AFRICAN CUSTOMARY LAW

"Customary Law" / "Indigenous Law" =
Customs + usages traditionally observed among the indigenous African peoples of SA + which form part of the culture of those peoples

Emphasis on **duties** rather than rights

The maintenance of order is supported by means of approving and disapproving legal sanctions
Sanction means:
Approval or confirmation of an act; and/or
Punishment for noncompliance with, i.e. statutes or behavioral prescriptions

Divisions of customary law:

Indigenous national law (tribal law)
Some kingdoms consist of several tribes + remnants (bits + pieces) of tribes, ruled by a king / paramount chief – i.e. Zulu
Indigenous International law (Law of different tribes)
Tribes entered into agmts to help one another against communal enemies

Customary public Law
Governs relations btw:
- Traditional authorities and subjects; and
- Traditional authorities within the tribe
  a. Indigenous constitutional + administrative law
     Composition, powers + functions of the public organs of authority
  b. Indigenous adjudicatory organs + law of procedure
     Composition + jurisdiction of the various indigenous / customary courts
     Procedures
     Evidence that may be lead in court to reach a decision
  c. Indigenous criminal law
     Public action to punish a subject who transgresses a rule that is punishable by law

Customary Private law
Legal relations between individuals and groups in capacity as private persons
- Law of property / persons / family / things / succession
- Law of personality (i.e. honour; good name; privacy)
- Law of immaterial property (i.e. copyright + patents) is unknown
- Law of obligations:
  - Contractual: arise btw a patient + a medicine specialist / traditional healer
  - Quasi-contractual: arise btw a guardian + a person supplying his ward with the necessities of life w/o his consent
  - Delictual: arise btw an owner + another person who has willfully damaged his property

Customary law comprises not only of norms, but also fixed rules of procedure, and as such, may also be subdivided into:

Substantive Law
Prescribes norms / requirements + attaches sanctions to these

Adjective Law (aka law of procedure + evidence)
Prescribes the manner in which norms are to be enforced + sanctions applied

Rights that fall within the vestee's estate: Violation of these entails patrimonial (determined in economic terms) loss + is the basis of an action for **damages**		
Right	**Object**	**Examples**
Real right	Corporeal thing apart from the person	Ownership
Obligatory right	Performance (If vested in a group –duty to perform is also that of a group – i.e. bride's family's right to have marriage goods delivered to them by bridegroom's family)	Right to a fee for professional services
Right of authority	Productivity + freedom of group member	Guardianship
Group right of guardianship	Freedom of members + entitles group concerned to productivity of its members	

Rights that do not fall within the vestee's estate: Violation of these rights result in an action for **satisfaction** Occasionally, violation results in patrimonial loss – i.e. violation of right to a good name which results in aggrieved losing her job – violator is a "thief" + aggrieved may claim loss of income		
Right	**Object**	**Examples**
Right of personality	Corporeal / incorporeal part of vestee's personality	Right to one's body Right to one's honor
	Where the vestee is a group	Southern Nguni ritual to remove defilement (adultery): beast is taken from wrongdoer's residence by women belonging to seduced girls group + is ritually slaughtered as an act of cleansing + to obtain satisfaction If girl is pregnant: guardian (as the rep of her group) is considered to have suffered patrimonial loss + may recover damages (which means that this action may lead to the infringement of various rights)

Various indigenous legal systems

Each tribe / kingdom has its own legal system that, in varying degrees, differs from the legal systems of the other tribes / kingdoms – however, there's substantial familiarity in the underlying principles + values of the diff local legal systems

Division + features of the Indigenous African people of SA

Main groups + their characteristics:

Nguni:

Languages	Originated from:
Zulu	KZN
Xhosa	Eastern Cape (esp. Ciskei + Transkei)
Swazi	Swaziland + Mpumalanga
Ndebele	Mpumalanga + North east Pretoria

NB Characteristics

Composite household divided into two or three sections –

- Each section has a senior wife with affiliated wives subordinate to her
- Each wife in a section formed a 'house' with its own rank, property and successor
- Mostly applicable in rural areas – In urban areas the wives live in separate houses / government areas

Sotho:

Languages	Originated from:
Tswana	Botswana, North West + Northern Cape
Northern Sotho	Northern Province
Southern Sotho	Lesotho + Free State

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

Shangana-Tsonga:
(aka "Tsonga" or "Shangana")

Originally settled in Northern Province and Mpumalanga in areas adjacent to Mozambique

Venda:

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

CHARACTERISTICS OF AFRICAN CUSTOMARY LAW

Unwritten:

Their law was not recorded in written legal sources (i.e. statutes / law reports / textbooks)
Court procedures were conducted orally
Law was transmitted orally from one generation to the next
Important legal principles were expressed by means of legal maxims –

- Group orientation + humaneness: "*a person is a person in relation to other people*",
- Marital relationship btw husband + wife: "*you hold him or her with both hands*"
- Ruler reigns through his councils + acts in acc with the will of his people: "*a ruler is a ruler through his people + the subjects are subjects through their ruler*"
- Subjects who left the area will be welcomed back by the tribe: "there is no return to the womb; to the ruins is the return

Customary:

Most indigenous legal systems resulted from age-old traditions and customs that came to be classified as "law"
Direct orders + instructions from leaders resulted in laws which were circulated by chiefs + which had to be followed
Formal administration of justice limited the court's function to the application, *and not the creation,* of law
Indigenous courts had no system of precedent

An expression of community values:

Public participation in the adjudication process resulted in law giving expression to the values / gen moral behavioral code of the community = as values changed, so did the law + conflict btw legal + moral values was unknown
Disputes affected the wider community – decisions had to take into account future relations between parties *within the community* = as a result, admin of justice did not concern legal justice as such (i.e. who was right and who was wrong), but the reconciliation of people ("human" justice)
Community's interest so NB that an individual had no special part to play in the law – rather – his role remained within the group (family on the one hand + community on the other)

The role of magico-religious conceptions:

Belief in ancestral spirits
After death, a person continues to live in a spiritual world – almost the same as when on earth
The law is derived from + protected by ancestral spirits

Deviation from the rules may lead to punishment by ancestral spirits (misfortune such as illness, drought, hail etc are seen to be forms of supernatural punishment)
Effect of this belief on the law is 2-fold:

- The law has a supernatural origin and is therefore seldom questioned; and
- The law appears static and unchangeable – change would be against the wishes of ancestral spirits

Belief in sorcery

Supernatural powers in the universe may be used by a person for his own ends either to the advantage / disadvantage of people / their own interests
Cases of sorcey involve a person ("sorcerer") who uses supernatural powers to do harm
It is in the interest of the community that the sorcerer is identified + removed from the community

The observance of rules:

People voluntarily observe legal rules + rules for living because of other factors that are more NB than law enforcing organs (i.e. police / courts) – such factors include:

- The religious or sacral (holy) elements of the law
- Public opinion, esp what other people may think + say about one's behavior
- If a person is harmed he will endeavour to get compensation / take measures to protect himself (i.e. medicines / sorcery)
- General participation in the legal process ensures that the law is handed down from generation to generation – everyone has the opp to find out how the law operates in their community
- Fear of punishment (especially that of supernatural origin)
- Influence of indigenous leaders who are regarded as the living representatives of the ancestors who are responsible for observance of the law
- ➢ Recognized leaders played NB role in daily life of communities w/ having to refer to their judicial authority i.e. allocation of land, admission of strangers
- ➢ Leaders are the bearers of traditions + must ensure such traditions are observed + have the authority to pronounce on what is allowed + what is not
- ➢ Local heads of families and kinship groups were consulted before important decisions were taken which ensured that the proposed action would not be opposed and interests of others would not be unfairly / illegally harmed + that they knew about the matter in the event of a legal dispute arising

NATURE OF CUSTOMARY LAW

The indigenous legal system is "unspecialized" if compared with Western legal systems (note: no legal system is totally unspecialized)

The larger the population, the larger the possibility of specialization

Specialised legal systems	Unspecialised legal systems
Similarities:	
• Relations governed by law (organs of authority + subjects on the one hand; and groups + individuals on the other hand) • Law is transferred from 1 generation to another = starts with education re family + develops in the wider context of the community • Transgression of the law / legal rules have specific consequences for transgressors	

Differences:	
Specialised legal systems	**Unspecialised legal systems**
Division between criminal and civil cases Each division has its own court i.e. Criminal action is held in a criminal court, civil action is held in a civil court	Criminal and civil cases are heard by a single hearing No clear division between case and procedure, and case and court
Distinction between criminal and civil cases Distinction between courts and procedures	No distinction
Classification : criminal cases, criminal courts and criminal procedure Civil cases, civil courts and civil procedures	No classification
Delimitation between criminal and civil cases	No delimitation
Time – action must be instituted before a certain time, otherwise the action may expire (prescription) Exact time NB to determine when rights + duties come into existence (i.e. birth, marriage, start of contract)	Time is unimportant, as prescription is unknown Precise moment when an event occurred is not nearly as NB as the fact that the event did actually occur
*Emphasis on **individual** – individual may uphold his rights even when against interests of community:*	*Emphasis on **group** rather than individual – individual functions entirely within the context of the group:*
Education systems stress the person's individuality + achievements	Education systems encourage a person to adapt to + become subordinate to the interests of the group
Individualization of rights – i.e. one individual (and not a group) is the owner / creditor + emphasizes the powers of the individual official	Ruler does not rule as an individual, but as a rep of members of the ruling family who were the true rulers
2 spouses are the only interested parties in a marriage	Both family groups participate in the marriage
Contracts are concluded btw individuals	Contracts are concluded between agnatic groups
Criminal is liable as an individual for his actions	Whole family group can be punished for crime committed by a member (i.e. sorcery: whole family killed / parents resp for crimes of their kids)
Appointed officials with exclusive power administer justice – public's role is limited to being an audience + settlement outside the court takes place btw individuals Judge is expected to find the law + decide accordingly	Admin of justice is informal + public partakes actively in proceedings in the open + negotiations for settlement outside the court takes place btw family groups Views of people present in court interpret the public sense of justice + lead to a judgment Aim of the court is to effect reconciliation rather than punishment / formal action – effort is made to resolve disputes by reconciliation Court decisions often based on consensus of opinions of court councilors who participate throughout proceedings by questioning, giving info + viewpoints
Governmental functions: judicial, executive + legislative powers clearly distinguished	Governmental functions not clearly distinguished –i.e. tribal chief = law-maker + executive official + judge-in-chief
Abstract approach Abstract consent + expression of intent – i.e.: Transfer of land: registration in a deeds office	**Concrete**, real and visible approach - apparent observable, visible acts from which consent becomes obvious in a very concrete way – i.e.: Transfer of land: acquired by demarcating + indicating an area + by actually using the land + bringing it under cultivation marriage: actual visible transfer of bride + marriage goods takes place evidence: if a woman spent a night with another man = evidence of adultery

Religious element
Law originates with the ancestors who consider it disrespectful + negligent to disobey it + enforce punishment
If important juristic acts are planned, the blessing of the ancestors is obtained by special means
Reconciliation btw community + ancestors accomplished by slaughtering an animal + having a communal meal

Categorisation
No distinction between categories, institutions + concepts
Difficult to know if authority in a family group with many members concerns private / public law
Categories of transgressions is sometimes vague – difficult to distinguish if transgression is harmful to interests of community / family groups (i.e. whether it's a delict / a crime)
Theft of another's property is a delict, whereas stock theft is a crime

Kinship
Family group has extensive authority over its members + this authority is firm, but compassionate + protective
Position of women compares unfavorably with that of men

Polygamy
One man can be married to more than one woman at the same time

CUSTOMARY LAW & THE CONSTITUTION

BEFORE '94 CONSTITUTION:

Black Administration Act – indigenous law:
- Enjoyed only limited recognition – had to be readily ascertainable with sufficient certainty in order for it to be applied
- Could be applied by all courts (although they weren't obliged to do so) – judges / magistrates did not need any formal / practical knowledge / training in indigenous law
- Onus was on the party to prove indigenous law in court, which placed a financial burden on the litigant because he had to obtain the services of an expert witness
- Could be amended / repealed by legislation
- Could not conflict with the principles of public policy + natural justice – however, a court could not declare *lobolo* + other similar to be in conflict with such principles
- Rules for proceedings btw Blacks who didn't belong to the same tribe:
  - Court must apply indigenous law in operation at place where defendant / respondent reside / carry on business / employed; if two / more different systems are in operation at that place and are not within a tribal area –
  - Court must apply the law of the tribe to which defendant / respondent belongs

'96 CONSTITUTION GIVES CLEAR + UNAMBIGUOUS RECOGNITION TO CUST LAW AS A SYSTEM OF LAW

Provisions of the Const which govern the recognition + application of customary law:

S211: Courts must apply + recognize customary law, subject to:
- BOR (principles of public pol + nat justice are n/a – Bennet= part of colonial past + of historical significance only)
- Legislation which is aimed at amending customary law (and not legislation in general)
- If it's applicable + in acc with gen principles of choice of law –courts obliged to protect rights derived from cust law if both parties reasonably expect to be subject to cust law; and/or right of 1 person creates responsibility (duty) for another

S30 and S31 convert a freedom into a constitutional right (rights demand a specific conduct, while freedoms allow choices) –

S30: Individuals have the **right** to take part in the culture of their own choice – they may demand access to a cultural group + take part in the activities of that group

S31: Persons belonging to a cultural, religious / linguistic community may not be denied the **right**, with other members of that community to –

- Enjoy their culture, practice their religion and use their language; and
- Form, join + maintain cultural, religious + linguistic institutions / associations

(This means that the state may not interfere with the rights of the individual and must allow institutions to exists which are necessary to maintain the culture concerned)
The cultural group / community *must be recognized by the state before* the individual may enforce his right

CUSTOMARY LAW & THE BOR

BOR **recognizes** customary law on the one hand + **prohibits discrimination** on the other –
This gave rise to conflict btw 2 opposing principles:

1. **Right of individual** to equal treatment; and
2. **Right of group** to adhere to culture of its choice

Some examples:
***Burial rights**: Mahala case –in acc with customary principle of primogeniture, eldest son of family head is heir + when family head died, son claimed he had the right to bury deceased = held: principle offends const right to equality (discriminates against women) – ito wishes of deceased + practical considerations, wife of deceased entitled to bury him*
***Patrimonial consequences of customary marriages**: President of RSA: court not prepared to uphold cust law position because it was discriminatory to women - marriage deemed to be entered into ito CL (in comm of prop)*
*Cust Law emphasizes the **group** + **individual** in context of the community = BOR emphasizes individual rights*
*Cust Law emphasizes **duties** = BOR emphasizes **rights***

FR have priority over cust law – however, cust law is a const right (not only a freedom) + is equal in status to any of the other FR – FR in conflict must be balanced against one another so as not to lead to oppression of / discrimination against, certain categories of people

Other ways outside of Const to be considered to resolve conflicts –

- Considering social implications of enforcing FR upon a certain cultural group
- Examining the origin of certain legal conflicts to decide which matters are more NB + urgent

JUDICIAL REVISION OF CUSTOMARY LAW

CC: Decides on interpretation, protection + enforcement of Const + has specific authority to remedy alleged / threatening violation of FR + adjudicate on const validity of legislation

HC: Has jurisdiction over any alleged / threatening violation of FR + to investigate validity of any legislation

A party to an action may query const validity of any rule of const law on grounds that it has a harmful effect on that particular party –
Cust law is presumed valid until decided otherwise by competent court – voidness must be proven on a preponderance of probabilities + everything done ito a right is valid until later declared invalid (*i.e. rights + duties which arise from a cust marriage are valid, even if later found to conflict FR*)

AMENDMENT OF CUSTOMARY LAW BY STATUTE

The Human Rights Commission may advise Parliament on leg affecting the rights of a person (i.e. Gender Equality + women) + Parliament may then amend cust law by statute in order to further FR
Provincial legislatures have concurrent jurisdiction with national Parliament in matters re cust law

INDIGENOUS LAW OF PERSONS

"Legal Subject"

Before Black Administration Act (original)	After Black Administration Act (modern)
Individual who bears rights, powers + duties which he **shares** with his agnatic group depending on his status within the group	Individual who bears rights, powers + duties **independent** from the other members of the group – but, individual should not be separated from the group as this would lead to injustice since emphasizing one individual within the group undermines the rights + privileges of other group members
Head could only be a man + was groups **spokesman** He held the highest rank + had certain powers distinguishing him significantly from other group members, but did not form a separate entity from the group + had no authority over life + death of members	**Head** was vested with **group's rights** to the exclusion of other members (i.e. owner of group's assets + had power to dispose of these – his successors were also regarded as heirs of group's property)
Juristic person was unknown – although agnatic group was an association of people, individual members did not have rights, powers + duties independent from the agnatic group and likewise, agnatic group did not have rights, powers + duties independent from the group members	

Status

Status	Rank
Determines powers derived from objective law	One factor which may influence a person's status

<u>Factors</u> that influence a person's status:

Age:

Before Black Administration Act	After Black Administration Act
Idea of a fixed age at which a person attained majority was unknown – age did not have significant legal significance + newborn babies shared in rights, powers + duties of their agnatic groups	Majority is attained at a fixed age of 21 (male / female) + when members become majors they can obtain rights, powers + duties independent from those of their agnatic group
Greater importance attached to physical development: Puberty: emphasized by initiation ceremonies where after person considered marriageable + an adult	

