the centre of each transaction that is organised and endorsed by a particular collective. The emphasis on group participation is understandable in the context of an oral tradition where the record of the transaction was the presence of the community itself. The contents of these contracts attest to the concept of *ubuntu* in their operation.

Lecture 3: Ukufakwa as a specific customary law contract

Can you remember what you read about *ubuntu* in part 1 of learning unit 1?

The philosophy of *ubuntu* is the measure of appropriateness for the conduct of all human beings. *Ubuntu* as humanness developed certain attributes such as communal living, group solidarity, responsibility, accountability, generosity, shared belonging, the ethos of co-operation and the ethic of reciprocity. *Ubuntu* meant humanness and humanity in the African sense.

Any conduct that was not underpinned by *ubuntu* was regarded as inhuman and unacceptable. The institutions of *ubuntu* discussed in chapter 10 of the textbook include *ukufakwa ukulobola, isondlo, ukwethula and ukwenzelela*. Central to all of them is the human element in the indigenous concept of obligations. The *ukufakwa* institution demonstrates *ubuntu* in indigenous contracts.

As a pre-colonial institution, *ukufakwa* is unaffected by the Western value-system.

The features of *ubuntu* in the *ukufakwa* institution must be noted. *Ukufakwa* means that any male relative of a deceased father such as his brother, uncle, cousin or nephew, takes on the responsibilities of the father and ensures that the customary traditions and ceremonies related to the initiation and/or marriage of the deceased's daughter are carried out as if the relative was her own father. This entitles the relative to a *pro rata* portion of the value of the *lobolo* goods when the daughter marries. It also makes him liable for fines for delicts committed by the daughter.

The relative is entitled to such a portion as of right, directly from its source; this means that as soon as goods are identified for delivery as *lobolo* goods, the relevant portion immediately belongs to the relative. He doesn't need to claim the portion from the property of the father since it already belongs to him.

If such goods are not delivered for whatever reason, the relative cannot bring a claim against the girl's father. He wouldn't have received the goods from him in the first place. In such a case, the relative has to suffer his share of the 'nothing received'. Nevertheless, the relative remains entitled to a portion of the marriage goods of any subsequent daughter even if he does not contribute to her marriage ceremonies.

Lecture 4: The attributes of ubuntu as found in ukufakwa

These attributes include the following:

Communal living means that relatives are one family and members of one home. They share the joys of unity and bear the burden that comes with it. Nobody should ever be seen naked nor should anyone be enriched at the expense of another. This is our home. These are our children. We must bring them up together for the common good.

A **shared sense of belonging** is also evident. No one should stand alone, nor should anyone enjoy wealth alone or suffer poverty alone. *Umuntu ngumuntu ngabantu/motho ke motho ka batho* – a human being derives his/her humanity from other humans. Life is shared. No child must suffer because his or her parents are poor but must enjoy the same upbringing as other children. Your prosperity must positively influence the financial means of your family. They must also use their abilities to enable you to assist them.

Group solidarity: Unity is strength (*umanyano ngamandla/kopano ke matla*. United we stand, divided we fall (*ukwanda kwaliwa ngumthakathi* –growth/prosperity ends where evil starts. An injury to one is an injury to all.

It means that when you are with your brothers and sisters, no enemy will ever overcome you. The shame of your brothers and sisters is yours and your shame is theirs. If one of your brothers and sisters fails or is despised, it is as if all of you have failed or are despised. If your brother's daughter behaves badly at her marriage home, she is a disgrace to her parents and all her relatives. If she is Ms Khumalo, no Khumalo relative can allow their name to fall into disrepute. An injury to one Khumalo is an injury to all Khumalos. *Amandla!/Matla!*

Reciprocity. The good that you do to others will be done to you (*izandla ziyahlambana* – the one hand washes the other) or (*inkomo ikhoth'eyikhothayo* – cattle lick each other's backs). There is no permanent loss. Whatever favour you do other people, they will return. One should never be reluctant to help others because, sometime in the future, they will reciprocate. A good deed is an investment. If you assist a niece, it may look as if you are getting the bad end of the stick, but when you receive your portion of the *lobolo* goods later on, the favour is returned. *Ubuntu* requires you to send your sister's children to university. It also requires those children to assist you in old age.

