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Chapter 1

INTRODUCTION

1.1 BACKGROUND TO AND STATEMENT OF THE TOPIC

The Constitution of the Republic of South Africa, Act 108 of 1996 clearly and unambiguously accepts and recognises indigenous law as part of the South African legal system. In terms of section 211 (3), "the courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law". Accordingly, the courts no longer have a discretion as to whether to apply either indigenous law or common law. The application of indigenous law has been accorded the status of a constitutional right, subject to the Bill of Rights. Furthermore, the right to culture (contained in Sections 30 and 31 of the Constitution) may well be interpreted to include indigenous law. Accordingly, where it is not clear whether indigenous law is applicable, it is submitted that a party can probably – by appealing to the right of choice of culture – request that indigenous law be applied.

However, in examining contracts in indigenous law, one has to establish whether the concept of contract is indeed known. Are contracts the proper

province of indigenous law or do they merely form part of social relations within the greater fabric of social life? Although it would appear (Whelpton 2002: 71) that the concept is known and that it is possible to identify general principles and various contracts in indigenous law, the individual character of each contract together with the subjective nature of indigenous law generally always have to be borne in mind.

The nature of a contract in indigenous law is more than a "mere instrument to participate in the economic and legal life of the community" (Whelpton 2002: 71). Indigenous contracts essentially emphasise relations between people rather than objects of contractual performances. The primary function of the law of indigenous contracts is to maintain harmonious relations between members of the community through speedy resolution of disputes. Any dispute is seen as potentially damaging to the community fabric, and accordingly, most resolutions are effected through negotiation and mediation giving expression to community values and moral code.

Legal principles regarding contracts developed in response to the needs of parties to ensure that fair justice would result from their contractual arrangements. However, the concept of fairness differs markedly from that of most Western legal systems. It does not require that the parties receive the full measure of their bargain, but only that any performance rendered will be justly compensated. Moreover, Whelpton also notes (1991: 66–76) that, although the indigenous law of contract is showing some signs of

adaptation to new developments, it remains clear that both established legal principles and human values are being retained.

It is against this background that the indigenous law of contract will be examined to ascertain the basis of liability.

1.2 **OBJECTIVES OF THE STUDY**

The purpose of this study is to examine the rules of indigenous law that apply to the conclusion and consequences of contracts – the rights and duties, which form the basis of contractual liability. It will be demonstrated that contractual justice lies mainly in bartering justice, with the appropriate maxim being '*lemme ga le bolae go bolaya lefifi'* (ugliness kills not, darkness kills). Indigenous law of contract stresses the element of debt (rather than right) and, in fact, Olivier (1989) discusses contracts solely in terms of debt.

In accordance with the emphasis on the real and concrete nature of indigenous law in general, contractual liability arises only from real contracts (ie executed contracts where one party has performed fully or partially in terms of the agreement). No recognition is given to executory contracts (ie a mere agreement does not form the basis of contractual liability). Whilst promises remain unperformed, no remedy is available on repudiation by one of the parties to the agreement.

1.3 **METHODOLOGY**

This study is based upon a comprehensive review of published literature (viz books, journal articles and theses) on both the legal and socio-cultural

aspects of indigenous contracts. Since the topic involves examining indigenous contracts in the context of the fabric of social life, attention is given in the review to written material of an anthropological nature to ensure that a holistic view of the problem is presented. Accordingly, the conclusions reached on the legal aspects of contractual liability are to be viewed against a backdrop of both established community values and the perpetuation of harmony within the community.

1.4 **PRESENTATION**

Chapter 2 briefly looks at the meaning and function of law from a philosophical perspective and addresses the question of whether "law" exists in pre-literate societies. The close inter-relationship between law and the socio-cultural environment is examined, and the question is posed as to whether contracts should be examined in a legal context at all, or whether, in fact, in an indigenous situation, they are not rather solely the province of social relations? The cultural element of necessity brings in the discipline of anthropology – requiring a holistic perspective to be taken on the inter-relationship of law and culture. Consideration is also given to the relationship of law and society within the framework of socio-cultural organisation – focusing on law not only as a dynamic social process but also as a degree of control exercised over society. The status of indigenous law under the South African Constitution is also briefly examined from the perspective of legal pluralism.

Chapter 3 focuses on indigenous law in particular and examines briefly its sources/origins in largely undifferentiated societies. The principal function of indigenous law in achieving justice through maintenance of harmony and

equilibrium in the community is looked at and, more specifically, in relation to indigenous contracts. Moreover, the flexible jurisprudence adopted by many indigenous courts in achieving such objectives is demonstrated to include liberal measures of equity and morality. It is shown that it is not only the underlying philosophy adopted by the courts that is flexible, but also often the judicial process by which such philosophy is implemented.

Chapter 4 reviews the concept of contract to discover whether such a concept actually exists in indigenous law. Moreover, the definition, scope, development, content and consequences of contracts are briefly examined to decide whether there exist in indigenous law general principles of the law of contract or whether contract merely forms part of the greater social fabric of life. The fundamental issues of personality and status are examined. The functions of contracts in indigenous law are briefly discussed.