Sex:

Before Black Administration Act	After Black Administration Act
Males: • Could succeed to position of family head and general / house property • Not allowed to deal arbitrarily with house property – had to consult his wife in the house concerned (however, this was not legally enforceable)	
Females: • Inferior position compared with males • Could not succeed to position of family head and/or general / house property • Not without status – had a reasonable degree of freedom re everyday use of house property + could call upon wider family group if husband dealt irresponsibly with house property	**Females:** • Position influenced by majority – unmarried women compare favourably with males • Cannot succeed to position of family head (regardless of whether reached majority / married) – this is in dire need of reconsideration esp re Promotion of Equality + Prevention of Unfair Discrimination Act + ito the Const (state may not discriminate unfairly against a person on the grounds of sex)

Rank

Family rank	House rank
Hierarchy of **family members** within the family group	Hierarchy of the various **houses** that make up a household
Relates to a person's legal status within the household	Relates to a person's legal status within a nuclear family (husband, wife + children)
<u>Family group:</u> a number of related households / agnatic groups – the most snr male exercises powers according to his rank + members of the family group often come together as a family council in order to discuss matters of common interest (i.e. conclusion of a marriage / disputes btw members) <u>Principle of primogeniture:</u> • Eldest son has higher rank than his younger brothers (same applies to sisters) • Children are ranked according to their father's rank within the family origin – if father was oldest brother, his children rank higher than any of the children of his brother and the brother himself (see SG p48 diagram)	<u>Polygamy: marriage with +1 spouse –</u> <u>Polygyny</u>: man is married to +1 woman at the same time = each marriage establishes a separate family, husband is the common spouse to all the families <u>Household</u>: (aka: agnatic group): unit of all the families headed by one husband – each household has a particular rank – the basis on which this ranking rests differs among the various indigenous African people – i.e.: Wife man married 1st ("main wife") + her children hold highest rank in the household, irrespective of age; Main wife is of a particular descent group (i.e. not always wife man married 1st) = children's rank determined by their mother's rank (not birth since the order of marriage is not decisive for the hierarchy); Nguni-speaking people: household is divided into sections + each section has a specific rank + within each section, each house also has a specific rank (see SG pg 49 diagram) – i.e. a person's rank depends on his position within a specific section + house <u>Polyandry</u>: a woman is married to +1 man at the same time (this is *foreign to indigenous African people*)

CUSTOMARY FAMILY LAW

"Patrimonial consequences" = legal consequences of marriage on married couple's property

Consequences of polygynous marriages:
- Two / more families exist within a unit known as an agnatic group (household)
- Legal relations within the family apply to each family within the agnatic group (household)
- Every component family has a particular rank which differs from the others (various families are bound to one another in relationships of rank by means of the husband who is the common spouse of each family)
- Multiple families require a complicated system of property relations = a distinction is made btw family (house) property and general property

Legal relations btw families within the household –
Each family within the agnatic group has certain rights + powers that it can exact from + protect against claims of the other houses within the household = houses become involved in contractual relationships with each other –
An agnatic group cannot be divided against itself = a house cannot protect its rights in court against another house because husband is head of all the houses + cannot represent one house in court as plaintiff and another as house as defendant –therefore, the wider family group is called in to settle disputes

Implications of Age of Majority Act –
Strongly emphasized rights + duties of the individual
Affects relationships btw parents + children and head of agnatic group + other members of the group
Individual can now act against the agnatic group (traditionally, the individual shared in the group rights)

TRADITIONAL INDIGENOUS MARRIAGE (TIM)
Background of (TIM) NB because:
- "Living law" at local level (i.e. still occurs esp. in rural areas)
- Underlying ideas (ancestral sprits + role of family group) apply to customary marriage
- Helps to understand of customary marriage which is the statutorily recognised + adapted form of TIM
- Polygynous nature = significant feature which it shares with customary union + customary marriage

Features:
- Union btw *2 family groups* - not dissolved by death of a spouse
- If a spouse is deficient in some way, a person from his/her family group may be substituted
- Man's agnatic group delivers marriage goods (*lobolo*) to the woman's agnatic group
- Procreation of children (esp. male) NB = living must care for ancestral spirits who live in a spirit world + in turn care for living kin by ensuring prosperity + wellbeing = husband + wife must procreate to ensure they'll be taken care of when they're ancestral spirits
- Marriage = process of growth: ceremonies + customs are evidence of the marriage process (not a legal transaction which comes into being at a specific time)
- Creates a legal unit = family (aka: house) together with related families, develops, through the husband, into a household
- Status – married man + woman have more powers than unmarried ones

Requirements:
- No fixed age required (sexual maturity is usually what is required)
- Marriages btw ascendants/descendants of father/mother + btw children of same mother / father forbidden
- Nguni: prohibits marriage btw persons with same family name / same as person's mother / father
- Sotho-Tswana: Marriage btw cross-cousins is encouraged + viewed as preferential marriages
- Persons not permitted to marry: Serious mental illness + married women
- Grounds for dissolution: Impotence / serious physical defects (can be substituted)

Customary union (CU)	Customary marriage (CM)
Statutory recognized version of TIM **before Recognition of Customary Marriages Act**	Introduced **15 November 2000** by Recongnition of Customary Marriages Act (RCMA)
Black Administration Act: • Association of a man + woman in a conjugal relationship acc to black law + custom, where neither man / woman is party to a subsisting marriage • Recognized as a "martial union", but not a "marriage" • All valid unions have been converted into CM's – there are no longer CU's	A marriage concluded in acc with customary law • A valid marriage at customary law which is existing at commencement date of RCMA is for all purposes recognized as a marriage • If a person is a spouse in +1 CM – all marriages entered into after 15 Nov 2000 which comply with the provisions of the Act, are for all purposes recognized marriages • Marriage entered into after 15 Nov 2000, which complies with requirements of RCMA is for all purposes recognized as a marriage

THE BETROTHAL

Legal act which has specific consequences –

Myburgh: Specific contract – elements of the contract = agmt + performance by man's group (performance being delivery of all / some marriage goods + other gifts)

Original indigenous law	Modern indigenous law
Agmt btw 2 **family groups** re a future marriage btw a male member of 1 group + female member of other	**Man, girl + her father** are parties to the agmt
Marriage **negotiations** are initiated by **man / his family group** by approaching women's family with a request	Man's first wife: man's **father / guardian** initiates negotiations Negotiations by man himself must be conducted with **woman's father / guardian** Negotiations **w/o man / woman's approval is unsuccessful** – their consent is a requirement for the marriage

- Negotiations take place to reach consenus re proposed marriange + amt of *lobolo* to be paid = reaching consensus leads to a formal betrothal which can be repudiated / terminated at any time + aggrieved party cannot demand compensation for breach of contract
- An engagement is not a prerequisite for a valid marriage
- Betrothals of infants + children are void
- Betrothals can be short / long + duration is determined by agmt btw the parties + usually depends on amt of time man/his father need to gather the *lobolo* cattle

Xhosa – <u>*ukuthwala* custom:</u>
Woman is abducted to force her family to enter into negotiations + taken to man's parental home + cared for with utmost kindness
3 types:

(a) Woman is aware of intended abduction + there's agmt btw the parties
(b) Families agree, but woman is unaware of abduction
(c) Neither woman nor her family have prior knowledge of the abduction

If woman abducted w/o her parent's consent, it may lead to a claim for delict + dmgs in the form of "*bopha*" cattle – i.e. *thwala* action: if man seduced woman + made her pregs during the time she was abducted, a seduction head of cattle + pregnancy beast will be payable
Press reports indicate that this custom is abused in cases where offences are committed against minors + forced marriages take place under the pretence of a so-called *thwala* action

Consequences:

Man	Woman
• May pay attention to other women (polygynous) as long as he does not neglect his betrothed • Deliver betrothal goods	• Cannot pay too much attention to other men during betrothal period

Betrothal goods	Marriage goods (*lobolo)*
Blankets, clothing / other household articles	Cattle / money
Delivered during betrothal period	Given together with betrothal goods with marriage in mind (usually before the marriage is concluded)
Property rights over these articles are transferred to the woman / her group upon delivery	Ownership remains vested in man's group giver until marriage is concluded –man's group bears the risk of loss / deaths during betrothal– woman's group must care for the cattle + report any losses asap to man's group – if they fail to report these losses in time, they must compensate man's group for them
If betrothal is terminated – guilt factor determines whether articles are returned / not – if woman's fault: goods normally have to be returned – if man's fault: goods are not returned	If betrothal is terminated, goods have to be returned, regardless of whose fault it was (Cape, Transkei + Ciskei courts have held blameworthiness to apply when considering what has to be returned)

Betrothal can be terminated in 3 ways + legal consequences re disposal of *goods already delivered* with proposed marriage in mind differs:

Death of the man / woman

(Some peoples – i.e. Pedi + Venda + some Tswana make provision for substitution whereby the deceased man / woman is replaced by another man / woman, usually deceased brother / sister – consent of other man/woman who is the substitute is required)

Consequences:

- Marriage goods must be returned to man's group + compensation must be made for losses of cattle not reported in good time (not returned if man caused woman's death (esp. if she died during betrothal period by giving birth to his child))

Mutual agreement btw the man + woman

Examples: they realize marriage will not be successful / relationship btw family groups soured)
Unlikely to happen because in modern indigenous law, woman's father is also party to the agmt (in original indigenous law, family groups, and not the man + woman, agreed to terminate the agmt)
Agmt to terminate cannot be effected w/o co-operation of the woman

Consequences:

- Parties reach an agmt re disposal of goods (usually returned to giver)

Unilateral agreement

Can be made with or w/o good cause
Based on principle that marriage amt is entered into in good faith + any act of other party contrary to this is a good reason for termination:

Good cause for the man's group:
- Woman's group unreasonably postpones marriage (esp. if accompanied by demands for more cattle / money to be delivered despite delivery of amt agreed upon / delivery of a reasonably quantity)
- Woman's misconduct with other men + neglect of her betrothed
- Woman's immorality – if he condones this, a new cause is required to terminate
- Man incurs physical injury after betrothal which renders him unfit for marriage (in this case he must compensate woman's group for all reasonable expenses incurred with proposed marriage in mind)

Good cause for woman:
- Man concludes indigenous marriage with another woman during betrothal period
- Man's immorality where monogamous marriage was contemplated + woman did not condone it
- Continuous neglect to the extent that woman's guardian had to instruct the man to proceed with the marriage
- Too much attention paid to other women + neglect of betrothed and her family

If woman's group terminates the betrothal – Jikejela case:
- Woman alone decides if she wants to terminate; her guardian has no say
- Woman must also decide if she wishes to reject the man / condone his misconduct
- Condonation / rejection by guardian w/o woman's consent has no effect

Consequences:
- Zulu – marriage goods must be returned regardless of which party terminated
- Other peoples – guilt factor NB: if man terminates with good cause – marriage goods must be returned / if man terminates w/o good cause or woman terminates with good cuase: man usually forfeits goods already delivered

LEGAL REQUIREMENTS FOR CUSTOMARY MARRIAGES

Have to be fulfilled in order to achieve a valid juristic act

Absolute requirements	Relative requirements
Must be satisfied beforehand	Juristic act only fulfilled when all requirements are satisfied + can be terminated upon failure to satisfy them
If not met – no juristic act (null + void *ab initio*)	If not met – valid juristic act is effected
Arise from law	Arise by agmt btw parties / law
Unalterable	Alterable by mutual agmt btw interested parties

ABSOLUTE REQUIREMENTS

Customary marriages entered into BEFORE 15 Nov 2000 –

Tested against requirements for traditional indigenous marriage / customary union – depending on where parties resided –

KZN (per Codes of Zulu Law):

- Consent of father / guardian of intended wife (if a minor), which may not be withheld w/o good reason
- Consent of father / guardian of prospective husband (if a minor); and
- Public declaration by prospective wife to the official witnesses at wedding ceremony that she voluntarily submits to marriage + gives her consent thereto

Outside KZN (per Olivier):

- Consent of father / guardian of man (under certain circumstances)

  Traditionally, there used to be a legal obligation on father / guardian of young man to help him with *lobolo* for his first wife – where a man provides his own *lobolo*, consent of his father / guardian is unimportant (unless he's a minor)

- Consent of father / guardian of woman

  Necessary – regardless of woman's age (tacit consent can be inferred – i.e. father accepted *lobolo* / allowed couple to live together as man + wife)
  Letsoalo case: woman's mother can legally negotiate *lobolo* + receive it + act as woman's guardian + approve her marriage = decision criticized by some as a distortion of African martial law, however, it's a good illustration of application of unofficial customary law + that customary law isn't static

- Consent of prospective husband

  Imperative (can be express or tacit) = prospective husband can be represented at the formal wedding ceremony + need not be physically present himself

- Consent of prospective wife

  Made an essential requirement by official courts
  May be express or tacitly inferred – i.e. she had no objection to participating in the wedding arrangements + ceremonies

- Handing over / delivery of woman to family group of man / man himself

  Wife must be integrated into husband's family, which was usually accompanied by ceremonies
  Subsequent circumstances indicate whether she was "handed over"
  Non-integration related to circumstances such as failure to make satisfactory arrangements re *lobolo* / deal turned sour / parties lost interest in each other before marriage had been concluded
  Process not limited to a single event + could a lengthily process
  Mbatha case: wife' alleged non-integration into husband's family because an accepted ritual was not performed – held: parties could agree to waive the requirement of the ritual + performance of specific rituals is not an essential requirement = case criticized – the real issue (whether wife had been integrated into husband's family) was overlooked

- Agmt that *lobolo* will be delivered

  Main component of customary marriage + relates to the measure (and not the actual delivery) of *lobolo* – i.e. no. of cattle / amt of money

- Non-existence of a civil marriage

  Before 1988, a civil marriage dissolved a preceding customary marriage + existence of a valid customary marriage concluded before RCMA was disputed in court –
  Road Accident Fund case: deceased killed in car accident + was married to plaintiff by customary rites and married to another by civil rights – civil marriage concluded before customary marriage – both women claimed loss of maintenance due to negligent death of breadwinner – trial court held legislature didn't intend to afford a person such as the plaintiff the right to claim for loss of support – on appeal, SCA held: any claimant who was a spouse in a customary marriage where her spouse was, at the time of his death, a spouse to a civil marriage as well, must be compensated by RAF + Minister of Justice ordered to review continued existence of current legislation
  According to Maithufi + Bekker: this matter requires urgent attention of legislatures – both marriages should be recognized as valid customary marriages (i.e. polygyny should be recognized in these circumstances)

- During registration of marriage, husband must declare traditional community's rules + customs with which marriage is to be concluded; traditional leader (or his delegate) + representatives of the diff marriage parties (who serve as witnesses) + make similar declarations [Note: 2 white people may encounter problems with registration of the marriage due to evidential problems]
- Must be registered within 12 m after commencement of the Act (i.e. before 15 Nov 2002) / any longer period prescribed by Minister in Gazette

Customary marriages entered into AFTER 15 Nov 2000 –

RCMA –

- Prospected spouses must both be + 18 years + consent to be married under customary law

  Achieves formal gender equality + prevents conclusion of forced marriages

  Provision is made re minors: Both his/her parents / guardian must consent –
  If consent of parent / guardian cannot be obtained – Marriage Act applies:
  Commissioner of child welfare may grant consent if satisfied:
  - Minor has neither parent / guardian + is not in a pozi to obtain consent from parent / guardian
  - Marriage will be in best interests of minor
  - In interests of minor to conclude an antenuptial contract (if so, such a contract must be entered into before granting consent)

  Note: commissioner may not grant consent if parents/guardian refuse to grant consent
  If consent of parent / guardian / Commissioner refuse to give consent, minor can apply to court for consent OR
  Minister of Home Affairs (or public officer authorized in writing) may grant written permission if considers marriage desirable + in interests of parties in question (such permission doesn't relieve parties from having to comply with all other requirements prescribed by law
  If minor entered into marriage without Minister / public officer's consent –

- Minster OHA / officer may, in writing, declare marriage to be valid customary marriage if marriage is desirable + in interests of both parties in question + marriage was in every other respect in acc with Marriage Act

A marriage concluded by a minor w/o necessary consent is voidable = minor / parent / guardian must apply for annulment (withdrawal / termination) + lodge the application with HC:

- Application by parent/guardian must be made before minor is 18 + within 6 wks of becoming aware of marriage
- Application by minor must be made before he is 18 / within 3 months after turning 21

Court will grant application only if it's in minor's best interests

RCMA does not alter prohibition of customary marriage btw persons related by blood / affinity – this is still determined by customary law + the laws and customs differ from group-to-group –

Nguni	***Sotho + Tswana***	***Tsonga***	***Venda***
▪ Xhosa: Sex with woman of same clan = incest ▪ Zulu: marriage with blood relations / person of same clan / clan of his mother's people prohibited ▪ Swazi: marriage btw man + woman belonging to clan of man's paternal grandmother / maternal grandparent of either sex is desirable	▪ Man may not marry an ascendant / descendant ▪ Marriages btw cousins are allowed, but cross-cousin marriages (man + daughter of his mother's brothers / father's sisters) preferred	Man may not marry daughter of paternal / maternal aunt / uncle	Desirable for man to marry woman from his maternal uncle's family