Collective ownership of assets. Brothers belong to a home which is the real owner of their productive activities. In the Khumalo home, every Khumalo must contribute to its growth and development After all, the cattle of one Khumalo are the cattle of all Khumalos. All Khumalos claim: 'these are our cattle' *(zinkomo zakuthi ezi).* The cattle are a collective Khumalo fund. What I pay in settlement of a debt is paid from the Khumalo fund (although it is administered by me), and what I receive is received by the Khumalo

fund. Our individual and collective efforts are directed at upholding our name, which is who we all are. The daughter's ceremonies are financed by the Khumalo home regardless of who the father or his brother is.

Our list of attributes for leading a good life is not exhaustive. You may also add generosity, respect, responsibility, accountability, trust, honesty, and so forth. All these and many more can be found in the institution of *ukufakwa*. It urges everyone (particularly relatives) to extend a helping hand and to share each other's joys and pains for the collective good. This is what *ubuntu* is all about – to live your life selflessly and to make sacrifices for others who, in turn, live their lives selflessly for you and for the world. In *ubuntu* we find the rules for a good life.

Lecture 5: Transformation of customary law

- Indigenous values

  Contractual obligations preserve the indigenous values of *ubuntu*. Family members display a sense of belonging and communal living. In customary obligations such as ***ukwenzelela, ukwethula, isondlo/dikotlo*** and ***inqoma/mafisa/sisa***, the focus is the wellbeing of the individual at the centre of the transaction. Consequently, contracts reveal the idea of *ubuntu* since the condition of *umuntu/motho* is the centre of concern.

  According to indigenous law, manhood capacitates one to bind one's family in contractual commitments. (See Mandela's autobiography *Long Walk to Freedom*). In the case of *Mabena*, the court restored this capacity by affirming that an adult and independent man can negotiate his own marriage.

- Constitutional values

  Ubuntu is an example of the capacity of the indigenous value system to harmonise with the Constitution. See the cases of *Makwanyane* and *Dikoko* as examples of how the application of *ubuntu* can transform common law. Ubuntu reveals the values of human dignity, equality and freedom in its focus on the interests of individuals in the context of the community. In accordance with the constitutional values of human dignity and equality, the court affirmed the capacity of young men and of women to make binding commitments and their participation in *ukulobola* negotiations was upheld in the *Mabena* case.

Activity 9.1

Examine the capacity of women and young people to enter into binding customary law commitments.

Feedback 9.1

Reflect on the ***Pause for Reflection*** *on pages 187 and 188, which will help you to understand that according to present customary law, women and young men are empowered to enter into binding commitments involving their families.*

Self-assessment 9.1

According to African indigenous values, the ukulobola/bogadi *contract was the most revered of all customary law commitments. Then the colonists condemned it as contrary to public policy and natural justice. When Africans protested, the colonists tried to make it an exception to the repugnancy clause in an effort to rescue the custom through statutes, which made it unlawful for the courts to count it in that list. As the struggle for recognition continued, the RCMA finally restored this African tradition in section 3(b) by making its preservation a requirement for the validity of the transaction.*

In not more than two pages, write a commentary on the resilience and survival of the ukulobola/bogadi *tradition in South Africa.*

Activity 9.2

How does one distinguish between *ukwenzelela, ukwethula, isondlo/dikotlo* and *inqoma/mafisa/sisa*?

Feedback 9.2

You must make a point of not only understanding but also being able to distinguish between these customary law institutions. For a summary, study ***This Chapter in Essence*** *on page 196 of the textbook.*

Self-assessment 9.2

Trace the various developments in the history of customary law focusing on the capacity to enter into binding obligations up to the present day.

Activity 9.3

Evaluate the maxim *umuntu ngumuntu ngabantu/motho ke motho ka batho* with specific reference to the attributes that underpin its philosophical thrust.