Chapter 5 looks at the general principles and material elements of contracts in indigenous law as stated by Prinsloo and Vorster and by Whelpton. A brief review of the topics of breach, remedies and termination is included.

Chapter 6 examines the basis of contractual liability in indigenous law. Comparisons are made with Roman Law, in which executory contracts were also not regarded as valid or enforceable. It is shown that the basis of contractual liability in indigenous law lies in an agreement plus performance or part performance by one of the parties. It is further demonstrated that generally some transfer of property or services has to take place to establish an obligation. Four examples of specific contracts are discussed to illustrate the practical application of the general principles of the indigenous law of

contract, and several well-known maxims are adduced to highlight the legal basis of contractual liability.

Chapter 7 in conclusion looks at the proposition advanced by Ghai that "African Courts do not enforce contracts, they settle disputes arising out of contracts". This examination is made in the context of indigenous courts utilising a holistic approach and providing human justice rather than legal justice. A final emphasis is given to the function of indigenous contracts (expressing community values) to reconcile people and thereby maintain harmony in the community.

Chapter 2

THE DEFINITION AND FUNCTION OF LAW

2.1 DEFINITION OF LAW

As Lloyd comments in opening his chapter on the meaning of law (1959: 32)
"much juristic ink has flown in an endeavour to provide a universally acceptable definition of law, but with little sign of attaining that objective". If this is the case with Western systems of law with written foundations, how much more uncertain is the concept of law in pre-literate societies, where law inevitably has custom and social mores entwined in its framework?

However, today it is reasonably common cause that law comprises a series of rules or norms which prescribe a course of conduct and usually indicate what should happen (the sanction) if this norm is not complied with (1959: 5). Thus it follows that law exists both as a system of norms and as a form of social control based on certain patterns of human behaviour. Lloyd (1959: 8) regards both these approaches as legitimate fields of study in jurisprudence, and states that jurisprudence should not be viewed purely from one of these standpoints alone. He also notes (1959: 9) "a growing tendency to stress sociological factors and forces which underlie legal sytems and condition their development". It is the importance of this aspect in particular that will be developed in looking at the indigenous law of contract in this and subsequent chapters.

Moreover, there is a close relationship between law and morals (viz common use of terminology – ought/obligation/duty). Legal obligation is more in the nature of a command (depending not on reason but on authority), whereas moral obligation implies that reasons exist for the duty to do something. Whilst philosophically it may be possible to differentiate between law and morals with distinctions of substance, it remains true that morality is in some way an integral part of law and of legal development: morality is "secreted in the interstices" of the legal system and thus inseparable from it (Lloyd 1959: 39). In his studies of Barotse jurisprudence, Gluckman supports and develops this view, emphasising the importance of morality in the functioning of legal systems.

2.2 INDIGENOUS LAW IN THE CONTEXT OF JURISPRUDENTIAL THEORY

Indigenous law can be said to embrace both the pre-modern and post-modern schools of thought in jurisprudence. In the former, particular importance is attached to the good of the community as a whole (the common good) as opposed to the particular interests of the individual. This approach relies heavily on the metaphysical or religious beliefs – such prescriptions for the collective good were often embodied into indigenous legal systems to perpetuate communal harmony (van Wyk & le Roux 2000: 5).

Traditional African legal philosophy (as depicted by the African playwright and Nobel prizewinner for literature, Wole Soyinka) emphasises the guarding of the natural order by the gods and ancestral spirits, and says it is

the task of the political authorities to keep the natural, social and spiritual order in harmony. The colonial authorities in Soyinka's play "Death and the King's Horseman" are unable to appreciate the powerful pull exerted by the horseman's tradition, social role and duty to his community (van Wyk & le Roux 2002: 10 and 29). In classical natural law, justice required no more than that every person receive what is due in accordance with the status associated with his/her role within society (op. cit. 8). Status will be demonstrated to be an important concept in indigenous legal systems.

Post-modern jurisprudential thought, on the other hand, holds that, although the content of the common good cannot practically be fixed, a true "community" is nevertheless characterised by a shared and ongoing debate over the content over the good life (op cit 5). It is sceptical towards over-rationality and urges that attention be focussed on a variety of minor perspectives. Thus care, imagination, empathy, story telling and tradition are all regarded as good guides to human interaction, and post-modernists hold that these so called "irrational" aspects constitute the essence of both law and communal life (op cit 6/7).

In asserting that a true community is characterised by a collective concern with or substantive vision of the common good, post-modern communitarians are echoing the approach of many indigenous legal systems, where community ethics and harmony are pivotal features of such systems (op cit 18). Both post-modernists and indigenous legal systems do not regard people as abstract bearers of even more abstract rights, but as real and concrete persons with duties to the community as a whole. Both regard individualism as an asocial philosophy and value harmony of the collective.

Both also attach great importance to the moral content of the law and deny the narrow positivist view of law.

Post-modern communitarians hold a contextual view of values (and rights) which, they maintain, are the product of a tradition or community (op cit 69). Ethical values and rights are the product of interactions between human beings who live together collectively (in the community) in a tradition. Both post-modernists and indigenous legal systems hold that law and ethics thus cannot be separated, and that value judgements can and should be used in applying law to reflect and uphold the mores of a given society.