- Marriage must be negotiated + entered into / celebrated in acc with customary law

  Negotiations, entering into + celebrating differs from group to group – without these, would be difficult to say if a customary marriage existed

  Masuku:
  Process of customary marriage is gradual + there are still underlying components of a customary marriage with involves a series of changes in:

  a. *Attitude of contracting groups towards each other (visits + exchange of social courtesies to establish harmony btw the groups, terminating in the consent of the groups to the marriage);*

  b. *Actual transaction = exchange of rights in woman for cattle – extent of lobolo is arranged*

  c. *Adjustment of woman in her new office – elevation from maidenhood to wifehood; departure from + farewell to group + its ancestors + intro to new group + its ancestors + her affiliation thereto – any children born to her belong to husband's group + even death does not dissolve the marriage*

- *Lobolo:*

  Bennett: *Lobolo* is, by implication, a contractual accessory, even though RCMA makes no ref to it

  Olivier: *lobolo* legalizes the marriage, legitimates children born of the woman + acts as a form of compensation to place responsibility on woman's father to support her when necessary, to stabilize the marriage + ensure proper treatment of wife by husband + his family – the primary function being to transfer woman's reproductive capacity to husband's family

- Spouses married acc to customary law are precluded from concluding a civil marriage during continuance of the customary marriage

  Legislature enacted this provision to protect the wife – before where a man married by civil rites married a woman by customary law, that subsequent marriage was null + void + the fie + children were auto discarded
  Husband + wife married ito customary law can convert *their* marriage into a civil marriage if neither of them is a partner to a subsisting marriage with another person (

- Registration

  Failure to register a customary marriage does not affect validity of marriage – registration merely provides proof that a customary marriage exists - Spouses are merely placed under a duty to ensure their marriage is registered = Must be registered within 3m after conclusion of marriage / longer period prescribed Gazette

  Reg officer registers marriage by recording ID of spouses, date of marriage, *lobolo* agreed + any other prescribed particulars + issues reg cert which is *prima facie* proof of existence of customary marriage

  If a customary marriage was not registered – anyone who has a sufficient interest may apply to reg officer to enquire into its existence – if reg officer satisfied valid customary marriage exits, he must register marriage + issue cert of reg = If reg officer not satisfied – he may refuse to register marriage + court may, upon application + investigation, order reg of marriage / cancellation / rectification of any reg effected by reg officer

  Minister may make regulations re:
  - Requirements to be met with + info to be furnished to reg officer;
  - Manner in which reg officer must satisfy himself re existence / validity of customary marriage;
  - Manner in which any person may participate in proof of existence / reg of any customary marriage;
  - Form + content of certificates, notices, affidavit + declarations req ito the Act;
  - Custody, certification, implementation, rectification, reproduction + disposal of any doc re reg / that is prescribed ito the Act;
  - Any matter required / permitted to be prescribed ito the Act; and
  - Any other matter necessary / expedient to provide for effect reg of customary marriage / efficient admin of the Act
  - Prescribing fees payable re reg + issuing reg cert

Traditional indigenous marriage –

- Man + woman must not be related to one another within the prohibited degrees of kinship

  Regarded as incest + that pollutes the community + ancestors may send supernatural punishment (i.e. droughts, hails storms, heat waves) to the community
  Persons who committed incest must be killed to purify the community of this pollution; or if they weren't killed, they had to undergo purification ceremonies to free the community of this pollution

- Consensus btw the 2 family groups on the 2 people to be united in marriage + marriage goods

  Individual members cannot agree on behalf of the group – groups negotiate over:
  The marriage partners –
  - Woman's group satisfies itself re man's capabilities, good name + ability to maintain woman
  - Man's family group satisfies itself re woman's qualities

The marriage goods (lobolo) –

- Most NB contract in customary law: agreement by which 1 party undertake to deliver a certain female person as a bride for a certain male person in return for the delivery of cattle / other property
- Originally the parties were the family groups of man + woman; however, nowadays, the parties may even be individuals (i.e. man, girl and her father)
- Delivery + transfer of marriage goods is made to bride's father, but can also take place through description + indication (constructive delivery) and may be made at any pre-arranged place – the time at which marriage goods must be delivered varies:
  - Where a group requires all the marriage goods to be delivered before transferring the bride = delivery of marriage goods is an absolute requirement
  - Where a group requires part of marriage goods to be delivered before the bride is transferred / delivery via installments after wife transferred = delivery of marriage goods is NOT an absolute requirement

- *NB requirements for lobolo contract* –
  - Consent of father / guardian of bride to be – points which may indicate tacit consent / refusal: acceptance / refusal of *lobolo*; or permission / refusal to allow girl to stay with man on understanding that *lobolo* will be paid later
  - Consent of bride (originally, her free consent was not necessary, but in modern indigenous law, her free consent is a requirement)
  - Consent of bridegroom (does not have to be given before negotiations for marriage commenced, however, the original custom where fathers consent on behalf of their kids is rejected in modern indigenous law)
  - Transfer of bride (see below)

  Customs by which man + woman attempt to force family groups to agree:

  Ukubalkea: man + woman elope

  Ukuthwala: man + his friends kidnap bride + take her to his people, apparently against her will

- <u>Transfer of bride by her family group to man's family group</u>

  Brings about the marriage: need not take place physically / be accompanied by ceremonies – but – there must be a formality indicating this transfer (usually she is delivered by her people to man's dwelling place + specific ceremonies are carried out there)
  Sufficient in some groups for groom to sleep with bride – as long as family groups have agreed on the marriage (no ceremonies need be carried out) = in these cases, guardianship over the woman is transferred because the woman herself does not have to be physically transferred
  Groom need not be present when she's transferred –indicates transfer is indeed to his family group

- <u>Woman may not already be involved in a marital union</u>

  If she is – the later union is null + void

<u>Customary Union –</u>

Inside KZN: Codes of Zulu –

- <u>Consent of bride's father / guardian</u> if she's a minor, which consent may not be unreasonably withheld
  Rights of any person entitlted to marriage goods may not be prejudiced based on the fact that consent of father / guardian of major bride no longer essential

- Consent of bridegroom's father / family head if he's a minor

- Public declaration by bride to the official witnesses that union takes place with her consent

Union must be registered (although non-registration does not render union invalid / null + void)

Lobolo = a separate contract which is supplementary to the union
= not an absolute requirement - no reqs stipulated in the code re *lobolo*
Parties to *lobolo* contract = groom + person entitled to girl's *lobolo*

Outside KZN:

- Consent of bride's father / guardian as a party to the agreement whether bride is minor / not =

  Where father / guardian comes to an agreement with bridegroom re marriage goods – he's also consented to the customary union [*Note: because in modern indigenous law bride's father / guardian is also party to the agmt in addition to the bride + bridegroom, there could be a conflict of interest btw bride + her father, however, bride's father has a material interest in the relationship (claim to lobolo), while bride is a spouse]*

- Consent of bridegrooms' father / guardian if bridegroom is a minor

- Consent of bride

- Consent of bridegroom

- Transfer of bride

- Non-existence of a CL (civil) marriage

- Marriage goods: opposing legal opinions:

  - Bekker: pmt of marriage goods required
  - Olivier: agmt to deliver marriage goods required

  Customs re delivery of marriage goods differ:

  - Some groups would never be able to meet pmt requirement = i.e. *ukutheleka* custom + Sotho group custom that marriage goods be delivered from marriage goods obtained in future for a daughter to be born of the marriage: an express agmt re marriage goods is required

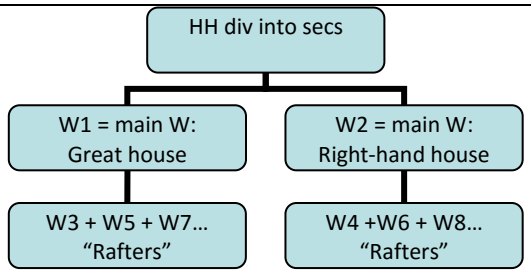
  - Some groups don't specifically enter into an agmt re delivery of marriage goods – quantity + time of delivery are regulated by custom: an express agmt re marriage goods is not required

CONSEQUENCES OF CUSTOMARY MARRIAGES

General consequences:

- New & separate legal unit: family house, comes into being
- H&W have mutual obligation to live together
- H&W have mutual duty to allow sexual intercourse
- H&W's status changes
- New house estate is established

Personal consequences:

Simple ranking system	Complex ranking system	
Tsonga	**Nguni**	**Other**
Household not divided	Each house forms sep legal unit with own property	Household not divided - each W establishes sep house with own property
Woman whom man marries 1st = main W All other W ranked in order of their marriage		Sotho-Tswana : 1st woman married = main W, unless there's a preferential marriage, then this W becomes main W regardless of order in which she was married Other: main W = W to whose marriage goods man's father contributed + rank of all other W's determined acc to order of marriage
H controls property of group as a whole – when he dies, eldest son of main W controls common property + W's + kids have claim to maintenance from common property	W's rank fixed + cannot be changed unless made publicly with convincing evidence W's rank cannot be lowered Swazi: rank of W's is determined after death of family head Every rafter (aka: igadi W) has her own house estate	
	If H marries seed raiser (SR) (W infertile / died / marriage dissolved) = SR does not establish a new house but forms part of house of woman she substituted – except if main W died / divorced, then SR takes in place in all respects SR's pozi must be made public during marriage ceremony – if not, SR establishes house with sep rank	Seed-raiser = same as Nguni

Relationships btw H&W:

Duties:
H: provide family with subsistence (dwelling area / agricultural land / seed / stock / clothing)
W: care for house / cultivate + prep food
<u>Before RCMA:</u>
TIM: W under guardianship of H
CU (outside KZN): W = minor + under guardianship of H; but enjoyed independence in running her house + a particular claim to *ubulungu* beast (given to mother of a girl by her family group at her marriage - offspring used for her maintenance – remains her personal prop unless marriage dissolved, then it becomes part of prop of her house + she forfeits claim to it (i.e. has a claim to it as long as she remains member of her house)
<u>After RCMA:</u>
W in CM has, on basis of equality with her H + subject to mat prop system governing marriage:

- Full status + capacity (incl. capacity to acquire assets + dispose of them
- Can enter into contracts + litigate
- Any other rights + powers given to her at cust-L

Proprietary consequences:

Control over house property (HP): HP belongs to H & W & kids - all share in it + each has duty to contribute towards it
Controlled by H on behalf of house, but in consultation with W & older kids
H is only person allowed to dispose of HP
CU: Members of house seen as individuals, each with particular rights & powers:

- Children who are majors + earn own living, have an estate sep to house – but must contribute part of their earnings to house
- W has no legal control over house property – but, if H irresponsibly disposes of HP + ignores W's objections she can institute action against him on behalf of her house

CM: W can acquire + dispose of assets; enter into contracts + litigate in court

Relationships btw houses: Prop of every house forms sep unit + one house cannot be enriched at cost of another
Transfer of prop btw houses:
Must be reasonable + for a just cause + family head must consult house members
Examples of instances where transfer of prop is allowable:

- House must repay a debt + doesn't have property to do so;
- Property of one house is used as marriage goods for son from another house – daughter from other house appointed as source from which debt is to be repaid = marriage goods received for daughter must be used to repay the debt;
- House property is used to marry a subordinate wife – such wife is usually affiliated to house that supplied property (custom is known as *ukwethula*)

Debt relationship created btw the 2 houses which must be repaid
Death of family head does not extinguish his debt
In the past, hous that supplied property could not sue other house in court for repmt (because family head could not simultaneously rep one house as P + other as D – i.e. a household cannot be divided against itself)
However, in modern indig law, woman belonging to house having claim can initiate claim against family head / other house

REFORM ITO RCMA

Marriages concluded before RCMA: S7(1) RCMA: still governed by customary law

Polygynous:

Creation of sep houses with their own house property controlled by husband) retained
Spouses can jointly apply to court for leave to change matrimonial property system governing their marriage = court may grant application if satisfied:

- Sound reasons for proposed change;
- Sufficient written notice for proposed change given to all creditors of spouses; and
- No other person will be prejudiced by proposed change

Court will then order that the mat prop system applicable to marriage(s) will no longer apply + authorizes parties to marriage(s) to enter into written contract to regulate future mat prop system acc to conditions determined by the court

If husband is in more than 1 customary marriage, all persons having sufficient interest in matter (esp. existing spouse(s)) must be joined in proceedings

Monogamous:

Gumede: RCMA declared unconst (as far as it relates to monogamous customary marriages) = all monogamous customary marriages entered into before RCMA are, as from 8 Dec 2008 (date of judgment), in comm of prop + profit + loss btw the spouses. Distinguishing btw customary marriages entered into BEFORE *commencement of Act and* AFTER *was declared unconst = patrimonial conseq of monogamous customary marriages entered into before and after commencement of RCMA are now the same*
Note: above judgment has no bearing on customary marriages terminated by death / divorce before date of judgment

Marriages concluded after RCMA:

Monogamous:
Family estate = in community of prop (unless excluded in ANC) – equal powers to H&W to administer + control joint estate

Polygynous:
Husband must apply to court to approve a written contract which will regulate future mat property system of his marriages – court must:
- If marriage is in comm of prop / subject to accrual system:
  - Terminate mat prop system applicable to marriage; and
  - Effect a div of mat prop
- Ensure equitable distribution of mat prop; and
- Take into account all relevant circumstances of the family groups which would be affected if application granted

Court may:
- Allow further amendments to terms of contract;
- Grant order subject to any condition it deems just; or
- Refuse applic if, in its opinion, interests of any party involved wouldn't be sufficiently safeguarded by proposed contract

All persons having sufficient interest in matter (esp. existing spouse(s)) must be joined in proceedings
If court grants applic – registrar must furnish each spouse with an order of court together with certified copy of contract + registrar must send the order + certified copy of contract to each registrar of deeds of are in which court's situated
RCMA silent about consequences if there's no approved contract = suggested that this should lead to nullity of marriage – H's competence to enter into further customary marriages must be seen as dependent on court's approval (so as to protect interests of wives + their family groups) = detrimental for woman in supposed marriage (many are unaware of provisions of RCMA + regard church ceremonies as sufficient)

Note:
Indicated by RCMA that only 1 mat prop system is applicable for ALL marriages + that the only possible option is total div of assets = very unfair towards wives who don't have opp of building up their own estates
Court has power to make equitable order it deems just in a divorce action

DISSOLUTION OF CUSTOMARY MARRIAGES

Ways of dissolution:

COURT ACTION:

TIM	CU	CM
Only if parties (spouses + their respective families) couldn't agree on consequences of dissolution (esp. ito disposal of marriage goods)	KZN: MUST be dissolved by *a competent court* Outside KZN: parties may approach court to decide on return of marriage goods (*lobolo*) + in doing so, indirectly dissolve CU	Regardless of where spouses reside, court is the only competent authority to dissolve CM ("court" = family court / competent div of HC / divorce court)
	Instituted by H against W's father for return of marriage goods; or Instituted by W + her father for dissolution of marriage + declaration of forfeiture of marriage goods = implies court can dissolve CU by way of a decision (W's father cannot institute action as sole claimant)	
	Codes of Zulu Law provides wife in KZN can institute action for dissolution w/o assistance of her father	

W/O INTERFERENCE OF THE COURT:

Original indigenous law: TIM dissolved by family groups concerned

Modern indigenous law: CU outside KZN can be dissolved in foll ways:

- Mutual agreement + agreement usually provides for consequences (no particular grounds need exist);
- H's initiative (with / w/o good reason); or
- W + her father's initiative (with or w/o good reason)

H / W'S DEATH:

TIM	CU	CM
Did not dissolve as a matter of course – relative was substituted for deceased	Death of wife: Terminates union – substitution is also possible House of deceased continues to exist If she hasn't given birth to a son – husband may marry a seed-raiser Death of husband: Does not terminate union "Widow" remains wife in household Male relative (sometimes a non-relative) can pro-create children for deceased with wife (if she's still able to bear children) – aka: "ukungena" Codes of Zulu Law – H's death dissolves union (ukungena permitted, however, later seed-raising cannot really be regarded as ukungena)	Position unclear – argued that customary law applies since there is no explicit amendment of customary law (i.e. death of spouses does not terminate the union)

Grounds for dissolution:

TIM	CU	CM
• Non-fulfillment by **wife of child-bearing** duties • Failure to **deliver marriage goods** • V**iolation of conjugal fidelity** by wife, amounting to repudiation • Wife preventing husband from taking action against her **adulterous lover** • Single act of **incest** by wife • **Premarital pregnancy** concealed from husband • Neglect of mutual **marriage duties,** incl. sexual intercourse • Expulsion of wife by husband – directly / indirectly • **Desertion** by wife with persistent, unfounded refusal to return • **Accusations of witchcraft** by husband = sufficient reason for wife to leave her husband • **Impotence** of husband (substitution possible)	**Outside KZN:** recognized by courts (except indig courts): • **Adultery**, if it amts to repudiation / renders union impossible – Concealment of ID / protection of adulterer; continued adultery & incest = aggravating circumstances & not sep grounds for divorce • **Pregnancy** during marriage due to secret pre-marital intercourse with another man • **Desertion** by wife • Refusal to have **sex** **In KZN (Codes of Zulu Law):** grounds for both husband & wife: • **Adultery** • Continued refusal of **conjugal rights** • Willful **desertion** • Continued **gross misconduct** • **Imprisonment** of at least 5yrs • Living together is **insupportable & dangerous** – i.e. Gross cruelty / ill-treatment / r serious allegations like witchcraft	**Irretrievable breakdown:** Views of spouses & wider family groups considered Question of fact: in light of all available evidence, is there a reasonable prospect that parties will be able to restore a normal marriage relationship btw themselves? Divorce Act (which applies to CM's) – court may accept as proof – • Parties continuously lived apart for at least 1yr immed before date of instituting divorce action • Defendant committed adultery & plaintiff finds this irreconcilable • Defendant declared habitual criminal ito sentence of court & is in prison as a result Court's discretion is limited – if parties agree marriage has broken down & ought to be dissolved & that D will not challenge P's allegation of irretrievable breakdown, court has to accept P's unchallenged evidence & grant divorce (i.e. = an option provided there's consensus btw the parties)

EFFECT OF DISSOLUTION ON MARRIAGE GOODS

Generally, goods are returned to husband OR forfeited by husband in favour of wife's group.