Feedback 9.3

Umuntu/motho *lives within the community to which he or she belongs. In solidarity with other members of his community, he or she cooperates with them as they return every favour he or she does them.* Umuntu/motho *owes everything about him or her to abantu/batho; without them, he or she cannot be* umuntu/motho.

Self-assessment 9.3

With regard to the concept of umuntu ngumuntu ngabantu/motho ke motho ka batho, *how can you describe the position of an individual (the self) in the African tradition?*

Activity 9.4

Ukufakwa and isondlo share common features linked to *ubuntu*. Please explain this statement.

Feedback 9.4

If you study these customary law institutions on pages 192 and 193 of the textbook, you will notice the centrality of umuntu/motho *as the beneficiary of the social arrangements involved. That proves that both institutions exemplify the practical operation of the concept of* ubuntu.

Self-assessment 9.4

Examine the institutions of ukwethula, ukwenzelela *and* mafisa, sisa/nqoma *and illustrate if and how they can be linked with ubuntu.*

Conclusion

In this learning unit, you learnt about the focus on *umuntu/motho* in the formation of binding commitments in customary law. The effect of this was to reveal the practical operation of the philosophy of *ubuntu*.

Learning unit 10

Customary law of obligations (delicts)

Study

You must study chapter 11 of the textbook.

Learning outcomes

This learning unit teaches you to:

- appreciate the operation of vicarious liability in the customary law of delict
- to understand that family property belongs to the corporate home which is collectively owned by all its members

Introduction

The law of delict as regulator of the indigenous concept and the binding nature of indigenous African obligations (delicts) is explored in this learning unit. In addition, the indigenous values regarding the binding nature of obligations are examined.

Lecture 1: Delictual liability in customary law

Study

Study the nature of delictual liability in customary law on pages 197 and 198 of the textbook.

Lecture 2: Defamation of character in customary law

Study

Study pages 199 and 200 of the textbook.

Study the case of *Dikoko v Mokhatla* 2006(6) SA 235 (CC); 2007(1) BCLR 1 (CC).

Lecture 3: The delicts of adultery and seduction in customary law

Study

Study pages 199 to 206 of the textbook.

Make sure that you can distinguish between adultery and seduction.

Lecture 4: Transformation of customary law

- Indigenous values

  The liability of the family head for the obligations of family members contains the indigenous idea that the family is a unit for collective action and communal accountability. In the African tradition, one does not live for oneself but for all fellow human beings. Compensation for a delict committed against a family member is payed into the family fund owned by the family. This tradition dates from a time when cattle were the currency used for settling one's obligations, and were owned by the home (family) through its head.

- Constitutional values

  The Children's Act has fixed the majority age at 18 years for everyone in South Africa, including people who are bound by customary law. The Act releases young people and women from the stranglehold of the power of the family head. (See the *Mabena* case which stipulates that youths and women, as adult and independent persons, have full capacity to act.)

Activity 10.1

Give an overview of the nature of delictual liability in customary law.

Feedback 10.1

This issue is treated on pages 197 and 198 of the textbook.

Self-assessment 10.1

Analyse any specific customary law delict with reference to its essential elements.

Activity 10.2

Discuss the nature of defamation of character in customary law.

Feedback 10.2

Refer to pages 199 and 200 of the textbook where this issue is dealt with.

Self-assessment 10.2

Study the case of Dikoko v Mokhatla *referred to in the* ***Pause for Reflection*** *on pages 199 and 200 of the textbook and briefly summarise the influence of* ubuntu *in the computation of damages in defamation cases.*

Activity 10.3

Can a wife married under customary law sue her husband's mistress for committing adultery with her husband? Explain your answer.