2.3 **WIDER PERSPECTIVES OF LAW**

Moving from the academic realms of philosophy to everyday reality, the law in action is more than a mere system of rules – it involves the use of certain principles such as the equitable and good (*aequum et bonum*)(Lloyd 1959: 39). It is by the skilled application of these principles to legal rules that the judicial process instills a moral content out of the legal order. Furthermore, Gluckman shows (again with particular reference to Barotse jurisprudence) that factors such as ideologies and value judgements also cannot be ignored in the legal process. Thus subjective factors and socio-cultural backgrounds must be taken into account in attempting to define law in all its complexity.

Malinowski took up this emphasis on the socio-cultural background when he concluded that "law" did exist in primitive/pre-industrialised societies (quoted in Moore 1978: 219). He viewed law as so much the stuff of ordinary social life that the whole context of social relations had to be examined to discover the content of its law. However, Malinowski was an

anthropologist and the established jurisprudential community accepted his ideas both reluctantly and selectively (Moore 1978: 22). Eventually, the broad and somewhat vague Malinowskian definitions of law (mutual rights and obligations of individuals, and sanctions deriving from ordinary social relationships) gave way to newer and more specialised definitions (Moore 1978: 222). These emphasised not only force, but also the institutional and organisational contexts of legal obligations (eg Barkun's "Law as a system of manipulable symbols that functions ……..…as a model of social structure"(quoted in Moore 1978: 222).

2.4 **MULTI-DISCIPLINARY APPROACH TO LAW**

The continued emphasis on social structures and relations of necessity requires further input from the specialist fields of both sociology and anthropology. Lloyd (1959: 4) states that in looking at jurisprudence in the realm of social sciences, it concerns itself with patterns of behaviour of man in society and that such empirical approach (accumulating and clarifying facts) will inevitably lead to some measure of coordination with other social sciences such as anthropology and sociology. It will be demonstrated later in the study that these two disciplines are of fundamental importance in the day-to-day practical operation of the indigenous law of contract.

However, Lloyd's inclusion of the works of Maine, Malinowski, Hoebel and Gluckman in the section on "Custom and the Historical School" – dealing largely with relations between custom and law – is criticised by Moore (1978: 220). She pertinently states that such an approach is "still far from extracting any general sociological significance from the study of societies quite different from our own". This, in fact, involves an important *caveat* in

approaching the study of indigenous law in general: one must be aware of and make allowances for an ethnocentric bias, which might distort true academic focus and lead to both false assumptions and incorrect conclusions.

Moreover, it should be borne in mind that whilst most lawyers generally view law as an instrument for controlling society and directing social change, most anthropologists view law as a reflection of a particular social order (Moore 1978: 244). Herein lies an important divergence of perspective: does law direct or reflect?

2.4.1 A**nthropological input**

Caplan (1995: 1-2) states that anthropology of law should not be viewed as apart from social anthropology. Disputes lead to key anthropological issues which enable one to observe social relations in action and understand cultural systems. She argues that a focus on law purely as a set of rules is incorrect in that it completely ignores that the total socio-cultural context in the settlement of disputes.

In relation to the Tiv, Bohannan (quoted in Moore 1978: 227) maintains that they do not have a copus juris – they have "laws" but not "law" (in contrast to Gluckman's observation of the Barotse judicial system). However, Moore comments that the Barotse judges used legal rules as a resource for decision making – invoking principles of varying degrees of generality.

2.4.2 **Social input**

Vinogradoff (quoted in Moore 1978: 14) states that "rules of conduct are generally established … by the gradual consolidation of opinions and habits. The historical development of law starts with custom. Rules are not imposed from above by legislative authorities but rise from below, from the society which comes to recognise them." However, the social control brought about by custom in non-state societies is now of diminishing importance as indigenous legal systems and the societies in which they operate become more developed. The total social background is thus a more relevant consideration in the study of maintaining social cohesion through indigenous legal systems.

These broader perspectives gradually gained acceptance in the jurisprudential community, and the realists schools, in particular, began to focus attention on the role of law in society and on the influence of society on law (ie embracing the "bigger picture"). Whilst theoretical lawyers state general principles underlying a particular branch of law, the social anthropologist analyses the relation of such principles to other elements in socio-cultural systems (Allott, Epstein and Gluckman 1969: 2-3). Thus both lawyers and anthropologists may cooperate fruitfully in studying the complex reality of social action – where indigenous legal systems seek to dispense common sense justice to perpetuate harmony in society (Allott et al 1969: 7). It will be demonstrated in subsequent chapters that the indigenous law of contract embraces such human justice in the milieu of societal fabric.