<u>Sometimes goods are returned in part only by taking foll factors into account –</u>

Amount of blame on either side

- **Wife is to blame:** marriage goods are usually returned
- **Husband is to blame:** marriage goods not returned (customarily 1 beast is returned to husband as concrete proof that marriage dissolved)

Number of children born

Wife's group allowed 1 beast as a deduction for every child born (incl. miscarried children)

If wife had more children than no. of marriage beasts – at least 1 beast must be returned to husband as concrete proof that marriage dissolved

Portion of marriage goods already delivered

Court may be approached for a decision if the parties fail to reach mutual agreement

CONSEQUENCES OF DISSOLUTION

Husband & wife:

Polygynous nature = husband's status not seriously affected

Wife's position changes drastically = divorced woman & no longer under guardianship of husband

- TIM: reverts to being under guardianship of her agnatic group of birth
- CU: reverts to guardianship of her father / his successor, unless she's older than 21 (i.e. a major)
- CM: becomes a major when she marries and remains a major on dissolution of her marriage

Children:

TIM	CU	CM
Remain members of house – infants can accompany mother to her people, but must return to father's home when older - **Father has absolute right to custody & guardianship** + Mother has no parental rights to custody / guardianship because she's not party to lobolo contract **If wife institutes action** – must prove father not fit & propert person due to ill-treatment / neglect / inability to care for kids **If husband institutes action** for custody – must prove wife not fit & proiper caregiver & lives in unsuitable conditions which endanger child's physical / moral wellbeing However – court & Const adapted above by emphasizing best interests of child as decisive + Guardianship Act grants equal powers of guardianship to both parents (Court considers effect on ancestral connection for children if custody given to someone other than father's family (i.e. rituals are performed on behalf of child by paternal family to ensure child remains connected with ancestors)	**Codes of Zulu Law**: under **guardianship of husband**, but court can make an order re custody & maintenance	IF **lobolo obligations** fulfilled, **husband & his family are entitled** to any children born of wife, but court can make an order re custody / guardianship of any minor child when granting decree for dissolution of CM Court takes into account any provision / arrangement made ito CL when making order re pmt of maintenance

Proprietary:

TIM: wife lost all rights & powers re house property + could not even claim to be maintained from it

RCMA provides for maintenance & matrimonial estate sharing + specifies that court has powers re allocation of assets & benefits of marriage when granting decree for dissolution of CM

Court must make an equitable order re polygynous marriages & consider factors such as contracts / agmts / court order / expectations & liabilities re marriage goods (esp. when deciding assets of estate to be divided)

Court may also order any person who in court's opinion has sufficient interest be joined in procedings

Divorce Act provides that no person ought to benefit financially from marriage he / she caused to fail – spouse loses claim he/she has to assets of other spouse

CL provides for "forfeiture of benefits" = divorce is effected by abandonment of wife & her family or by husband & his family of all their respective rights in the marriage = court order ito Divorce Act for forfeiture of patrimonial benefits of CM is in line with customary practice

Civil Marriages

RCMA provides:
No spouse in a CM can conclude a civil marriage during existence of CM, unless spouses conclude civil marriage with each other & as long as neither spouse is in an existing CM with another person (a civil marriage that contravenes these provisions will be void)
If spouses in CM later conclude civil marriage with each other, marriage will be in community of prop, unless excluded by ANC

RCMA is silent re consequences of converting CM to civil marriage – most acceptable view = CM will be terminated on date civil marriage concluded, but termination is not retrospective – CL rules apply to CM & its consequences until civil marriage concluded & thereafter rules applicable to civil marriages apply

CUSTOMARY LAW OF PROPERTY: CUSTOMARY LAW OF THINGS

RIGHTS RE PROPERTY –

General property:
- Belongs to household as a whole, controlled by family head on their behalf & in interests of group
- Each member of household shares in it acc to his status within the group
- When family head dies – control passes to his general successor – result = successor becomes an heir to exclusion of other members & is responsible for use of such property
- Includes:
  - Property of family head's mother's house to which he has succeeded;
  - Property eared by family head by his occupation; and
  - Land allocated to family head by tribal authority which has not been allotted to a particular house

House property:
- Accrues & belongs to a specific house, consisting of wife & her children & used for benefit of that house
- Controlled by husband as head of house – morally (not legally) obliged to consult wife & house successor (if already an adult) when disposing house property
- Wife & children have special interest in / rights to such property – at dissolution of marriage, such rights / interests do not terminate (they continue to reside in the house)
- Wife has reasonable degree of control over house property ito daily household affairs
- When property from 1 house is used to benefit another, debt relationship is created btw houses concerned & debt must be repaid (no action for repmt can be instituted in an indigenous court)
- Wife can protect house property from husband's prodigality by calling on husband's agnatic group / applying to magistrate
- When husband dies – control passes to house successor (usually wife's eldest son) – note: successor does NOT become owner of property as an individual to exclusion of other members of house
- Includes:
  - Earnings of family members;
  - Livestock allocated to a house from general property;
  - Property given to woman on her marriage, i.e. utensils;
  - Marriage goods received from daughters of the house;
  - Yields from fields belonging to house; and
  - Land allocated to house for dwelling & cultivation

Personal / Individual property:

- Belongs to a person who has acquired it, although it may be under control of family head
- Originally unknown in CL = rights in personal things (i.e. clothing, necklaces & weapons) vested in group – indiv couldn't deal with it as they please – rather, he had to always consult with the other members of the agnatic group
- Modern CL acknowledges individual ownership – individual is morally (not legally) obliged to consult family head in using such property, but may dispose of the property as he/she desires

METHODS OF <u>ACQUIRING</u> PROPERTY –

Allotment *(aka: allocation)*:

<u>Land:</u>

Traditionally allocated by traditional authority to family heads who in turn allocated it to constituent family houses = debate began re women's rights in property: however, among African people of SA, married women have always been allotted land, as part of house property, to cultivate & reside on (generally, whatever land has been allotted to her husband belongs to her house & has to be used exclusively for the benefit of such house.

Nowadays: allocated to unmarried & divorced women as well & woman now also have complete control over such land in the same way as men
RCMA states that despite rules of CL, age of majority of a person is determined in acc with Age of Majority Act = unmarried women have same rights re communal land

<u>Other property:</u>

Any kind of property can be allotted to a person ito CL

Property given to wife is allotted to her house & becomes part of house property – she does not obtain control over the property, but it cannot be used w/o her consent / authorization = she is the owner

Inheritance (see below re succession, etc)

Marriage (as discussed herein)

Other methods, i.e. original methods: appropriation, manufacture, cultivation & breeding; and derivative methods: transfer

CUSTOMARY LAW OF SUCCESSION & INHERITENCE

INHERITENCE	SUCCESSION
Deceased assets are divided among his heirs ito of a will (testate succession) or CL (intestate succession)	No division of property Successor takes place of deceased & gains control over property & people over which deceased controlled Acc to rules of customary law (i.e. intestate)
Liabilities are set off against assets & balance is divided – if liab exceed asset, heirs inherit nothing	Successor succeeds to asses AND liabilities of estate – if liab exceed assets, successor succeeds to these as well

SUCCESSION:

Deals with continuation of status and control of people & property; Succession to status positions takes place ONLY when family head dies – death of other members of family does not give rise to succession to their statuses

- Original CL: related solely to states / Modern CL: acknowledges individual inheritance of property
- Original: no total disposition of property by a will / Modern: can dispose assets by a will
- Distinction made btw general and special / house succession
- Original: successor succeeded to deceased's assets & liabilities / Modern: Differs btw groups – i.e. KZN – successor succeeds to assets of estate and ONLY debts re marriage contracts; rest of RSA – successor succeeds to assets AND all debts of predecessor
- Succession in status is limited largely to males (esp. those of patrilineage)
- Follows principle of primogeniture (man is succeeded by his firstborn son)
- Duty that cannot be relinquished / ceded
- Male descendents enjoy pref over male ascendants (ansestors); male ascendants enjoy pref over collateral male relatives (in lateral line, i.e. brothers & sisters)
- Disposal among living is possible, provided usual formalities are complied with
- Successor may be removed from line of succession ("disinherited") on good grounds

GENERAL ORDER OF SUCCESSION:

Principles taken into account: succession on death; primogeniture; and succession by males in male line of descent.

<u>Succession in a monogamous household</u> –

- When a male dies, his **eldest son**, or, if he's deceased, his eldest son inherits
- If eldest son died w/o male descendants, the **second son** / his male descendants succeed, in their order of birth
- If deceased died w/o male descendants, deceased's **father** succeeds
- If deceased survives all male descendants & his father – his elder **brother** / his male descendant's (acc to order of the houses) succeed (i.e. this is how all brothers of deceased & their male descendants are considered ito succession)
- If deceased's father / brothers have no male descendants to succeed, **grandfather** / his male descendant's (acc to seniority) succeed
- Thereafter deceased **great-grandfather** and his male descendants are considered
- If there are no male descendants (very unlikely) – **traditional leader** of deceased's traditional authority succeeds
- If there's no traditional leader – **President** succeeds as supreme chief

<u>Succession in a polygynous household</u> –

Household is NOT divided into sections	Household is divided into sections
Eldest son in that particular house succeeds If he's deceased, all his male descendants are considered and thereafter his younger brothers & their descendants If the particular house has no male descendant – successor is obtained from house next in rank	If there's no male within a particular section who can succeed, the senior male in the other section succeeds in the section that does not have a successor

Order of succession among male children (in order of preference):

- Legitimate son fathered by deceased himself
- Married man's illegitimate son with an unmarried / divorced woman for whom maintenance was paid
- Sons born out of an *ukungena* relationship
- Adopted children / children born from an adulterous relationship with the wife (unless repudiated) according to chronological order in which they became attached to late husband's family. *Note: adopted child is excluded by a legitimate child. Zulu & Swazi groups don't recognize adoption*
- Sons of wife of deceased not born from *ukungena* relationship
- Premarital son of unmarried woman / extramarital son of divorced woman for which no *isondlo* has been paid (this is an example of succession through a woman since such children are regarded to belong to family of their mother & not to family of deceased – such a son can succeed through his mother only if deceased has no other male relatives

Note: Bhe case (see details below): extended Intestate Succession Act to all persons, including those who adhere to customary law = no distinction will in future be made btw legitimate & illegitimate children or between men & women

GENERAL AND SPECIAL SUCCESSION

General successor	Special successor
Control over household & property of general estate belonging to agnatic group as a whole	Control over the house & house property
Control over all the various houses & is the successor to the main house – visa versa – successor to main house is usually also general successor	Control over the house property & members of the relative house, exercised in consultation with adult house members
If household is divided into sections – successor to main house of main section is also general successor	There are as many house successors as there are houses in a household
Senior family members form a family council which exercises control over constituent agnatic group & its independent houses (i.e. disciplines family head if he wastes general property / neglects duties towards his family)	

After death of family head, each house forms a potentially independent unit from which a new household may emerge –general successor obtains overall control over all the houses, maintaining the original unity.

Refer to diagram on pg 117 of SG

POWERS & DUTIES OF SUCCESSOR

Original IL: Universal nature = successor acquired benefits (powers) AND duties when family head died

- General successor: acted in place of deceased & acquired control over gen property & responsible for general debts of household, collecting outstanding debts, performing family rituals on behalf of family members (in this case he relied on property of gen estate) – powers & duties re house he succeeded were same as those of other house successors
- House successors in proportion to rank of each house – each house successor was independent over affairs of his house, including duties such as: care & support for members of house, ensuring debts were paid & collected, provision of marriage goods for sons and wedding outfits of daughters

Modern IL:

- <u>KZN</u> = successor liable only for debts equivalent to assets of estate, BUT fully liable for *lobolo* debts contracted with another house to establish its own house (i.e. inter-house loans)
- <u>Outside KZN</u> = universal succession = still liable for debts, even if there's not enough assets

Generally: successor is also liable for **delicts** of deceased (except Mpondo) however, if action was instituted before death of deceased / deceased accepted liability during his lifetime, liability limited to extent of estate

DISPOSITION *INTER VIVOS*

Family head could, during his lifetime, make allotments from general property which would remain valid after his death, such as:

- Allotment of property to a specific house or son
- Adoption –influences normal order of succession
- Transferring a younger son from one house to another house that doesn't have a son (such sun succeeds to the latter house)
- Seed-raising
- Allocating daughters to sons in a house so as to provide for marriage goods of these sons – marriage goods received for daughter are then used as marriage goods for wife of one of the sons
- Ukungena (procreation of successor for deceased man by his widows)

Above dispositions must be accompanied by formalities & done in consultation with wider family group

Family head (and apparently other members of group) can dispose of personal property through a customary will done in a formal manner

STATUTORY REGULATION OF CL OF INHERITANCE IN SA

Testamentary dispositions:

Original IL did not recognize total disposition of property by means of a will because rights & duties were held by agnatic group and individual could not be bearer of rights & dispose property

Modern IL recognizes wills and S23 of Black Administration Act (BAA) regulated succession among indigenous Africans in that it provided:

- All moveable property allocated to a house or a wife in a customary marriage is inherited acc to rules of original indigenous law and cannot be bequeathed by means of a will;
- Estate of black that's totally / partially bequeathed by a will must be administered ito Administration of Estates Act;
- Land (immovable prop) must pass to one male person, determined in acc with tables of succession
- Persons who contracted a civil marriage (but never a customary marriage); and unmarried persons (as long as they held individual rights) can dispose of their whole estate by means of a will

Note: S23 was found unconst & invalid by *Bhe* case and repealed with far-reaching implications

Intestate Inheritance:

S23 of BAA stipulated that:

- Estate of black who died w/o a valid will devolved acc to rules contained in Government Notice (GN) 1987
- Master of HC has no powers re administration of intestate estate of deceased African – estate must be administered ito GN 1987 by local Mag of are where deceased lived

***Moseneke* case:**
S23 differentiated on race, ethnic origin & colour and constitutes unfair discrimination & limitations posed therein were not reasonable & justifiable – provisions were therefore held unconst & invalid –
To reach a just & equitable order:

- S23 of BAA is invalid with immediate effect
- *Status quo* re estates already completed ito BAA and GN 1987 should be upheld
- Declaration of invalidity of GN of 1987 (see *Zondi* case below) is suspended for 2 years
- Beneficiaries of intestate estate not governed by CL had a choice to report estate to Master / mag

***Zondi* case:**
GN 1987 unconst - distinguished, for purposes of intestate succession, btw estate of a person who was partner in civil marriage on the one hand; and estate or person who was partner in civil marriage in comm of prop / ANC on the other hand

> *Note: this case is a decision of Natal Provincial Division & is therefore not binding on other provinces – however, CC in Bhe case declared GN 1987 to be unconst and invalid = ALL property may be diposed of by means of a will from 15 Oct 2004 and Intestate Succession Act will be applied to all estates irrespective of race / gender of a deceased*

Changes brought about due to above cases:

1. Administration of Estates Amendment Act (AEAA) and GN 2002 came into operation on 5 Dec 2002:
2. AEAA provided for service points where officials of Dpt of Justice could exercise functions on behalf & under direction of Master; however, customary estates still had to be administered under supervision of mags
3. Estates that fell under BAA & GN 1987 must now be supervised by Master (no longer responsibility of mags)
4. Estates currently being administered ito BAA must be completed as if BAA not declared invalid

Bhe case:
Heard 3 cases concurrently which all concerned customary law of intestate succession
2 main issues:

1. Const validity of s23 of Black Administration Act which prescribed the manner in which estates of deceased blacks should be administered and distributed
2. Const of rule of primogeniture – basis of challenge: precludes widows from inheriting as intestate heirs from their deceased husbands, daughters from inheriting from their deceased fathers, younger son from inheriting from deceased father and extra-marital child from inheriting from natural deceased father

Held: On 15 Oct 2004

- S23 of BAA unconst – discrimination on grounds of race & colour unjustifiable ito Const
- Rule of primogeniture is unconst and invalid – violates equality (gender); infringes women's right to dignity; and against rights of children (in denying extra-marital children right to inherit from their deceased fathers unfairly discriminated against them & infringed their right to dignity as well)

Estates that would previously have developed acc to customary law of intestate succession must now devolve acc to rules provided for in Intestate Succession Act
To protect partners in polygamous customary marriages, Intestate Succession Act expanded to all spouses and children (irrespective of their gender) of a deceased
Declaration of invalidity was made retrospective to 27 April 1994 (this does not apply, however, to any completed transfer of ownership to an heir, unless it's established that when such transfer was effected, the transferee was on notice that the property was subject to a legal challenge of statutory provisions & customary rule of primogeniture
African customary law of intestate succession & inheritance has, for centuries, been underpinned by male domination & gross discrimination against women & children – Bhe case finally bring customary law of intestate succession into line with values enshrined in Const & eliminates gender & birth inconsistencies prevalent with this system of law

THE ADMINISTRATION OF INDIGENOUS ESTATES

Testate estates	Intestate estates
Acc to Administration of Estates Act House property & quitrent land are excluded from testamentary disposition	Previously administered ito GN 1987 Bhe case – all estates to be would up after date of judgment (15 Oct 2004) will now be administered acc to Admin of Estates Act Bhe case had no effect on intestate estates of blacks **currently** under administration –provisions of Black Administration Act & GN 1987 will continue to apply

LEGAL REFORM

Repeal of the Black Administration Act and Amendment of Certain Laws Act (RBAAACL) was enacted and passed in 2005 as a result of the Bhe case.