Feedback 10.3

Reflect on the ***Counter Point*** *on page 201 of the textbook.*

Self-assessment 10.3

Consider the ***Pause for Reflection*** *on page 205 of the textbook and comment on the right of the father to gain custody of his child after settling his customary obligations in light of the concept of the "best interests of the child".*

Activity 10.4

Evaluate the concept of communal legal personality in terms of which the corporate family home, as represented by the family head, is liable for individual family members' delictual and contractual obligations. Examine the impact of the notion of majority age, as entrenched in the Children's Act 38 of 2005, on the operation of this liability since the indigenous principle of primogeniture and the constitutional right to equality co-exist in our law.

Feedback 10.4

You need to demonstrate your understanding of the African concept of family with its inherent features of a corporate home in which the family head runs the affairs of the household under the guidance of and in consultation with the clan elders. Here the relationships with and authority of the family head over his wife [wives], sons, siblings, children and other residents of the home becomes important as these impact on the nature of the property rights of a communal society. Everyone participates in the running of the affairs of the corporate home in whose service and on behalf of which the family head fulfils his leadership role. Being the only entity with legal capacity, the corporate home is represented by the family head who enforces its rights and defends it from liability. This includes liability for delicts and breach of contract by family members. The Children's Act provides that everyone becomes an adult at 18 years of age. An adult person has no guardian and, therefore, a father cannot be sued for the wrongs of his adult child. It also means that the adult child has the capacity to act without the assistance of a father.

Self-assessment 10.4

What does "the best interests of the child" mean? Does it mean that it should be placed in the care of someone who has the money to bring it up; even if means that the child will grow up in a culture that is different from that of its biological parents?

Conclusion

In this learning unit, you learnt about the idea of delict in customary law, the collective nature of delictual liability and its effect on the members of the corporate home. In addition, you studied various customary law delicts and the resolution of delictual disputes in the context of collective solidarity. Besides defamation of character, adultery and seduction in customary law, the influence of the statutory age of majority on parental power was examined.

PART 3

POLITICAL AND CIVIC ASPECTS OF AFRICAN CUSTOMARY LAW

Learning unit 11

Traditional leadership institutions

Study

You must study:

- chapter 13 of the textbook:
- Traditional Leadership and Governance Framework Act (TLGFA), 41 of 2003
- *Nwamitwa v Philia and Others* 2005 (3) SA 536 (T)
- *Shilubana and Others v Nwamitwa* 2007 (2) SA 432 (SCA)
- *Shilubana v Nwamitwa* 2008 (9) BCLR 914 (CC)

Learning outcomes

This learning unit will:

- equip you with the knowledge about the concept, constitution and functioning of traditional leadership institutions
- teach you about the law regulating the appointment, succession and removal of traditional leaders from office

Introduction

The institution of traditional leadership, its councils and its courts are studied to reveal the system of recognition, identification, appointment and removal of traditional leaders from office, the recognition of traditional communities and the withdrawal of such recognition.

Lecture 1: History of traditional leadership institutions

Study

You must study pages 227 to 235 of the textbook to understand how this institution was undermined by colonial and apartheid authorities. Moreover, you must study *Nwamitwa v Philia and Others* 2005 (3) SA 536 (T) and *Shilubana and Others v Nwamitwa* 2007 (2) SA 432 (SCA) where the succession dispute was handled in a manner similar to that of the old order.

Lecture 2: Recognition and jurisdiction of traditional leaders

Study

With lecture 1 fresh in your memory, you must study the TLGFA with regard to the recognition of traditional leaders and traditional communities and councils in the textbook on pages 235 to 246 as well as *Shilubana v Nwamitwa* 2008 (9) BCLR 914 (CC).

Lecture 3: Recognition of traditional communities

Study

You must study pages 247 to 251 in the textbook together with the TLGFA in order to realise the development of this institution under the TLGFA compared to the old order. You must also study *Shilubana v Nwamitwa* 2008 (9) BCLR 914 (CC).

Lecture 4: Recognition of traditional councils

The TLGFA has brought about very important transformative changes in line with the demands of the democratic Constitution, especially those relating to the appointment of women as traditional leaders. These changes have been endorsed by the judiciary.