2.5 LEGAL PLURALISM

A brief comment on the issue of legal pluralism is also pertinent at this stage. Generally existing as a corollary of cultural pluralism, it implies co-existence of officially recognised state laws side by side with indigenous law (van Niekerk 2002: 3). However, in accordance with strict analytical positivism, many jurists were unable to see legal rules in a social context and to recognise the social reality within which law functions. Thus legal development often did not address the real needs of a culturally heterogeneous society. In South Africa, even though the status of indigenous law is now recognised by virtue of section 211 of the Constitution (Act 108 of 1996) as a source of law, it has yet to be accorded equal status: official indigenous law "exists" as an independent system alongside Western law (van Niekerk 2002: 5). In the South African context, the values of communitarism and fraternity inherent in indigenous law have been systematically underprivileged in the past because of the dominance of Roman-Dutch law.

Against a background of constitutional rights to culture (sections 31 and 32 of Act 108 of 1996) van Niekerk states (2002: 18) that the objective should be harmonisation of different laws – with the ideal being articulation of general fundamental values within the framework of own specific cultural values. In the South African situation, a recent Law Commission (Project 90 – 1999 quoted in van Niekerk 2002: 18) recommends that the application of indigenous law should remain at the discretion of the courts, but with precise and flexible guidelines laid down. "Thus by deciding each case on merit, individual justice will be done and, by directing the court's discretion, legal certainty will be obtained" (van Niekerk 2002: 18).

2.6 LAW IN SOCIAL PERSPECTIVE

The recurrent theme in so far as this chapter is concerned (and, indeed, throughout subsequent chapters) is that of law viewed in a social perspective. To develop further on this theme, reference is made to the works of Nader and Todd and again later to Moore. Nader & Todd (1978: 10) place law "in the context of broader patterns of social control" (though not equated thereto) and state that social control is to be viewed in "the broader framework of cultural and social organisation of society". They trace the development of the anthropological study of law away from the static structural-functionalist model to the more dynamic processual model. Disputes are viewed as social processes imbedded in social relations – with the focus of attention shifting "from the dispute itself to the social processes of which the dispute is part" (Nader & Todd 1978: 16). The shift from structure to process stems from the works, inter alia, of Gulliver (on the Arusha) and Colson (on the Tonga).

Gulliver (1971) and Colson (1953) demonstrate that disputes are part of a dynamic social process, but are to be viewed in a series of events linking persons and groups over time and possibly involving other disputes. It will be important to view contracts in indigenous law in this light (see subsequent chapters) – as agreements imbedded in the interaction of social relations. Disputes arising from contracts will, of necessity, stem from or involve social relationships, with the concept of status being an important element in most indigenous societies.

2.6.1 **Social dimension of disputes**

Two dimensions in the dispute management process are highlighted: the first is the social one, in which a shift from structure to process includes a shift from institutions and social groups to individuals and the choices they are forced to make in the social interaction of the dispute process (Nader & Todd 1978: 16). Here the expected continuing social relationships and the necessary maintenance of harmony plays a significant role.

2.6.2 **Cultural dimension of disputes**

The second dimension is the cultural one, which, prior to the works of Hoebel (1954) and Gluckman (1965), had been largely ignored. Thus ideologies, values and attitudes (the inside or world view) of a society were all sidelined in favour of the study of social relations, structures and networks. Hoebel (1954) and Gluckman (1965) demonstrate that all disputes have a cultural component. The structure of a culture will determine how far the individual/group may stray from socially accepted norms (ie, deviance is thus culturally prescribed). Accordingly, attainment of "social justice" requires that both social expectations and cultural presumptions and mores of the community must be embraced in the decision-making process.

2.6.3 **The reglementary process**

Turning now to Moore, her view of the social relations aspect is somewhat different. Her focus is on what she describes as "the reglementary process" – maintaining that "the same social processes that prevent total regulation of a society also reshape and transform efforts at partial regulation" (1978: 1). Attempts to control behaviour are made through the use of explicit rules –

with legal institutions and the state at the core of all social disciplines – but in the reality of social life as a whole, law and legal institutions are demonstrated to effect only a degree of intentional control over society (1978: 31-32). She (1978: 41) poses the question "What happens when there is a discrepancy between ideology and social reality" (eg, when communal harmony is threatened by internal conflicts)? "Laws …. rules …..customs are regarded as part of the explicit cultural framework through which the attempt is made to fix social life to keep it from slipping into the sea of indeterminacy".

Hoebel (quoted in Moore 1978: 54) states that "we must have a look at society and culture at large in order to find the place of law within the total structure". In other words, to seek an answer to the question "Does law control society or society control law?", both law and the social context in which it operates must be inspected together (1978: 55). Moore concludes that to understand the relationship between law and society, a new emphasis is necessary to focus on the dimension of time – the sequence of events. It is with this new approach that she hopes a greater understanding may be gained of "the way in which legal institutions, rules and ideas function as part of the framework within which ongoing social life is carried on, and how the processes of social life affect that very framework" (Moore 1978: 256).

Pospisil (quoted in Moore 1978: 17) states that "every society has a multiplicity of legal systems and legal levels, and that law as a <u>category of social phenomena</u> (rather than as a professional laywers term) exists in all of them" (my emphasis). The reglementary process examines the way "partial

orders and partial controls operate in social contexts" (Moore 1978: 30). Accordingly, the true meaning and function of law will not become evident solely from a conservative study of law: the complementary disciplines of anthropology and sociology will have to be involved to provide the necessary holistic perspective to the study. A wide range of legitimately socially enforceable rules are regarded and accepted by anthropologists as "law" in the cultural environment. Thus regard must be had to this viewpoint in examining the functions of indigenous legal systems in the social context in which they operate.