RBAAACL recognizes that BAA must be repealed.

For legal certainty & good governance, RBAAACL could only be implemented incrementally so as to allow legislature sufficient time to effect necessary legislative alternatives:

- S1 repeals numerous sections of BAA which specifically affect customary law of succession
- S2 amends numerous other Acts – it amends Admin of Estates Act by replacing it will a provision that augments jurisdictional powers of Master in matters re –
  - property belonging to a minor, including property of a minor governed by customary law; or
  - property belonging to a person under curatorship / to be placed under curatorship

Reform of Customary Law of Succession and Regulations of Related Matters Act (RCLSRRM) commenced 20 Sept 2010:

- Main purpose is to modify devolution of intestate property re persons who are subject to customary law
- Reiterates that widows & certain children need protection under customary law of succession & social circumstances have changed & customary law of succession does not provide adequate protection for welfare of family members
- Applicable to all intestate estates, irrespective of fact that a person is subject to customary law

Redefines various customary law & traditional CL concepts, such as =

- **"Descendant"** = Person who is a descendant ito Intestate Succession Act; person accepted by deceased as his own child ito customary law; woman from substitute marriage; and women from woman to woman marriage

- **"Spouse"** = partner in a customary marriage that's recognized ito RCMA

- **"Freedom of testation"** = recognizes persons freedom to make testamentary provisions re his assets; gives women living under cust law right to dispose of property allotted to her & house property by means of a will; makes it clear that customary estate can be devolved ito a will; "descendant" for the purpose of interpreting a will / intestate estate of a woman = in her case the terms "children" in her will or "descendant" in Intestate Succession Act have to be interpreted to include:
  - Child born of union btw husband of such a woman & another woman entered into in acc with customary law for purpose of providing children for first-mentioned woman's house; and
  - Child born to a woman to whom first-mentioned woman was married under customary law for purpose of providing children for first-mentioned woman's house

CUSTOMARY COURT PROCEDURE & EVIDENCE

AFRICAN CUSTOMARY PROCESS OF NEGOTIATION RE DISPUTES

Settlement of disputes within family groups:

Head of family group (related agnatic groups of at most 3 generations) responsible for conduct of its members & has to see to it that disputes among its members are settled – correct procedure = negotiation with a view to reconciliation

Settled by head with assistance of **adult members** of family:

Dispute is usually reported by mother / snr. Female figure – if she thinks people involved in dispute cannot settle dispute, matter is reported to head of family (HOF) – HOF then arranges a meeting (mostly indoors since it's regarded as a pvt matter) with adult members of family to discuss matter with people involved in dispute

If matter cannot be settled within family circle –

Snr relatives outside family are invited to help – if matter also cannot be setttled within this circle, assistance of direct **neighbours** (often not relatives of family) are called in *(note: urban areas – neighbours virtually always invited to help, since relatives do not live close by and are not readily available):*

During meeting, matter is discussed thoroughly & openly – object = ways of reconciling parties involved in dispute with each other – strong emphasis on **restoring relations** btw those involved in dispute & between them and other people present (women generally also take part in these discussions – sometimes procedure is conducted by a senior sister of head of family)

Meeting finds a solution:

Wrongdoer reprimanded & required to "wash the wrong" = slaughter chicken / goat (these days even tea & biscuits) & cook it & eat it during meal shared by those present in meeting – meal symbolizes that relations have been restored & disputing parties & family group have reconciled

Parties concerned do not accept proposed solution:

Dispute gets taken to local headman (head of lowest customary court and he may settle disputes btw inhabitants of that particular ward) – parties concerned must be assisted by their relatives, but relatives often don't wish to give such assistance, in such circumstances, headman serves first as a mediator before he makes a formal judicial decision

Settlement of disputes between non-related family groups:

People involved in dispute first try settle it among themselves by negotiation – if this fails – matter taken to headman's court – headman then acts as mediator

Disputes that develop btw husband & wife	**Disputes that develop btw other non-related family groups**
Marital relationship brings about special relationship btw their family groups	Dispute can't be taken directly to court – if it is & wrongdoer found guilty, court reprimands wrongdoer's group for not wishing to come to a reconciliation
First: matter discussed within husband's family circle	Aggrieved discusses matter within his family group – if agreed wrong was done, matter reported to family group of wrongdoer
If no solution is found – wife's family is invited to help	Wronged group sends 2 / more members (and sometimes neighbour) to report matter (aka: "throwing a kierie") & complaint is heard, but not acted upon
If no solution can be agreed – marital relationship can be terminated w/o headman	Wrongdoer's group meets to investigate & discuss complaint – if clear wrong done it sends reps (can include a neighbour) to wronged party to offer apologies may bring goods to compensate for dmgs - if apology & dmgs accepted, matter is solved
If negotiations bring about reconciliation – reconciliatory meal must be offered by party at fault	If there's no reaction from wrongdoer's group – aggrieved group will throw the keirie after some time elapses & ask "where have you buried us" (aka: "why u ignoring us") – process is repeated 4 times before matter taken to court
	If there are negotiations btw family groups, but groups cannot come to agreement – headman invited to help & acts as mediator

Note: at any stage during process of negotiation / mediation parties come to an agreement, reconciliatory meal is held as a visible & concrete way of announcing that relations & harmony btw parties & with broader community have been restored

Today, in both rural & urban areas, the local residential group takes place of extended family groups & neighbours also play larger part in negotiation – in urban areas, where there's sometimes many "strangers" living close to one another, disputes are often, if not treated the traditional way, reported to police / church groups or civics

AFRICAN CUSTOMARY COURT PROCEDURE

Headman's court	**Chief's court**
Lowest court	• Formally recognized by legislation
	• Not a court of record
	• Criminal Procedure Act – neither higher or lower court
	• African customary law – senior / highest court
Trial procedure and procedure for civil & criminal actions are the same in both courts	

Criminal action	Civil action
Complainant / Accused	Plaintiff / Defendant
Instituted by traditional authority against offender – if found guilty, offender is punished in the form of a fine (used to also be in the form of corporal punishment) (i.e. murder / contempt of the ruler)	Instituted where agnatic groups rights & powers infringed (i.e. adultery / damage to property) – court may order reparation of damage (i.e. pmt of compensation)

If an act gives rise to both criminal & civil action (i.e. assault & theft) – both will be dealt with in same hearing & court may impose punishment & award damages to harmed party

LODGEMENT PROCEDURE

Criminal case	**Civil Case**
Agnatic group of harmed person reports case to local headman (in exceptional cases complaint may be lodged directly with chief's court)	If negotiations btw plaintiff & defendant's agnatic groups – P's group reported matter to their headman
Headman investigates matter & reports to chief - If complaint is founded – chief sets date for trial & parties concerned are notified accordingly	If D & P live in same ward – headman sets date of trial & notifies D If D & P don't live in same ward – P's headman sends P's group with reps of ward to headman of D to report matter – headman of D sets a date (case is tried in court of D's headman)
Each party must ensure its witnesses are present on day of trial. Customary procedure applies in so far as it is not in conflict with public pol & natural justice (it was therefore decided in HC that person may not be sentenced in his absence & chief may not administer justice in a case in which he himself is the complainant)	On day of hearing: both parties & witnesses must be present – case may not be heard in absence of one of parties – if party cannot be present & offered apologies BEFORE proceedings – case is postponed – if party absent w/o excuse, case postponed and party warned to be present when case heard again – if absent w/o an excuse for a second time – he's brought to court by messengers & may be punished for contempt of court *Note: ITO statutory court rules – case may be heard in chief's court in absence of a party ("judgment by default") – but in such a case, party may not be punished for contempt of court as well*
	If a party is not satisfied with decision of headman's court – he may ask case to be referred to chief's court: dissatisfied party & a rep of headman's court report case to chief's court – person at chief's court "receives" case & sets date for trial on chief's behalf (procedure in chief's court is same as in headman's court)

TRIAL PROCEDURE

- Onus = accused must prove his innocence in court
- Held in public – open to members of public & may be attended by any adult person, even strangers & anyone can pose questions & submit info
- All parties must be present – judgment by default is unknown

- Legal rep unknown – however, every person, no matter his age / sex is assisted by relative

- Each party must ensure that its witnesses are present – witnesses may not be related to parties concerned

- Proceedings used to be conducted orally only, with no written record – today, however, all chiefs courts keep record containing basic info & legislation also requires judgment of chief's court to be registered – case must be recorded in quadruplicate straight after judgment & must contain names of parties, particulars of case & judgment& must be signed by / on behalf of chief & 2 members of court – original report must be handed in at local mag court for registration & each party is given a copy

- If judgment of chief's court is not registered within 2 months – it lapses & parties are in same pozi as they would've been had judgment not been given & judgment cannot be implemented / taken on appeal / review
  Bhengu: court rules place administrative duty on chief to submit written judgment for registration – failure = liability for costs incurred by party to implement the judgment / dmgs suffered by 3rd party because of such failure

- Chief = judge-in-council (guided by opinions & advice of those present, esp. council members (judgment is usually a synopsis of consensus opinion of those present)

- Formal, but follow specific pattern & take place in an orderly manner:
  - P states side of matter & replies of D & Q's are asked by council members & those present to clear up ambiguities
  - Evidence of witnesses of P – witnesses are questioned by those present
  - Evidence of witnesses of D heard & questioned & P & D may give further explanations / question each other
  - Matter discussed by those present, followed by views on facts
  - Judgment given – usually a consensus judgment is considered ideal & often matter discussed until council members reach consensus

- Persons who misbehave are called to order & receive a warning – if they continue, they may be removed from courtroom & fined summarily for contempt of court

- Nobody is judge in his own case – case involving a ward headman is heard by another headman / referred to chief – case involving chief is heard by snr relative of chief & his father's brother
- Inquisitorial = court's duty to try establish truth by questioning & cross-examination (no evidence is excluded)

- Parties & their witnesses are given ample opp to submit evidence to court – court must be satisfied there's enough evidence to substantiate facts of case

- Court competent to hold in situ (where offence took place) investigations + court may even make use of extrajudicial methods of proof – i.e. pointing out by a diviner = "time cannot stand in the place of truth"

<u>When hearing a civil case:</u>

- D may not institute counter-claim & ask that his liability toward P be removed – applicable maxims: "one debt is not heard by another"; "one debt is not settled by another" & "person cannot pay attention to 2 matters at same time

- Former times: asylum was unknown = person affected by court order could escape punishment by fleeing to i.e. house of chief's mother / house of tribal wife

- Mendacity (telling lies) not punishable, but liar's evidence considered less reliable

- No oath taken by parties / their witnesses

- Perjury (willfully giving false evidence under oath) is unknown & not punishable

- Prescription of debt claim is unknown – P is however compelled to submit claim w/o delay because: delay may make it more difficult for P to prove facts because witnesses move or die; P may lose action if he dies before action instituted – if action already instituted & he dies, action passes to his successor; P may harm the other party through his delay – i.e. he may be denied opp to examine facts in good time / NB witness may die / leave the area = if P waits too long to institute action – court may refuse to hear the case because damage / facts can no longer be established with certainty (i.e. not because of prescription)

- If action is instituted it may be postponed indefinitely – even years, until i.e. accused has returned to area, etc.

AFRICAN CUSTOMARY LAW & THE COURTS

Aggrieved party can choose whether to institute action in:
- Court of traditional leaders; OR
- Magistrate's court; OR
- Small claims court

<u>If instituted in court of traditional leader:</u> Right of appeal to local mag's court and from there to HC and from there to SCA

<u>If instituted in small claims court:</u> No right of appeal to mag's court

<u>If African customary law which is in dispute is in conflict with BOR:</u> matter must be referred to SCA or CC

African Customary Law & the MC

Constitution: Courts must apply customary law:
- When that law is applicable;
- Subject to the Const; and
- Subject to any law that specifically deals with customary law

"Creatures of statute" = can only exercise jurisdiction specifically conferred on them – i.e. they may not:
- Make custody awards (custody disputes must be heard in HC);
- Claims that exceeds amt of it's jurisd (such claims must be heard in HC)

Regulated by Law of Evidence Amendment Act = MC acts in 2 capacities:
1. Court of first instance
2. Court of appeal – matter first instituted in court of traditional leader & is then taken to MC on appeal

If value of claim / subject of matter in dispute before traditional leader is less than R10, it cannot lie for appeal unless mag has, after summary inquiry, certified that an NB principle of law is involved –

R10 is ridiculously low – however – limiting any amt is out of sync with nature & purpose of courts of traditional leaders – their aim is to reconcile conflicting parties & to settle disputes – value of claim is not the predominant factor

If there's an appeal against decision of traditional leader, MC can confirm, alter / set aside judgment + this will be deemed to be a decision of a MC for all purposes

MC has no power to review *decision* of court of traditional leader which has been appealed against, but it has the power to review an *administrative* act of a traditional leader

Traditional leader must furnish his reasons for judgment in person or by deputy – his reason becomes part of record – if he fails to furnish reasons, mag may order him to do so and may even dispense with such reasons

***Zwane**: on appeal, court considers:*

- *Specific claim in lower court;*
- *Judgment based on that claim;*
- *Traditional leader's reason for judgment; and*
- *Evidence recorded by court of appeal upon which a fresh judgment must be given*

Court cannot change cause of action, but supplies recording of evidence that's lacking in lower court

- If case instituted in MC as court of first instance – mag can choose whether to apply CL or Afric Cust Law
- If MC hears an appeal from court of traditional leader – mag must apply Afric Cust Law (this is because court of traditional leader can only apply Afric Cust Law) & this rule applies regardless of whether the legal fact is found in CL or Afric Cust Law

As court of appeal in criminal matters:

- Any person convicted by traditional leader may appeal to MC in whose are trial took place
- In hearing appeal, mag must hear & record available evidence that's relevant & may thereupon confirm / set aside / vary conviction & sentence / give such judgment as he thinks traditional leader should have given in the first instance

<u>Procedure on appeal:</u>

Appellant must, within 30d from date of pronouncement of judgment, in person, give notice of appeal to:

- Traditional leader who delivered judgment;
- Respondent / complainant; and
- Clerk of MC

Appeal conducted & tried as if it were a criminal trial – except that appellant not called upon to plead to charge

In giving judgment, court does not convict / aquit appellant – but rather, court confirms / invalidates or varies conviction & sentence, as it thinks just

If appellant fails to appear, court can postpone hearing or dismiss appeal

<u>Concurrent jurisdiction</u> = jurisd of MC as court of first instance and jurisd of court of traditional leader sometimes overlap re a person / cause of action / area

It has been held that while proceedings are under way in one court – same action should not be instituted in another court – however, there is no RULE which actually prohibits this & as such, there's not certainty on whether principles such as: an objection that same case is pending in another court and/or a matter has already been decided and is closed may be applied in these circumstances

2 undesirable consequences of concurrent jurisdiction =

1. Party can choose his own settlement forum: P can use a court which will provide him with most effective remedy, regardless of what prejudice it may cause D

2. Possible that action instituted in wrong court may have to be transferred to correct forum = loss of time & money (most legal systems leave it to clerk of court to decide in which court of law the action should be instituted

African Customary Law & the Small-claims Court:

Any court may take judicial notice of customary law = SCC entitled to adjudicate in disputes arising from customary law

Restricted to hearing small claims not exceeding amt determined by Minister in GG (currently R3K)
Matters that are specifically excluded:

- Dissolution of African Customary Law marriages
- Actions for damages for seduction; and
- Breach of promise to marry

(All above must be heard in MC = disadvantages of higher costs & more formalities)

Presiding officers = advocates, attorneys / magistrates who act as *commissioBrners*

They are not require to speak Bantu or be proficient in African Customary Law – Sometimes argued that this may constitute a gross irregularity, warranting review by SCA, however – type of person for whom courts designed is unlikely to have time / education / initiative to challenge court's decision

No legal rep permitted (except in the case of minors / persons lacking *locus standi*); general rules of evidence do not apply & questioning of witnesses may be on inquisitorial (court takes active part in investigation) basis