Lecture 5: Transformation of customary law

- Indigenous values

The TLGFA has restored the function of identifying the next traditional leaders to the royal family. This step has minimised the risk of appointing illegitimate candidates. The Valoyi community took advantage of section 211(2) of the Constitution that allows traditional authorities to amend their law so that they could return the traditional leadership position to the original lineage of Hosi Fofoza after whose death it was transferred to Hosi Richard. In *Shilubana v Nwamitwa* 2008 (9) BCLR 914 (CC) the court affirmed this development, thus returning customary law making powers to the community.

- Constitutional values

  In *Shilubana v Nwamitwa* 2008 (9) BCLR 914 (CC) the values of non-sexism and equality were upheld. This paved the way for the appointment of a woman to a traditional leadership position. In the same case, the traditional authority's amendment of their law in line with the Constitution was affirmed.

Activity 11.1

Analyse the following *democratic principle* of indigenous African philosophy – *kgosi ke kgosi ka batho/inkosi yinkosi ngabantu* (literally meaning a traditional leader is what he or she is because of the people) and evaluate its potential to limit royal authoritarianism.

Feedback 11.1

The philosophical meaning of the maxim kgosi ke kgosi ka batho/inkosi yinkosi ngabantu *is that the source of royal authority is the community that appoints a traditional leader because without that community he or she would not be a traditional leader. This principle means a traditional leader cannot exceed his or mandate which, by its very nature, is circumscribed by the general will of the people. In this way, his or her chances of acting autocratically are limited because he can be deposed if he disregards the voice of the people. This forces him or her to apply the* batho pele *(literally, people first) principle in the conduct of royal and traditional affairs.*

This often astonishes cultural outsiders who think that indigenous African law does not limit public power and that traditional leaders are dictators. This is owing to the misconception that traditional leaders are not elected. In reality, the most celebrated principle governing their leadership role has always been "kgosi ke kgosi ka batho/inkosi yinkosi ngabantu" *– the source of royal authority is the community. This principle means that the position of traditional leader owes its existence to the people who create its parameters.*

It means that communities bestow the mandate for the creation of the institution of traditional leadership, its duties, functions and privileges. A traditional leader is appointed by the community and functions as the community's agent for service delivery and policy conceptualisation, formulation and implementation. The opposite can never be true, for without the people a leader cannot exist.

These principles were implied in Pilane's *case where the Court upheld the right of the community to protest against a traditional leader who denied them their freedom of expression, association and assembly. It is unfortunate that the court did not expressly alluded to the philosophy of* kgosi ke kgosi ka batho/inkosi yinkosi ngabantu *as the indigenous warehouse of these constitutional freedoms. This would have been a sounder justification for dismissing the Roman-Dutch interdicts that the High Court had issued to hamper the efficacy of these constitutional freedoms.*

Self-assessment 11.1

Study the Traditional Leadership and Governance Framework Act 41 of 2003 carefully and, by consulting case law, evaluate its transformative role in post-apartheid customary law.

Activity 11.2

Examine the following scenario and answer the questions that follow:

X is the most senior son of B, a deceased traditional leader of one of the prominent kingdoms in South Africa. He hopes to succeed his father as traditional leader and head of the traditional authority in terms of legislation and customs presently practised by the rural community. The royal family has identified X as a person who is qualified for appointment in these roles and has presented his particulars to the government

in terms of section 11 of the Traditional Leadership and Governance Framework Act 41 of 2003.

X has an elder sister Y who also aspires to succeed her father as the traditional leader and head of the said traditional authority. She believes that she has a stronger right than X to succeed her father and that her gender is not a bar to her assumption of that role. Y's bid does not enjoy the support of the royal family and, consequently, she has not been recommended by the traditional authority in terms of the Act.

Y has launched a High Court application to be declared the rightful successor to the position left vacant by her father's death. The traditional authority supports X in his defence against Y's High Court application.

Critically evaluate X's and Y's chances of appointment in the position of traditional leader and head of the traditional authority.