2.7 INDIGENOUS CONTRACTS – ARE THEY TO BE EXAMINED IN A LEGAL OR SOCIAL CONTEXT?

The question can thus be posed of whether indigenous contracts should be examined in a legal context at all, or should rather be viewed solely as the province of social relations? In examining the broad framework of jurisprudence, it becomes evident that much law derives from social custom and is also entwined with the mores of a society. Tradition and morality thus form important elements in indigenous law: such elements are embraced in the practical application of indigenous law relating to contracts. Thus it may be concluded that, whilst many contractual matters should rightly remain in the social domain, those with wider ramifications (and especially those impacting on communal harmony) will be dealt with by the law, which will usually endeavour to bring about social (human) justice to meet social expectations, which will also be in accordance with the society's mores.

It is against such a background that this study views the operation of the indigenous law of contract. Contracts will be shown to fulfil an important function in the social life of an indigenous community. With the accent on both the subjective nature of contracts and the object of preserving communal harmony, indigenous contracts are far more than a device for establishing the economic and legal implications of a transaction (Whelpton 2002: 71). Thus social processes and the maintenance of good social relations are important underlying fundamentals (functioning outside "the law"), which direct the application of the indigenous law of contract and reflect the values and aspirations of the community. Such an approach thus embraces elements of both the social and cultural schools of thought outlined above: the focus on indigenous law, in particular, will be developed in the following chapter.

2.8 **LITERATURE REVIEW**

In reviewing the literature, much of the focus has been on studies in the Southern African context (principally Whelpton, Prinsloo and Vorster, Walker, Mahoney and Schapera). However, to obtain a broader perspective, studies on the wider African continent have been included, and thus the works of Allott, Epstein and Gluckman, and Ghai are utilised to provide comprehensive coverage of the topic.

Chapter 3

FOCUS ON INDIGENOUS LAW

3.1 DOES A SYSTEM OF INDIGENOUS LAW EXIST?

In focusing on indigenous law, the first question to be addressed is whether, in fact, a system of indigenous law does exist or whether such "law" exists merely in the application of customary norms and values in society. Goodhart (in Gluckman 1955: 13) examines the early lack of interest in 'primitive' law, contrasting it with other social sciences where great emphasis was placed on the origin of the various concepts. He points out that Maine in his books, "Ancient Law" and "Early Law and Custom" – although discussing the topic at some length - viewed it as essentially religious in nature, being "entangled with religious ritual and observance". Lack of first-hand information contributed in large measure to the narrow perspective of his generalisations.

3.1.1 Early views

Goodhart cites two main reasons for the refusal to acknowledge the importance of early law. The first was that it did not fit neatly into the Austinian definition of law as a command, because prior to the full development of the state, there was no person or group of persons who could issue such commands. Accordingly, instead of introducing a little flexibility into their definition, the Austinians and neo-Austinians opted for the "remarkable view" that early law was not law at all. Salmond in his "Jurisprudence" (1947: 54 quoted by Goodhart 1955: 13) states "if there are

any rules prior to, and independent of the state, they may greatly resemble law; they may be primeval substitutes for law; they may be the historical source from which law is developed and proceeds, but they are not themselves law". Today, such an extreme view is scarcely credible, since it has come to be accepted that no clear distinction can be made between early law and that of the fully developed modern state - with the latter not only having its origins in the former but also being largely identical in nature to it.

The second explanation advanced by Goodhart for the lack of prominent treatment of early law was the paucity of material available with which to make an informed assessment of the topic. Prior to Malinowski's "Crime and Custom in Savage Society" (1926), only passing references to early law in early anthropological studies existed (Goodhart op cit: 14). Malinowski's observations from an anthropological standpoint led him to conclude that some form of civil and criminal law did exist in primitive societies and that it was not of religious origin. Malinowski, as an anthropologist, emphasised (as the dynamic force behind the performance of obligations) the social and economic state of the man who wished to stay in good standing amongst his fellows (Moore 1978: 219). Thus he concluded that law as a phenomenon outside of the traditional sphere of courts and legislatures did exist; this view that there was law in non-industrial societies heralded a new perspective on primitive law.

3.1.2 **Modern views**

Malinowski's early conclusions were amplified and developed by Gluckman in his "Judicial Process amongst the Barotse of Northern Rhodesia" (1955), and his analysis of the nature and definition of law has already been touched

upon in chapter 2. Such analysis clearly demonstrates the close similarities between primitive and modern systems of law – thus contradicting earlier views that the former was not really law at all.

Since indigenous legal systems are of the non-speciliased type, they differ in important respects from specialised (Western systems). However, Myburgh (1985: 98) points out that such differences are not differences in nature, since law is one of the aspects of the cultures of all peoples. Accordingly, indigenous legal systems cover the same ground and comprise the same divisions as other jural systems, so that the former systems must be as capable of explanation in terms of jural theory as the latter systems – if necessary, with adaptation of the theory. Myburgh concludes that criticisms of explanations of indigenous legal systems in terms of specialised systems are unfounded: law is law everywhere, and there is, indeed, coherence in jural theory.