THE COURTS OF TRADITIONAL LEADERS

Traditional leaders are empowered to adjudicate civil & criminal cases granted to them by the Minister – if they impose a criminal penalty w/o having the authority to do so they fall foul of criminal prescription of CL & can be held liable for any consequences which arise as a result

Constitutionality:

<u>Unfair discrimination on non-blacks? NO</u>
Only blacks have access to courts of traditional leaders = general practice to limit institutions of particular culture to members of that cultural group

- *Brown case: Australian HC found an Act which discriminated on racial grounds valid because it was a "special measure" to protect the cultural group concerned*
  - Reservation of special courts for use by blacks is a reasonable & justifiable limitation on law against discrimination
  - African customary courts can be seen as a special measure because they function for benefit of blacks who don't have access to MC's / SCA due to financial & educational reasons and most NB, provide blacks with a forum that's in harmony with their cultural expectations

<u>Unfair discrimination on blacks? NO</u>
Blacks have a choice as to which court to institute their action = ONLY if they were COMPELLED to institute their cases in this court in the first instance would it constitute unfair discrimination

African customary courts	*Other courts*
Can only apply African customary law	Can apply African customary law AND CL
No legal representation allowed	Legal representation allowed

Above differences are in agmt with a particular cultural orientation & traditional method of admin of justice is very similar to that of other courts

JURISDICTION

Civil matters	Criminal matters
Recognised / appointed traditional leader (or his deputy) empowered by Minister to hear & decide on claims constitutes a court & his finding is binding & becomes a case decided & closed – subject to right of appeal to MC - Minister can revoke this power at any time	Minister can empower traditional leaders (or their deputies) to try criminal offences Minister can revoke this power at any time
Matters they can hear:	
May hear & decide cases which: • Result from African customary law; and • Are instituted by blacks against blacks who reside within his are of jurisdiction – "Reside" = *Ex parte Minister of Native Affairs:* *Issue is place of residence and NOT domicilium* *Person can be domiciled in one place & temp reside in another place* *Person can have + 1 place of residence, but can live only in 1 place at a time – person must prove where he resided when summons was SERVED* There must be evidence that there are good grounds to regard such place as person's regular residence @ time summons served	Competent to hear: • Crimes in acc with CL; • Crimes in acc with African customary law; and • Statutory crimes to extent prescribed by Minister Crime must be committed btw blacks in area under trad leaders control (extent of power is connected to residence, NOT group membership) (he may only punish a non-black for contempt of his court) Third Schedule of Black Administration Amendment Act contains 35 offences which are excluded from traditional leader's jurisdiction
Matters they cannot hear:	
May not decide on cases re nullity / divorce / separation re civil marriage btw blacks <u>Lobolo</u>: *Gqada: claim re lobolo ito civil marriage = claim which originates from African customary law* Bekker: above decision is questionable because it: It assumes traditional leaders have expert knowledge of gen law of persons re civil marriages & their dissolution; and *lobolo* re civil marriage is a matter distinctive in which African customary law serves only as a *directive* - claim does not *arise* from African customary law Unisa: decision has merit: Dissolution of marriage, at that stage, already decided by divorce court / SCA – *lobolo* issue does not arise from dissolution of a civil marriage	Problems emanating from Third Schedule = Civil & criminal matters are heard in 1 suit – i.e.: • Traditional leader not empowered to hear any matter re arson (ITO CL & African cust law arson is merely a form of malicious damage to property), but may hear dispute re damage to property; OR • Traditional leader not empowered to hear any matter re fraud, but he may hear matter re theft; OR • Traditional leader not empowered to hear matter re kidnapping, but he may hear one re child stealing Unlikely that traditional leaders make such fine distinctions on technical grounds & for example it may happen that traditional leader decides on both delictual and criminal element of a case, although he has no power to do so re the criminal element **Punishment that trad leader may not impose:** • Death / mutilation / grievous bodily harm / prison • Fine > R40 / 2 head of large stock (or 10 head of small) Corporal punishment, except in the case of unmarried males < 30yrs (note: this conflicts fundamental rights)
	Additional way of claiming unpaid fines: If trad leader can't recover fine he can arrest person & in 48hrs bring him before MC to order pmt of fine – if person fails to comply immediately, mag may sentence him to prison for < 3 m & must issue a warrant for person's detention – action = inquiry (NOT retrial) as to whether trad leader empowered to try offence & impose fine & why fine or part of it wasn't paid

Right of appeal:	
Right of appeal against sentence imposed by traditional leader to local MC (court of appeal must certify issue involves NB principle of law if claim is less than R10) – execution of sentence is postponed until appeal decided upon	Accused may appeal sentence to MC which has jurisd in area trial took place: MC can: • Uphold appeal; or • Set aside conviction / sentence; or • Alter conviction *If MC confirms / alters conviction: mag can either confirm sentence / order its immediate satisfaction / set aside sentence & impose other sentence* If person immediately fails to comply with mag's sentence – mag may: Impose prison for < than 3m; or Set aside sentence & in lieu thereof, impose prison for < 3m w/o option of fine When entertaining appeal, court may hear new evidence = more correct to describe hearing as a retrial instead of an appeal – Rules of Court provides there must be written record of proceedings (which must be delivered to local mag in 2m of date of judgment, otherwise judgment lapses), but this doesn't include a record of evidence heard Appeal court may nullify trad leader's judgment if African customary-law wrongly applied to claim arising out of CL – BUT – it may not alter cause of action at will (i.e. it must continue to apply African cust-law on appeal)

African cust law of procedure & rules of evidence apply in both civil & criminal matters

AFRICAN CUST-LAW OF EVIDENCE

Nature:

- Based on customs; reasonableness & effectiveness
- Court's interested in merits of the case – technical grounds for judgment are unknown

Characteristics:

1. Inquisitorial procedure: court plays active part in examining parties & their witnesses to determine "truth"
2. Free system of evidence: no evidence is excluded –it's ALL admissible & judged on its merits by the court

Burden of proof	Evidential burden
Based on principle that party loses case if court doesn't have enough grounds to make a finding on an issue of fact	Based on principle that party must prove its claims in court
Neither party, nor both parties together, have burden of proving their case – court acquires proof by playing an active part in process of questioning so it will be able to give judgment No scientific reasoning – court decides, on merits of evidence, if facts rendered are true – if it's difficult to decide, court may use extrajudicial means of proof – i.e. referring parties to trad leader	Civil: not required to prove issue of fact conclusively – court plays active part in examining parties & in can judge rendering of facts itself – claim is 1st argued by respective family groups & only after no agmt reached - matter referred to headman's court & then parties should know if case is founded / not Criminal: no prosecutor submits evidence on behalf of court – court plays active part in questioning & calling witnesses to give evidence

Measure of proof:

Primary aim = to determine "truth" & reconcile parties, court & community (NOT to prove who is right / wrong)

No case can end in "absolution from the instance" (dismissal of claim because court couldn't decide in favour of a party on evidence submitted by it) –

- measure of balance of probabilities does not apply
- principle that case against accused must be proved beyond reasonable doubt is unknown
- disallowance of P's case before D is heard is unknown
- specific test, such as "reasonable man" unknown = facts & evidence are evaluated within local cultural context

Court plays active part in process of questioning & evaluating evidential material; and
Parties concerned, their witnesses AND any person present in court may submit evidence during trial – thereafter judgment is given after court tested & weighed validity of evidence through process of questioning

Evidential material & means:

Facts in dispute are proved by evidence & questioning = other evidential means include admissions, judicial notice & presumptions

Evidence:

Oral statement made in court by party / witness; voluntarily / in answer to a Q = most NB form of evidential material

Types of evidence:

- <u>Direct:</u>
  Best type of evidence - evidence of person who has seen or heard something directly (i.e. eyewitness) – not enough proof on its own & always considered together with other evidence
  Maquta: D took P's blanket when he court P stealing stuff from his (D's) garden – held that custom of taking article belonging to wrongdoer from scene of crime was not confined to adultery cases only – it could be taken by force from wrongdoer

- <u>Circumstantial:</u>
  Supplements other evidence & evidential material – used as supporting evidence when direct evidence is seldom at hand
  Appeal court – in adultery cases, court would receive evidence of a "catch" – court modified rule re "catch": proof of a catch which has no connection with alleged act of intercourse merely shows intimacy btw wife & alleged adulterer & may be accepted as evidence in support of wife's testimony

- <u>Hearsay:</u>
  Admissible & considered together with other evidence & can serve as guideline for questioning – however, a case relying mainly on hearsay has little chance of success

- <u>Concrete evidential material:</u>
  Strong evidential value – i.e. piece of clothing / injuries on the back: person must explain to court how his property came to be in possession of another / how he was injured / wounded = often decisive evidence when used together with other evidence

- Evidence in previous cases:
  Not decisive because each case decided on its own merits

- Expert evidence:
  In a case re twins in Eastern Cape, a precedent was made re extent to which Xhosas use opinion evidence = a person has to be an "old sage of repute" before he can be regarded as an expert: opinion evidence re degree of physical resemblance of chilled to alleged father was admitted

  Court may itself, via questioning & inspection, produce evidence
  Members of court council can actively take part in questioning to evaluate creditability of persons involved
  Member of court council does not have to withdraw from process just because he was an eyewitness
  Anyone present in court may submit further evidence / query evidence / question parties & their witnesses – after witness given evidence & been questioned, he may be called again at any stage in process to give further explanations on grounds of new evidence –
  Open system of questioning = parties to civil case may conduct their own questioning of other parties & their witnesses – persons' refusal to answer Q leads to conclusion that he's hiding something from the court

Admissions:

Civil:
At stage when case is taken to court of headman, there's already reasonable clarity re facts in dispute & unnecessary for court to ask parties to admit certain facts

Criminal:
Case investigated by accuser's local headman & councilors - if accused:
- Admits to all facts = punished w/o further hearing;
- Admits certain facts, but denies others = facts admitted are accepted as proven

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

Judicial notice:

Court takes notice of known facts w/o proof being submitted – i.e.
- Personal particulars of parties;
- Matters known to members of court by virtue of their position in admin of traditional authority (i.e. where certain places are situated / boundaries of certain area);
- Cultural customs (i.e. person may not enter another person's hut in other person's absence);
- Animal behavior (i.e. cow will not reject calf in suckling stage)

Presumptions:

Assumptions made by court about fact that has not been proven directly by evidence – fact presumed is accepted by court as correct until it's rebutted – i.e.

- Children of married woman are children of her husband;
- Adult is mentally sound until there's evidence to contrary;
- Person doesn't voluntarily entrust pieces of personal clothing to a stranger;
- Person doesn't voluntarily

Extraordinary evidential material:

- In former times – if facts of case were difficult to prove, court would send parties, accompanied by 2 witnesses to an *inyanga* (traditional healer). Today, tribal police are used for this purpose.
- *Inyanga* uses extrajudicial methods (i.e. throwing bones) to determined if accused is guilty & conveys his finding to messengers who then convey it court (*inyanga* himself does not appear in court to give evidence)
- *Inyanga's* finding is accepted as decisive evidence (no further evidence required) & court then gives judgment

Competence to give evidence / testify:

All persons except if insane / intoxicated (case usually postponed to first allow person to get sober) can testify – this includes:
- Child who can remember & relate an incidence / ID persons;
- Co-accused may testify for / against one another;
- Wife can testify for / against husband & husband can testify for / against wife – court weighs evidence carefully (such evidence must usually be confirmed by other evidence)

Chiefs / headman / members of court council may NOT act as witnesses – however, they don't have to withdraw themselves from case merely because they know something about the case – they must convey their evidence to the court *(Note: in former times – chief testified in pvt to chief councilor, who passed this info to the court (i.e. chief was not allowed to testify in public)*

No case is decided by an individual – chief & headman, together with members of court council, decide case – this ensures that the outcome cannot be influenced by a certain individual's prior knowledge of the case

Giving evidence:

- Not given under oath = perjury (willfully giving false evidence under oath) is unknown
- No action taken against party for lying – it merely harms party's case
- Given orally in presence of parties concerned & subject to questioning
- Court may also receive documentary evidence

Each party & all witnesses given full opportunity to testify at their discretion w/o interruption – court patiently listens to evidence & seldom reprimand's person to limit evidence strictly to case in hand – however, if a person states case in very long-winded manner, he will be asked to come to the point & if he doesn't – it can harm his case

Court determines evidence with due allowance for all facts of matter & motives of witnesses – if it appears person is wasting court's time – he can be fined

<u>Witnesses:</u>
- Parties to action are responsible for witnesses to be present on day of trial
- If witness can't attend – court may, on request, postpone trial once
- Proceedings can continue w/o witness until it appears particular witness is necessary & then case is postponed
- Court itself may call upon anyone to testify if of opinion person has some info – if person can't attend, he must give reasons before hand & case will be postponed if reasons are acceptable
- Names of P's witnesses are given to headman when case is reported – D is then notified in writing of case against him & date of trial & asked to bring along his witnesses on such date

SENTENCE / JUDGMENT OF AFRICAN CUSTOMARY COURT

Court not bound to previous judgment on comparable cases – each case is judged on its own merits

Criminal cases: judgment = punishing the accused (reprimand / warning / fine / attachment of property)

Civil cases: judgment = rejecting / accepting P's claim: if accepted – D usually asked to compensate for P's damage) – factors taken into acc when determining amt of compensation:

- Damage was done intentionally: set for a higher amt
- P's claim unfounded / attitude is inflexible & P is warned to stop wasting court's time with trivialities
- Status / economic situation / circumstances of parties when offence took place (i.e. affluent person / person of royal descent expected to pay more because such people are expected to set an example to the community)
- Certain offences (i.e. impregnating unmarried woman / adultery) – fixed amt (court may amend this is special cases)

Northern Ndebele differentiate btw a fine and compensation:

- "Fine": punitive element (punishment)
- "Compensation": civil element

Judgment re case with both criminal & civil element will therefore also comprise an element of punishment & one of compensation

"Court levy" / "Court costs":

- Additional goods / money, other than damages, ordered by the court to be delivered
- "Levy": former times no money was used – however, today: court levy takes form of money which must be paid into tribal fund – usually due by party against whom judgment given
- *Mangangahlaa:*
  - "Levy" of Sotho-speaking = to tighten the jaw / move the jaw a lot = compensation to court for time spent on case & to close court proceedings
  - Plays a role in reconciliation of parties: in former times, goat / head of cattle given if case took long time: animal slaughtered for members of court & eaten in meal shared by them & litigants = any trace of disagreement that still existed among litigant was removed in visible & concrete manner
  - Ordered to compensate for malicious damage caused
  - Ordered if a party unreasonably refuses to come to an accord with another family group during negotiations
  - Criminal cases: imposed for food served to members of council & accused

EXECUTION OF SENTENCE / JUDGMENT OF AFRICAN CUSTOMARY COURT

In the past, sentences in form of corporal punishment / banishment were enforced directly after court session – today: may be enforced only if no notice of appeal received 30d after registration of judgment with local MC

Comp / fine must be paid asap after judgment – goats / goods / money must be taken to court where judgment given. Successful party notified that it may be fetched & sometimes gives part of it to court to use for serving food to its members

If a person refuses / neglects to pay in reasonable time – court orders person's property to be confiscated - no more goods may be seized than what is laid down in judgment. Former times: force could be used to confiscate. Xhosa had a special messenger (umsila) for this function. Fine / compensation usually increased summarily & can be regarded as fine for contempt of court – Northern Sotho used this for maintenance of

messengers & as such, it can also be regarded as execution costs. Interference with messenger in execution of his duty is considered a crime. If property to be confiscated is outside are of jurisdiction of an African customary court, application must be made to clerk of MC for execution of judgment

Judgment debtor can arrange with court to pay judgment goods in installments

(See above re "Additional way of claiming unpaid fines")

AFRICAN CUSTOMARY CRIMINAL LAW

Certain offences that are harmful to community & have consequences that are disapproved by community may be decided by the courts only – persons involved do not have choice whether to settle matter themselves / institute action in court

Elements of a crime:

- There must be a human act (act / omission)
- The act must be unlawful
- It must be possible to blame the act on the perpetrator
- Community must be of opinion that act should be punished

	Crime	Delict
Parties harmed	Community	Individuals / agnatic groups
Property affected	Public property	Property of individual / agnatic group
Procedure involved	Matter first tried in court	Mediation btw parties required before legal proceedings may be instituted
Punishment / compensation	Offender is punished	Damages (in the form of money) payable to party harmed

Certain acts constitute **crime & delict** – no separate actions – matter as a whole is settled in court: in the same process **punishment is given & compensation is granted** to aggrieved party: NB to determine in each case how act in question is viewed by particular community

Infringement of communal interests sometimes takes the form of defilement (pollution) of community – i.e. assault & homicide; abortion generates a ritual heat that keeps away the rain

> Incest & contempt of court = defiling = punishment is imposed and a meal of lustration (purification) & conciliation is ordered as well – cattle paid as fine are slaughtered at court & all present & members of court council & persons involved in act of defilement must join in the mal – in this way, offenders visibly reconciled with community

Prescription (if person waits too long before instituting action - action lapses in course of time) of a crime is unknown