Taking into account the traditions and cultures regarding the appointment of traditional leaders in South Africa, what considerations would have persuaded the traditional authority to support X rather than Y in its recommendations to government, notwithstanding Y's age, the provisions of section 11 of the Traditional Leadership and Governance Framework Act, 41 of 2003, and despite case law? Explain why.

Feedback 11.2

The general rule that emerged from the Constitutional Court's judgment in Shilubana *is that the most senior child, male or female, of the previous traditional leader shall be appointed as the successor. We say "most senior" advisedly because it would be a mistake to say "eldest child". An eldest child of the previous traditional leader may be illegitimate and therefore not the most senior in terms of rank and status. Even among legitimate children, the house to which children belong is of great importance. For instance, in the kingdom of Thembuland the most senior son of the king's senior wife, King Jonguhlanga Dalindyebo, was younger than Prince Bambilanga Dalindyebo, but the former succeeded his father as king because of seniority, not age. Similarly, Prince Bambilanga Dalindyebo, the eldest child of King Jongintaba Dalindyebo, did not succeed his father as king because he came from a junior house.*

As to the claims of Y and X (and provided both candidates are equally appointable) the history of the prevailing traditional cultures governing succession in general and succession to traditional leadership in particular would be decisive.

As the following cases demonstrate, even the courts treated patriarchy and patrilineal succession as the guiding principle for the customary law of succession: Mthembu v Letsela and Another *1997 (2) SA 936 (T);* Mthembu v Letsela and Another *1998 (2) SA 675 (T);* Mthembu v Letsela and Another *2000 (3) SA 867 (SCA);* Nwamitwa v Philia and Others *2005 (3) SA 536 (T); and* Shilubana and Others v Nwamitwa *2007 (2) SA 432 (SCA).*

One can understand the reliance on historical reality without necessarily supporting the traditional authority's assumption that X is the eligible candidate. So central was the principle of primogeniture that Y would have failed, not only at the level of the traditional authority, but also in any, if not all, of the above courts. In the cases of Bhe v The Magistrate Khayelitsha *1998 (3) 2004 (1) BCLR 27 (C) and* Shibi v Sithole and Others *Gauteng Case 7292/01 dated 19 November 2003 (unreported), the Western Cape High Court and the North Gauteng High Court had to intervene because the respective magistrates, on the*

basis of the principle of primogeniture, had chosen senior males instead of more eligible females as successors.

But before the appointment can be made by government, the royal family must identify the eligible candidate who is not necessarily the first-born son or first-born daughter, but a suitably qualified candidate. Without any gender bias, their choice might have been based on merit, competence, leadership characteristics, qualifications, charisma and so on. They could have overlooked the senior princess (Y) because of her unstable temperament, incompetence, a lack of leadership characteristics, a lack of qualifications, a lack of charisma, cruelty, rudeness, alcoholism, racism, sexism or any other characteristic which is unbecoming to a traditional leader (after all, gender equality does not mean that women must be preferred at all costs). Therefore, it does not necessary follow that because one is the eldest child of the previous traditional leader, he or she will be appointed to succeed him or her. As Mahao puts it, the selection process is only the first step and is subject to the more rigorous step, the ratification process. The latter step decides whether the selection stands or falls, depending on whether the selected candidate passes or fails the leadership tests after selection.

Self-assessment 11.2

Assuming that the amaZulu royal authority has not amended their customary law to provide for gender equality in the kingship succession process, how would a dispute between a first-born princess and a second-born prince be resolved in the event of a vacancy that needed to be filled in that kingship? Draw an analogy with the consent requirement for a further marriage which was the custom among the Tsonga people. As discussed in Feedback 9(ii), other groups also cannot sidestep this requirement in their own communities. Can the Zulu royal authority – that has not amended its customary law to provide for gender equality in the kingship succession process – be forced to observe the constitutional imperatives of gender equality and human dignity?

Conclusion

In this learning unit, you learnt about the idea of traditional leadership; how it survived during various historical periods; the effect of the Constitution on the status of the traditional leadership institution; and, finally, the impact of legislative transformation on the traditional leadership institution and traditional communities.

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