3.2 NATURE OF INDIGENOUS LAW

Indigenous legal systems are not, however, without a very different fundamental emphasis – due in large measure to differentiation. As Allott et al (1969: 5) observe, the "law' in Europe and North America (with the social and economic differentiation of their societies) is considerably differentiated from other institutions, and can thus more or less be viewed separately. Whereas with the absence of marked societal differentiation in less developed communities, the principles and rules of their indigenous legal systems were not clearly separated from the social environment. Hence indigenous law, operating in a non-specialised cultural environment, was not enunciated in authoritative texts or edicts, but was seen to be

embedded in the customs and practices of the people. Accordingly, it was difficult to distinguish whether a given norm was legal or non-legal, and the only way to determine this was to investigate the social background (Allott et al 1969: 6). With the growing understanding that indigenous law was indeed a legal system, came also the growing realisation that the only way to examine indigenous legal systems was for both lawyers and anthropologists together to study the complex reality of social action as the relevant backdrop to the legal system.

Myburgh (1985: 1) states that "indigenous law, meaning the traditional law of the indigenous people as adapted to change by themselves, may be said to fall within the sphere of …….. juristic antrhopology". He emphasises that, although the theoretical approach is juristic, the factual basis is to be found mainly in anthropological literature.

Having elevated primitive law to the status of a legal system, what exactly do we examine? Allott et al (1969: 9) ask the question whether it is the traditional (or ancient) law or the modern ("perverted") law – infected by non-African ideas. When such modern indigenous law is administered by non-customary courts and recorded in the technical language of either lawyer or anthropologist, the whole character and style of indigenous law may well be fundamentally altered, and with it, the basic concepts possibly corrupted ("sabotaged under the pressures of modernisation" – Nader & Todd 1978: 2).

3.3 CONCEPT OF CHANGE

The constancy of change is a given, and it is inevitable that any indigenous legal system will be affected thereby. The early views of indigenous law as ancient and immutable clearly ignore the time factor and accordingly are to be discarded.

Like all culture, law is subject to constant change; among the indigenous peoples, Myburgh (1985: 50) shows that the modifications have been more largely due to contact with the West that to factors arising amongst the peoples themselves. Such contact has often resulted in the simultaneous operation of indigenous legal systems and a Western system with which they are sometimes incompatible – giving rise to the attendant problem areas of legal pluralism.

The fundamental question that has to be addressed is, in adapting to new circumstances and environments, has indigenous law gone so far that the changes it has taken on board in the process have rendered its rules so unstable and unpredictable that one is no longer able to regard them as a true system of law (Allott et al 1969: 9) ?

Allott et al (1969: 10) argue that the answer to this question is in the negative. Indigenous law comprises a variety of different principles, norms and rules. Of these some state wide and general principles (of morality and public policy) which cement together an ideological framework for justice. These principles are flexible in nature and can be adapted by the judges to enable the legal system to adapt to changing conditions and standards. Such flexibility also enables old rules and principles to be declared obsolete and

new ones to be substituted in their place. In accordance with this approach, it is submitted, for example, that the trend towards individualization has brought about a dilution of the importance of group rights, but has not led to the actual disappearance of rights such as family guardianship and family ownership.

Whelpton (1992: 246-7) demonstrates with his Bakwena ba Mogopa study that indigenous law adapts to new circumstances whilst at the same time retaining proven legal principles and cultural values. In the indigenous law of contract, special adaptations have been made of own type, which cannot be typified as either Western or traditional. Whereas Westernisation has produced cultural changes, which have lessened traditional values (without replacement by Western values) – such as Western individualism diluting a group-orientated lifestyle – indigenous law still demonstrates a sturdy retention of underlying principles, albeit in an adapted and truncated form. Thus as Myburgh (1985: 11) concludes, indigenous law is not doomed to distinction; whilst it is undergoing rapid change, it will nevertheless retain some of its original traits.

3.4 CERTAINTY OF LAW AS AGAINST UNCERTAINTY OF LEGAL CONCEPTS

Clearly, this flexibility involves an element of uncertainty in the system – Gluckman's "paradox" – the certainty of law as against the uncertainty of legal concepts. The question can now be posed for example, at what stage does the disregard of a traditional rule amount to the abrogation of such rule and concomitant losing of the force of law? However, it is this very flexibility that ultimately gives an indigenous legal system its strength to

mould itself into a living, adaptable and functional system of law which dispenses a "just decision". It is this aspect of a living law that is to be emphasised, looking at customary court procedures and interpretations against a background of the fabric of social life (Whelpton and van der Merwe's micro-studies of the Bakwena ba Mogopa in contract and delict, respectively, confirm this emphasis).