THE ACT AS AN ELEMENT OF A CRIME

Must be a conscious human act (unconscious & involuntary acts cannot constitute a crime)
Act must cause harm
Acts of animals cannot constitute a crime
Can also involve an omission – however, it's not a person's duty to prevent a crime

CAUSE & EFFECT: THE PROBLEM OF CAUSALITY

Criterion used = experience of the community –
People know from general experience that a certain act usually causes that particular effect
Every act that constitutes an indispensable condition for a particular state of affairs is considered a cause

Poisoning:
Poison itself is not summarily taken to be cause of death; even if does is a lethal one – reason: there's always possibility that poison will not be effective & most people usually try to prevent such misfortune befalling them – poison will be taken as cause of death only after other possible causes have been eliminated

Omission may bring about a particular effect

There can be more than 1 person involved in a crime:

Co-perpetrator	Accomplice	Accessory after the fact
Participating in a crime - Includes persuading / ordering / bribing another person to commit a crime	Intentionally helps others commit a crime	Intentionally helps criminal evade liability aka "hiding a robber" / "hiding stolen goods"
Punishable – Does not matter whether perpetrators are equally involved / not	Punishable because he intentionally does something to promote commission of a crime	Commits and independent crime
Requirement = conscious collaboration in the commission of a crime – person collaborating must be aware that he is committing a crime		

Head of agnatic group is always liable for conduct of members of his group = principle of group rights & duties: group member himself incurs liability & is punished; if there's a fine, it must be paid by group, represented by its head

UNLAWFULNESS

Act is considered unlawful only if it's in conflict with (i.e. harmful to) the interests of community

"Grounds of justification" = circumstances under which what looks like an unlawful act is still considered lawful:

Defence:
Person may forcibly defend himself / his property / other persons / their property against unlawful attack
Only as much force as is necessary to ward off assault / abduction / robbery may be used
Attack must already have begun / threatening to begin

Necessity:
To protect yourself / another person / your own / another person's property from danger

Self-help:
Thief / rapist / abductor / adulterer caught in the act may be assaulted / killed = unlawfulness is excluded based on self-help in order to obtain satisfaction (however, vengeance does not exclude unlawfulness – assault after the offence is not allowed)

Executing orders:
Executing an official order by traditional ruler / his authorized agent (i.e. seizing property of a judgment debtor)

Impossibility to execute an order

Consent:
If agnatic group consented to certain act which causes someone injury / harm

Institutional action (i.e. action acc to recognized cultural institution)

Discipline:
Adults have wide disciplinary powers – i.e. any adult who catches a child committing an offence can chastise (discipline / punish by reprimanding / beating) child, no matter what their relationship / wrongs done by child; an initiation master also has official power to chastise initiates during initiation ceremonies

GUILT

Unlawful act must be accompanied by guilt + not merely an accident – 2 forms of guilt:

Intent	Negligence
Consciously doing something you know is wrong	Not acting like an ordinary man / woman
i.e. contempt of court / rape / assault / murder	i.e. official discipline not adhered to / culpable homicide

No strict distinction btw intent & negligence in African cust-law = rather – **relation btw cause & effect** is considered:

- Did the act cause that particular effect?
- Did the perpetrator plan the act?

No fixed age at which kids be held criminally liable –
Former times: whether boy as just herding goats or whether he was already herding cattle; person who'd not yet undergone initiation ceremonies was not considered mature & therefore not criminally liable

Person's not criminally liable for unlawful conduct =

- Small child / insane person (they don't have mental ability to judge their actions)

- Intoxication / other drugged condition does NOT exclude criminal liability; nor is it a mitigating factor if accused himself is responsible for his condition (i.e. if person intoxicated / in drugged condition & made to commit a crime – his intoxicated / drugged state and fact that he was made to commit crime are considered mitigating factors)
- Supernatural causes (i.e. sorcery) does NOT exclude criminal liability, but, believing in sorcery & fear that sorcery performed by victim may endanger person / his relations / community may be regarded as mitigating factor

PUNISHMENT

Former times – foll punishment was known (to increase the punishment, sometimes these were combined):

- Death penalty;
- Banishment;
- Confiscation of property;
- Removal of offender to appointed area within communal territory;
- Fines (in the form of stock);
- Corporal punishment;
- Compulsory labour; and
- Warnings

Form of punishment was determined by considering:

- **Mitigating** circumstances: Insignificance of offence / youth / provocation / diminished liability
- **Aggravating** circumstances: Seriousness of crime / use of force in perpetration of crime / perpetration of crime within victim's dwelling / premises; repeated perpetration of crimes
- **Intentional** unlawful acts were punished more severely than negligent acts

Today:
African cust court may still impose punishment, except death / mutilation / bodily harm (incl. corporal punishment) & max fine that may be imposed is now limited & it may not sentence a person to imprisonment (i.e. former times a common method of executing judgment was to detain convicted person until imposed fine paid by relatives – today = not allowed because it boils down to imprisonment until fine paid has been paid)

SPECIFIC CRIMES

CONTEMPT OF THE RULER

Act that intentionally rejects / disregards / opposes / disputes authority of the ruler (rejection of authority of traditional leader / national assembly / headman / messenger is also regarded as contempt)

Examples of acts punished as contempt of the ruler:

- Explicitly rejecting ruler's authority;
- Unlawfully calling & holding tribal meetings;
- Usurp (taking over / assuming) headmanship;
- Conspiring to usurp ruler's position;
- Encouraging persons to divide traditional authority & establish independent traditional authority;
- Encouraging subjects to leave tribal are & join another ruler;
- Rejecting authority of headman; and
- Adultery with "tribal wife"

Requires intent (i.e. stranger visiting ruler's are doesn't have allegiance with ruler & cannot commit this crime)

Former times: punishable in foll ways:

- Banishment;
- Death penalty together with confiscation of property;
- Fine;
- Corporal punishment

Today: because of const – fine is only valid form of punishment

ASSAULT

Unlawfully & intentionally hurting another person's body – associated with **blood & bodily injury**: based on belief that human blood belongs to the ruler – to injure someone until the blood flows also has a public, defiling (polluting) effect on community – this defilement is then compensated for by means of reconciliatory meal where assailant & victim & members of court council are present; assailant must provide animal that's slaughtered

- Can be indirect (i.e. instigating a dog to bite someone)
- Intention & unlawfulness are required
- Grounds of justification = defence / executing official order or discipline / participation in recognized stick fights or initiation ceremonies
- There must be a complainant

Delictual element:
If victim & assailant can settle matter btw themselves there's no punishment (esp if less serious crime) = interests of community are satisfied because relations btw those concerned are restored & harmony then exists in community

Element of compensation:
Former times: African cust court gave part of judgment goods to complainant as satisfaction & ordered retaliation (revenge) – injured could injure assailant in a similar way = intention was both punishment & satisfaction
Today: assailant ordered by African cust court to pay victims medical costs that were caused directly by assault

Punishment decided on by African cust court (in former times generally a fine / corporal punishment or combination of the two)

- **Mitigating** circumstances: provocation
- **Aggravating** circumstances: serious injury & use of dangerous weapon

RAPE
Man uses violence to force woman to have sex with him w/o being married to him

- Only a man can commit rape
- Use of violence is a requirement:
  - Woman has to offer resistance, unless threatened
  - Northern Sotho: if proven woman thrown on ground / constrained & clothes torn off while she was screaming / offering resistance in another way = sufficient grounds for attacker to be found guilty of rape as long as woman reported matter to head of family immediately
  - Tswana / Ndebele: if there's no penetration, it's sometimes regarded as assault and not rape
  - *Note: Sex with not sexually mature girl is punishable as rape, even if there's no violence*
  - Mere fact that woman did not consent doesn't mean rape was committed – there had to be violence as well: based on principle that individual cannot consent to harming rights of the group. Likewise, if woman does consent, it cannot be used as defence

Regarded unlawful & intentional harm to woman's body & honour and harms honour of agnatic group
Former times: punished with death penalty / fines / corporal punishment; or combination
If person caught rapist in act with his wife / daughter / sister: he could give him sever thrashing and sometimes even kill him w/o being punished = this was regarded as lawful means of self-help that excluded unlawfulness & a way of protecting agnatic group's guardianship & compensation for infringement of agnatic group's guardianship over victim (i.e. satisfaction)
Today: rape may not be tried by African cust-court as a crime, but only as a delict
Note: above distinction is not understood by people concerned because according to African customary procedure – criminal & delictual liability resulting from a single act must be tried in one court

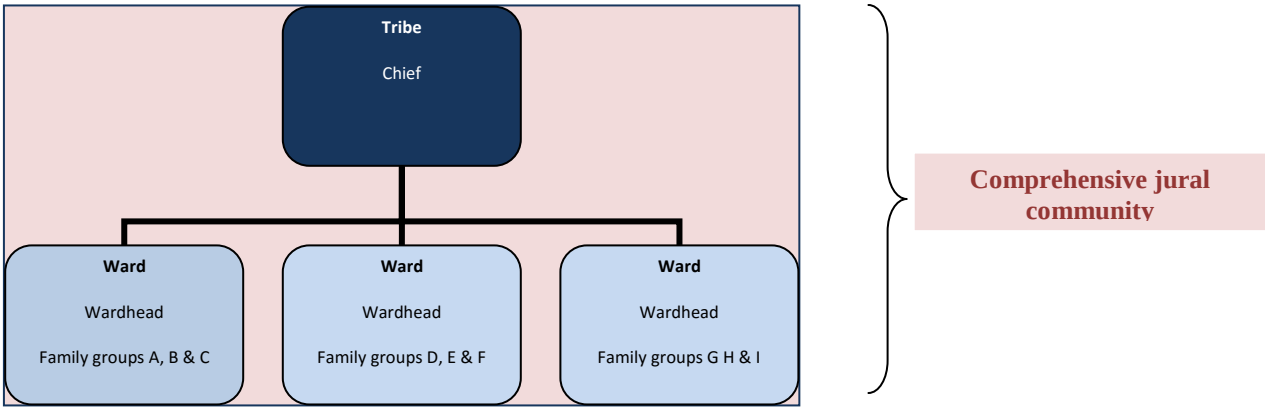
TRADITIONAL CONSTITUTIONAL & ADMINISTRATIVE LAW

THE TRADITIONAL STATE IN SA =
People in a cultural context who comprise of an autonomous (independent) jural community (political unit with its own juristic life)

<u>CRITERIA</u> which determines a jural community =
- **Own territory:**
  - Clear topographical (i.e. natural & artificial features of an area – i.e. river / mountain / valley) boundareis btw territories of nieghbouring states
  - Boundaries of the constituent subordinate jural communities within comprehensive jural community not clearly defined
  - Organ of authority within each subordinate jural community exercises control over its own territory & is subject to higher authority of comprehensive jural community
- **Own household:**
  - "Household" = interaction btw members of jural community, incl. everyday contacts
  - Membership may be acquired / lost in various ways
- **Own public law authority:**
  - Organs of authority exercise authority within community & represent it against outside jural communities
  - Head of jural community = most NB organ of authority

<u>FACTORS</u> that play a role in establishment & structure of jural community =
- **Genealogical:**
  - Developed out of an original founding group which formed core of jural community & in which ruling family established
- **Religious:**
  - Belief in ancestor spirits = NB in sanctioning authority of organs of government of jural communities – ruling family was regarded as descendants of original rulers
- **Territorial factors**

HIERARCHY OF CONSTITUTENT JURAL COMMUNITIES



Unspecialised legal system:
- Legislative, executive & jural functions exercised by head of comprehensive jural community
- Lower organs of auth only exercised executive & jural functions

CITIZENSHIP

Acquired through: Birth / Conquest / Voluntary subjugation
Terminated: Voluntarily / Banishment

(Note: membership did not end at death because ancestors form part of community)

Citizens rights	Citizens duties
• Allotment of land for residential & agricultural purposes • Keep unlimited numbers of livestock that could graze on communal land • Rely on ruler for emergency relieve • Make representations to the ruler on any matter • Protection under the law	• Citizen allegiance = pay tribute (give compulsory occasional gift to ruler on special occasions / under special circumstances) • Perform public service • Obtain permission from authorities to leave the area • Men: military service & attend meetings of public interest

Characteristics of traditional system of government =

- General participation of adult males in public matters
- Participatory & consensual democracy: decisions decided on basis of consensus
- Monarchial system with elements of democratic system

THE RULER (Traditional Leader)

- Not a dictator = derived position & authority from consensus of the people
- Patrilineal succession / succession in male line generally applied
- Spiritual & physical ability; character & capability taken into acc when selecting successor after ruler's death
- Not specifically trained (sometimes temp assumed functions of government during predecessor's lifetime)
- Successor sometimes had to be of particular descent (i.e. eldest son of ruler's main wife) & were customs re choice & descent of main wife
- Official / public capacity: only an organ of state – power to manage property exclusively of public-law nature & limited to state / public property – however, he could not do as he liked with this property
- If he exceeded powers – actions invalid & enforceable & if persisted in illegal actions – subjects could refuse to obey him / depart from the area / revolted against him resulting in civil war / his assassination

<u>Fulfillment of functions =</u>
If he neglects his duty – loses his authority & prestige
Note: Apart from judicial duties, all other functions of traditional community leaders have vanished due to influence of missionaries and provincial & local government taking over many functions formerly fulfilled by traditional leaders

THE COUNCILS:
System of authority-in-councils: ruler was assisted in his governmental functions by councils who acted as his advisors = ruler not bound by advice – ruler only had to *consult* council

Council	Members	Meetings	Functions
Private council	Membership not always hereditary & comprised: • Ruler's kinsmen (sometimes confidents) • Men of particular capability • Influential headman	Met informally & sometimes in secret	Advise on legislative & NB administrative measures; Informed ruler re daily occurrences Control / criticize ruler's actions
General / representative council	• Members of private council; • Heads of constituent jural communities • Kinsmen / capable / influential members nominated by ruler		Advise on weighty measures & legislation Control actions of ruler & criticize him
Court council	• Members of general council • Those with knowledge of law		Assessors - Judgment of members helped ruler come to decision re cases before the court
People's assembly	Men only • Head of families; • Initiated men; • Male regiments; • Adult males	Convened by ruler Attendance sometimes compulsory (i.e. when NB legislation discussed)	Matters affecting subjects – i.e.: Altering boundaries of sate / settlement of dispute with neighbouring state / war Among some groups: could criticse ruler

Note:
- *Ruler was head of each council*
- *Decisions at meetings not taken by vote – but revolved around general principal of consensus*
- *Council's advice was an NB measure of control over ruler's actions*

TRADITIONAL AUTHORITIES IN SA

Recognition before 1951

Pre-colonial phase:
Subordinate to colonial authorities = traditional ruler's authority was diminished – no longer had any legislative power & executive and judicial powers limited

Traditional government under colonial influence: Government intervention – indirect rule

1927 Black Administration Act:
Indirect rule implemented nationally – transformed traditional authorities & courts into government institutions subject to statutory rules including legislative superstructure
- *State President* = Supreme chief of all Bantu-speaking groups & had same powers as a chief under African cust-law - legislative powers exercised by special proclamation
- *Special officials* = Administration of African-speaking communities & control over chiefs
- *Special commissioners' courts* = Acted alongside African customary court of chief – traditional leader's jurisdiction in civil & criminal matters limited & subject to appeal & revision by special commissioners' courts
- *Traditional leader =* Appointed by State President (no longer held position because of birth in male line alone)

Note: Traditional ward governmental structures not officially recognized

Functions of traditional leaders are contained in Proclamation of 1957:

- Furthering interests of tribe;
- Furthering material, moral & social well-being of the people;
- Developing & improving territory;
- Simulating participation of the people in admin of tribe;
- Maintain law & order in territory;
- Execute powers, functions & duties in co-operation with traditional authority;
- Futhering the exercise of all acts &I regulations in his area re: public health / tax / reg of births & deaths / preventing animal diseases / land use & administration; and
- Bring all new acts & regulations to attention of tribe

Recognition after 1951:

Granted measure of recognition by Black Authorities Act of 1951 which provided for:

- Self government on local, regional & territorial level
- Adaptation of traditional authorities to demands of modern administration
- One advisory council only – traditional councils not recognised
- Powers, activities & duties of traditional authority included:
- Managing matters of the tribe;
- Assisting & guiding chief in exercising his duties;
- Exercising powers & performing activities & duties in accordance with State President's judgment & within scope of traditional tribal management / power granted by him

Observe traditional laws & customs
ITO Proclamation of 1994: administration of traditional authorities lies with the provinces

(See pg 208 of SG for diagram re gen structure of traditional authorities)

Traditional Leadership & Governance Framework Act:

- National framework, norms & standards to define place & role of traditional leadership within new system of democratic governance
- Seeks to transform institution of traditional leadership in line with const imperatives
- Seeks to restore the integrity & legitimacy of institution of traditional leadership in line with customary laws & practices

Provides for the following:
Traditional communities

- Subject to a system of traditional leadership ito that community's customs
- Observes system of cust-law
- Must transform & adapt cust-law & customs relevant to application of the Act so that it complies with principles in BOR & Const

Traditional councils

- Must be established by traditional community once Premier of a province recognizes a traditional community
- Must be established in line with principles set out in provincial legislation
- May not have more than 30 members
- At least 1/3 of members must be women
- Members must comprise:
  - Traditional leaders & members of traditional community selected by snr traditional leader; and
  - Other members democratically elected for a term of 5 yrs & who must constitute 40% of members

- Functions:
  - Administration of affairs of traditional community in acc with customs & tradition
  - Assisting, supporting & guiding traditional leaders in perf their functions & supporting municipalities in ID of community needs
  - Consulting with relevant local & provincial houses of traditional leaders so as to recommending appropriate interventions to Government that will contribute to development & service delivery within traditional council's area of jurisdiction
  - Participating in development of policy & legislation at local level & programs of municipalities & provincial & national spheres of government
  - Promoting indigenous knowledge systems for sustainable development & disaster management
  - Functions conferred by customary law, customs & statutory law consistent with Const
  - Must meet once a year with traditional community to give account of activities & finances of traditional council & levies received by it

Withdrawal of recognition of traditional communities

- Only the Premier of a province can withdraw recognition of a community as a traditional community; & he must do this in acc with provincial legislation
- May only be considered if:
  - Community concerned requests Premier that its recognition as traditional community be withdrawn; or
  - 2 or more communities request Premier that they merge into a single traditional community

Houses of Traditional Leaders

Constitution provides for:

- National house & provincial houses of traditional leaders
- Local houses of traditional leaders
  - May not comprise more than 10 members; or such higher number not exceeding 20 as may be determined by minister where there are more than 35 traditional councils within the area of jurisdiction of district / metropolitan municipality
  - Members are elected by an electoral college consisting of all Kings / Queens or their reps, and snr traditional leaders residing within the district municipality

Referral of bills to national house of traditional leaders

- Any parliamentary Bill re cust-law / customs of traditional communities must be referred by secretary of parliament of national house of traditional leaders for its comments before it is passed by house of parliament where it was introduced
- National house of traditional leaders must make any comments it wishes to make within 30d from date of such referral

TRADITIONAL LEADERS & THE CONSTITUTION

Constitution provides for traditional authorities and for the Institution, status & role of traditional leadership =

"Traditional leadership" is not defined in the Const – inferred that traditional leadership refers to a cultural institution (indigenous leadership) which has been handed down from generation to generation, including the principle of heredity and succession by men

Customary law should be understood as it is adapted by legislation & administration of justice: Traditional leadership is now regulated by:
Black Administration Act; Black Authorities Act; and Traditional Leadership & Governance Framework Act

Categories of traditional leaders:
Constitution & Provincial Houses of Traditional Leaders regard the foll as traditional leaders:

- Kings;
- Chiefs;
- Ward heads; and
- Other councilors

Traditional Leadership & Governance Framework Act recognises:

- Kingship;
- Snr traditional leadership; and
- Headmanship as leadership positions within institution of traditional leadership

Const position of traditional leaders: The inclusion of traditional leadership in a democratic constitutional dispensation leads to inconsistencies:

- <u>Democracy implies periodic & popular elections =</u>
  - Traditional leadership is inherited – election never a criterion for assuming office of traditional ruler
  - Hereditary leadership further implies that traditional leader holds office for life – in contrast to the fixed terms of office of elected leaders in a democratic system
  - However – constitutional writers consciously accepted that traditional leadership would be an exception to democratic principle of free elections

  Inconsistency is brought sharply to the fore when we look at new powers given to traditional leaders on provincial & national levels –
  - Limited powers – can make laws which must be considered by provincial & national legislature, BUT they cannot make laws by themselves
  - They can insist on being consulted re matters of cust-law, but can do little more than delay legislative process if they don't agree with specific legislation
- <u>Recognition of institution of traditional leadership conflicts non-discrimination clause of Const because it's mainly reserved for men only =</u>
  - Clashes with equality clause:
    - It's discriminatory that chief's daughter cannot succeed if she's first-born;
    - Principle of primogeniture = firstborn must succeed, regardless of whether they are male / female: daughter belongs to patrilineage of her father, but her children belong to patrilineage of her husband = if a woman is allowed to succeed, her children cannot succeed as they are not members of the patrilineage
    - Female head cannot perform political rites in honor of ancestors – these rituals can be performed by male members of male line of descent only

Implications that could follow if principle of patrilineal succession abolished:
If women were allowed to succeed acc to customary system of succession – they will have to support & maintain members of household & perform rituals during sickness & death: this would bring about fundamental changes to status of women & the "traditional" way of communal life

Arguments raised in favour of principle of patrilineal succession:

1. Must determine what is meant by "unreasonable" discrimination = i.e. does it mean "unreasonable" in an abstract sense or in a particular sense? Can a specific position be seen as being unreasonable if it's generally accepted & underwritten by a cultural tradition?
2. Const provides for continued existence of traditional authorities – if principle of patrilineal success is abolished – wit will mean this authority is no longer traditional
3. Political background that resulted in chapter on traditional authorities in the Const cannot be ignored if a decision is made on application & interpretation of this chapter (traditional leaders were persuaded to support the Const & new political dispensation on condition that traditional government will be protected)

SUCCESSION TO TRADITIONAL LEADERSHIP

- *Chieftainship is born* = seniority principle is a primary consideration & usually decisive
- Successor is subject to thorough deliberation & consultation among snr members of ruling lineage
- Potential successor must be born to principal wife
- Deathbed wish of deceased traditional leader taken into account
- Adulthood is a prerequisite (since adulthood is attained by marriage, it's a requirement that heir to throne be married before he may succeed)

<u>Situations that may arise on death of the ruler:</u>
- There's a suitable successor & succession can take place w/o delay; or
- A person is appointed to act as a regent until a lawful successor is in a position to succeed – this happens when:
- No successor has yet been born; or
- Successor is not suitable / competent to succeed

Black Administration Act (1927): State President:
- May recognize / appoint any person as traditional leader – he's not bound to rules of cust-law of succession / expected to consider them / observe them when recognizing / appointing a particular person
- Acquired power to remove from office a traditional leader

At present – provinces are vested with power to recognize & appoint traditional leaders & provincial legislature not bound by local law of succession of particular tribe (in practice – tribes are usually permitted to nominate a person acc to tribal law for institution & recognition as chief)

Mosome case: although modern law occasionally provides for observation of African law of succession, authorities are not bound by it

Traditional Leadership & Governance Framework Act (2003) –
President must recognize a person as a King / Queen by way of:
- Notice in GG;
- Issuing certificate of recognition to identified person; and
- Informing relevant House of Traditional Leaders of recognition of snr traditional leader, headman / headwoman

If there's any evidence / allegations that identification of person as traditional leader was not done in acc with cust-law / customs / processes – President / Premier of particular province may:
- Refer matter to National House of Traditional Leaders (in the case of a King / Queen);
- Refuse to issue certificate of recognition; and
- Refer matter back to royal family for reconsideration & resolution where certificate of recognition refused

Provides for removal from office of snr traditional leaders / headmen / headwomen on foll grounds:
- Conviction of an offence with sentence of imprisonment for +12 yrs w/o option of a fine;
- Physical incapacity / mental infirmity which makes it impossible to function as snr traditional leader / headman / headwoman;
- Wrongful appointment / recognition; or
- Transgression of customary rule / principle that warrants removal
- If successor to position of King / Queen / Snr traditional leader / headman / headwoman is still regarded as a minor ito applicable cust-law / customs: Royal family must within a reasonable time:
  - ID a regent to assume leadership on behalf of minor; and inform Premier of province concerned of particulars of person ID'd as regent & reasons for ID of that person
  - Premier must recognize regent ID'd

Deputy Traditional Leaders are recognized ito the Act to act on behalf of traditional leaders in their absence & their appt / removal is regulated by provincial legislation (when such appt's are made, traditional leader must inform President of same)

Indigenous principles of succession to traditional leadership:

- Hereditary system & position of traditional leader follows the patrilineage
- Successor = oldest son of ruler by tribal / main wife
- Other wives of ruler occupy a particular position of rank which has significance esp where an acting traditional leader / regent is appointed
- Sons of ruler by various wives retain rank of their mothers
- The ruler to which younger full & half brothers may succeed varies among the different groups

Substitution (Replacement) of the husband by the institution of the levirate:

- If husband dies before he can marry / before he can marry the tribal wife – children are raised on his behalf with a wife married after his death, usually to a relative – i.e. his younger brother
- If successor dies w/o any male descendants with his principal wife: a son can be procreated with his principal wife and his younger brother / a close patrilineal relative of deceased or his father; or his younger brother will be new successor

If successor dies before his father (the traditional leader) – goes to oldest son of late successor on condition that royal family approves son's mother as principal wife

Substitution of wife by sororate institution:

- If principal wife is barren / bears only daughters – supplementary wife is affiliated to principal house & bears successor on behalf of principal wife = ensures traditional leader has a successor & that this successor is born in principal house (once this supplementary wife bears a son as a successor, she does not have to stay with the husband's people – she can even marry another man) – *among some people a daughter-in-law is married for childless wife / wife w/o a son, as a tribal wife for the generation of her fictitious son – children were then raised with the daughter-in-law ito institution of the levirate*
- If neither principal wife / supplementary wife bear a son – traditional leadership goes to oldest son of late traditional leader's second wife (if supplementary wife is married she is always ranked directly after wife for whom she was married & all other woman shift one position lower)

Complementation of wife (a specific defect is supplemented w/o replacing the person having the defect – once defect is complemented, person standing in to make defect good is under no obligation towards husband's group)

Problems / causes of succession disputes:

Trad leader tries to divorce tribal wife w/o cooperation of ruling famly:

- Tribal wife is not actually wife of traditional leader = he cannot therefore divorce her at will
- Problem intensifies if trad leader is married to tribal wife in civil marriage & later on marries further wives ito cust-law = position of tribal wife disputed – for this reason the argument has been advanced that tribal wife shouldn't be married by civil marriage

Trad leader marries a wife in civil marriage w/o cooperation of ruling family / against their will & wishes:

- This wife is then the only wife & sometimes regarded as tribal wife, although ito cust-law she is not

Wife is appointed to act temporarily as trad leader:

- Tribal wife associates with "unacceptable males";
- Tribal wife refuses to cooperate with ruling family;
- Wife who is not tribal wife tries to usurp trad leadership for her son; or
- Tribal wife is opposed by deceased chief's brothers & half brothers

Tribal wife's pozi disputed by descendants of wife married before tribal wife was married

Temporary lack of a tribal wife: Wife who temporarily took over functions of tribal wife afterwards claims status of tribal wife

Biological paternity of successor

Tribal wife accused of witchcraft in order to exclude the rightful successor

Substitution: rightful successor's claim questioned at a later stage by man / woman who acted as substitute & who claim privileges of man/woman for whom they were substituted

Consequences of succession disputes:
Often results in split in ruling family at tribal level – it is thus NB that any succession dispute be resolved asap so as not to disrupt efficient administration & the administration of justice at tribal level (this requires cognizance & application of local law of succession)

Resolution of succession disputes & commission on trad leadership disputes & claims:

If a dispute re customary law / customs arises within a trad community / btw trad communities / other customary institutions - on matters re Trad Leadership & Governance Framework Act - members & trad leaders within trad community / customary institution concerned - must seek to resolve dispute internally & in acc with customs

If dispute cannot be resolved internally –

- Must be referred to relevant provincial house of trad leaders
- House must seek to resolve dispute in acc with internal rules & procedures

If house unable to resolve dispute –

- Must be referred to Premier of province concerned who must resolve dispute after consulting:
- Parties to dispute; and
- Provincial house of trad leaders concerned

Commission on Traditional Leadership Disputes & Claims –

- Commission established by Trad Leadership & Governance Framework Act
- May decide on any traditional leadership dispute & claims arising in any province
- May investigate several trad leadership issues, incl. those re succession to trad leadership
- Must consider & apply cust-law & customs of relevant trad community at time events occurred when considering dispute / claim
- When claim considered by commission re kingship / snr trad leadership / headmanship: commission must be guided by customary norms re establishment of kingship / snr trad leadership / headmanship

Female succession to traditional leadership is no longer an issue:
Traditional Leadership & Governance Framework Act = traditional community must transform & adapt customary law & customs to comply with BOR – in particular:

- Prevent unfair discrimination;
- Promote equality; and
- Seek to progressively advance gender representation in succession to traditional leadership positions

Shilubana: CC held that traditional authorities may develop cust-law in acc with norms & values of Const

TRADITIONAL ADMINISTRATIVE ACT

Administrative determinations:
An act whereby:

- ✓ Legal relations are created / amended / terminated; or
- ✓ Creation / amendment / termination of legal relations are refused

General determinations	Particular determinations
Creates / amends / terminates general legal relations	Creates / amends / terminates particular legal relations
Valid for all subjects	Directed at a particular subject
Made known in public so that whole chiefdom can take notice	Conveyed to the person by personal notification
If successfully disputed & made invalid – whole of determination falls away in relations to all the subjects	If successfully disputed & made invalid – determination falls away towards subjects who opposed it only

If a person neglects a prohibition / command instituted in an administrative determination – he commits a **crime** – a crime can only be committed if administrative act is **legally valid**

Traditional administrative act can be tested against foll requirements to see if it's legally valid:

The author:
The ruler is organ of authority who acts as author of determination from which all duties of subjects flow
A ruler's determination is valid only in the area of the trad authority & on residents who are in that territory - an instruction which addresses a person who lives outside of that territory cannot be enforced

The form of the act:
Announcement: valid only if it comes to attention of person to whom it relates

Content:
Must be clear & understandable – action required from subjects must be clearly stated & determination must be connected to the exercise of an administrative function
Correct procedures:
Ruler must consult relevant councils in circumstances where subject's rights have been infringed (at present, trad authority is consulted since it is the only council that's been statutorily recognized)

The purpose of the act:
Must be to further public interest
There is also a particular specific objective for every action (i.e. expropriation of land for general use by the tribe / attachment of property to use it as evidence in a criminal case)
Entails the authorized action as well as the execution of the act in order to attain the authorized purpose- if authorized action is directed towards an unauthorized purpose – the action is invalid

<u>Consequences of the act:</u>
Must be reasonable –
Consequences & effect of act must be possible;
Rights & freedom of subjects must not be exceedingly burdened;
No discrimination btw individuals / groups (except where law permits)

Moshesh: SCA held that ruler's order that subjects work for free in interest of community was seen as being reasonable – however – such an order may not make unreasonable distinction btw age regiments & wards / individual people

No compensation is payable re orders for removal – however:
Suitable land must be allotted elsewhere to people required to move;
They must be allowed to remove all building material;
If it's cultivated land –a reasonable amt of time must be allowed to elapse to gather harvest of the land

Control over trad leader's administrative actions:

Consultation process is a form of control which proceeds administrative action = exercised by means of advice by different councils – trad authority is empowered to do this

Mediation	Judicial control acc to cust-law	Control acc to CL	
		Internal review	Judicial control
Aggrieved subject relates complaint to member of the private council who consults ruler in private	Aggrieved subject raises invalidity of act as a defence in a criminal suit	Aggrieved subject can request higher authority to review administrative actions of ruler	Aggrieved subject can directly apply to MG / SC to check administrative action of ruler
If he finds ruler acted incorrectly – can reprimand him & require him to offer his pardon to the subject (one / more pieces of cattle can be delivered by way of reconciliation)	(Cust-law doesn't allow a court action to a subject to oppose an administrative action of ruler in the tribal court because ruler will then act as judge & accused in the same case)	Higher authorities = Local mag; Provincial minister entrusted with trad authorities; and State President	Subject can apply for: Review of validity of administrative act; Interdict- chief ordered to stop the act that infringes rights of applicant; Mandmaus – chief compelled to execute his power
Council can also act on its own against wrongful act of ruler	Subject uses this method to oppose administrative determination of ruler indirectly	Higher authority can also review administrative actions of trad ruler on its own accords	Act can be opposed indirectly by raising invalidity of act as a defence in a criminal case
If council & ruler cannot come to compromise – referred to trad authority (in the past was referred to representative council & if it didn't succeed in reconciling ruler & subject – referred to people's assembly where it was dealt with publicly)		Higher authority considers validity, desirability & effectiveness of act It can then confirm / disapprove / amend / replace action / take new facts into account / apply new considerations	Court considers validity requirements of administrative action & NOT its effectiveness
		If subject is dissatisfied with higher authority's decision – can oppose it in a court of law (reviewing authorities decision does not have power of a court decision)	If subject wishes a deferment (postponement) of ruler's administrative act, he must specifically apply for a temp interdict
		Trad ruler cannot oppose decision in a court of law because he & mag belong to same hierarchy of power & are not independent parties in such a case – trad ruler can appeal to higher official in hierarchy if dissatisfied with decision of review	Trad leader is privately & criminally liable on account of his invalid administrative action

Judicial review acc to legislation:

Promotion of Administrative Justice Act provides –
Anyone may institute proceedings in a court / tribunal for judicial review of an administrative action

"Administrative action" = action taken by:

- ✓ An organ of state, when exercising: Power ito Const / Provincial Const or Public power / function ito legislation
- ✓ A Natural / juristic person ito an empowering provision

ITO an administrative action which adversely affects rights of any person & which has a direct, external legal effect

Trad leaders, headman & trad authorities make decisions of an administrative nature likely to affects rights of any person & a direct, external legal effect = Provisions of the Act also apply to administrative decisions of trad leaders, but not to their judicial functions