Gluckman (1955: 325-6) refines the view of indigenous law even further with his distinction between law in general and law in action. The former he regards as the corpus juris – containing the body of rules to which people ought to confirm and which the courts ought to enforce. This, he contrasts with law in action, being the adjudication process in which both general principles and general perceptions of social relationships are applied to specific disputes. He concludes that law in general is channeled through law in action to cover a variety of situations in social life – emphasising again the flexibility of indigenous legal systems. (Gluckman 1965: 23) thus dismisses completely Gulliver's assertion that the "compilation of a corpus juris was but an arid undertaking".

Moore (1978: 232) points out that neither Hoebel, Bohannan nor even Gluckman present substantive law as an indigenous legal system, but instead "each has taken what he considers to be the most important consistent theme in culture and society and has traced signs of that theme through some substantive rules". She points to Gluckman's theme as that of a system of social relations: these rules are illustrated in the hearing of individual cases. However, most authorities accept that substantive rules – although

sometimes vague and unpredictable – do, in fact, constitute a legal system as such.

3.5 FEATURES AND FUNCTIONS OF INDIGENOUS LEGAL SYSTEMS

Against this background, what are the principal features and functions of indigenous legal systems? Allott (1965: 131) states that "indigenous legal systems of Africa do not constitute a single system, but rather a family of systems …. with sufficient similarity of procedure, principles, institutions and techniques for a common account to be given of them". The characteristics of such systems are well set out in Vorster & Whelpton (1999: 13-16) and elements therefrom are set out in the following sections.

3.5.1 No written sources; oral maxims to express principles

Originally indigenous law was not recorded in written legal sources and law was thus transmitted orally. This process was furthered by public participation in the administration of justice – resulting in the community in general having a broad general knowledge of law. Legal principles were often expressed by means of legal maxims such as *Motho ke motho ka batho* (Sotho*); umuntu ngumuntu ngabantu* (Zulu)*:* "A person is a person in relation to other people" – thus expressing group orientation and humaness. Another maxim is in Northern Sotho, *Omo tshware ka diatla te pedi"*: You should hold him or her with both hands" – giving expression to the marital relationship between husband and wife.

3.5.2 **Precedent**

Indigenous law is customary in nature, resulting from many age-old traditions and customs being subsumed into law, with leaders also promulgating laws that had to be followed. No system of precedent is known – the focus is on the individual dispute in question (demonstrating the real and concrete nature of indigenous law).

3.5.3 **Expression of community mores**

In addition to general knowledge of the law, public participation in the adjudication process also ensures that indigenous law gives expression to the prevailing values or general moral behavioral code of the community; as values changed, so over time did the law. Settlement of disputes thus does not focus on individual parties, but more on the wider community taking into account future relations between the parties within the communities. Accordingly, the maintenance of harmony is served not by "legal" justice but by "human" justice (reconciliation of people).

3.5.4 **Sanctions**

Legal rules (and rules for living) are generally observed voluntarily by the community for a variety of reasons as set out below:

a) The religious element of the law – in particular the belief in ancestral spirits. Any breach of the law (derived from ancestors and protected by their spirits) will lead to supernatural punishment.

b) Public opinion – sensitivity as to how others will view one's own behaviour.

c) If a person is harmed, he will endeavour either to get compensation or protect himself through "magic" means of medicines.

d) Public participation in the legal process ensures everyone understands how the law operates.

e) Fear of punishment (especially of supernatural origin).

f) The unquestioned authority and influence of indigenous leaders (as representatives of the ancestors and bearers of the community's traditions).

Thus, these invisible sanctions generally ensure adherence to legal rules.

3.6 INDIGENOUS LAW OF CONTRACT AIMS TO MAINTAIN COMMUNITY HARMONY

In viewing the indigenous law of contract, the general public thus have a working knowledge of the principles involved, and the solution to disputes of a contractual nature must accord with community values and mores. Ghai (quoted in Allott et al 1969: 76) points out that "contracts are not enforced – disputes arising out of contracts are settled". This emphasises the community involvement in the indigenous law of contract with community values being upheld against individual rights. Thus indigenous law of contract has a broad-based orientation to ensure that disputes do not damage the fragile fabric of society and provoke potentially dangerous disharmony.

As to the function of indigenous law, what Walker (1969: 71) states with specific regard to indigenous contracts, also holds good for indigenous law in general. Walker points out that the primary function "is to ensure perpetuation of harmony through speedy resolutions of disputes. There is concern for justice to the individual, but it must often yield to the greater interest of the tribe (community) as a whole in preserving harmonious

relations between its members. Any dispute therefore is thought to be of potential damage to the fabric of the community as a whole."

3.7 STATUS

The jurisprudence embraced by indigenous law has been briefly touched in chapter 2. In examining the jurisprudence of the Barotse, Gluckman (1965: 39-40) concludes that the underlying theme is that of a society dominated by status. As a jurisprudential concept "status" is located within the matrix of social relationships.

3.8 CONCEPTS APPLIED IN THE ADJUDICATION PROCESS

Having examined the main characteristics of indigenous law above, it is clear that the Barotse model can be extrapolated into indigenous law generally. In varying degrees, indigenous courts mostly apply concepts of equity, justice and morality in the adjudication of disputes. Gluckman (1955: 325-6) states that in Barotse law the adjudication process involves the judges coming to a moral decision on a dispute and then selecting those elements of the corpus juris which can be utilised to support such a decision. This flexible approach to achieve justice is indicative of the nature of most indigenous systems: the general principles remain certain, whereas the flexibility lies in the principles' constituent concepts.

This approach reflects both the prevalent ideologies and expectations of the community. Moreover, the flexibility enhances the ability of indigenous law to cope with social change and to adapt and develop accordingly. Gluckman (1955: 24) sees the judicial process as "the attempt to specify legal concepts

with ethical implications according to the structure of society in application to the great variety of circumstance of life itself".

Gluckman (1955: 325-6) concludes that "the Barotse judges' main task is to specify a series of flexible concepts and introduce (via these interconnecting concepts) equitable arguments to assess both the reasonable performance of duties and exercise of rights". Such flexibility is always subject to overriding general principles so that, in reality, judicial discretion is still fettered by "established law" (Gluckman 1955: 362). Standards of behaviour are measured against that of the customary and reasonable man (Gluckman 1965: 22). However, Gluckman observes that Barotse judges are reluctant to support a person who is right in law but wrong in justice: they may well seek to achieve "justice" by indirect, and perhaps administrative, action.

3.9 THE CASE FOR CODIFICATION

With a view to removing some of the elements of uncertainty obtaining in unwritten indigenous legal systems (whose societies were largely illiterate and uneducated), the process of codification has, in some instances, been initiated. In civil law tradition countries, Allott et al (1969: 32) sate that codification has gone furthest towards creating a new, unified, systematic law – sometimes with and sometimes without full investigation of local customary laws. However, in common law countries, after the initial deposit of codes, little has been done to complete a systematic codification process. Attempts to produce a new law, which would largely unify or integrate previously diverse systems of written, customary and religious laws have proved ineffective.

What has been achieved in Swaziland, Zambia and Malawi, however, is a restatement in an authoritative form of the customary laws – intended merely as a guide to the courts on the applicable laws rather than as a preparation of a code (Allott et al 1969: 32). This accords with van Niekerk's views on legal pluralism and the guiding of the courts in the light of constitutional developments in South Africa. Moreover, despite token democracies in many countries, codification (especially when couched in broad terms) can be a powerful weapon in the hands of a government bent on reshaping economic, political and social development (Allott et al 1969: 33). The logistical difficulties inherent in the codification of a complex myriad of customary law renders this task not only somewhat futile, but also inherently dangerous, given possible governmental hidden agendas.

Accordingly, codification is not viewed as a practical answer to criticisms of uncertainties and over-wide discretions. Whelpton (1991: 245-6) argues in relation to the Bakwena ba Mogopa that codification will only be successful if all the rules of the community are included (ie, incorporating the living law of a people at a particular time and not merely a set of rigid rules). If the culture of a community changes, the law must be adapted to accord with new circumstances/perspectives: indigenous legal systems must retain flexibility to fulfil their functions and cannot be constrained by rigid legal parameters that might be inherent in codification.

3.10 **CONCLUSION**

Accordingly, despite much uncertainty in the field of indigenous law, it can be regarded as a true system of law. Since most indigenous legal systems

are, in fact, living laws incorporating concepts of social justice and community mores, it is necessary to retain a degree of flexibility in the judicial process. The adoption of flexible concepts in specific circumstances/disputes ensures that social justice will prevail (if necessary over legal justice) in accordance with the expectations of the community. Thus, in so doing, the preservation of harmonious relations within the community is ensured. Generally, indigenous legal systems are able to relate their societies' ideals/norms to the actualities of social life by the application of living law through a flexible judicial process.

Chapter 4.

CONCEPT AND FUNCTIONS OF CONTRACTS IN INDIGENOUS LAW

4.1 DEFINITION OF CONTRACT

In a non-specialised sense "contract" is viewed as a mutual agreement between two or more persons that something shall be done or foreborne by one or both, whereas in a more specialised legal sense it is viewed as an agreement enforceable by law.

The typical classical contract has been defined by Atiyah (quoted in Cooke & Oughton 1993: 27) as "a bilateral executory agreement. It consists of an exchange of promises: the exchange is deliberately carried through by the process of offer and acceptance, with the intention of creating a binding deal. When the offer is accepted, the agreement is consummated, and a contract comes into existence before anything is actually done by the parties. No performance is required……" (my emphasis).

This Western model of contract places the emphasis on agreements and executory contracts, in contrast to the indigenous model where the emphasis is on acts and executed contracts. The classical model of contract in Western systems is designed for businessmen dealing at arm's length and negotiating a future exchange. A contract is what the parties promise they will do. Thus, once agreement is reached, a contract exists and is independent of any prior or subsequent acts by the parties (ie, a contract is separate from anything done by the parties) (Cooke & Oughton 1993: 42).

In the indigenous environment however, contracts fulfil different functions. The real and concrete nature of indigenous law seeks action in the form of performance or part-performance to establish liability and embraces a subjective approach to the parties in contrast to the western objective view of contract as a thing.

Hosten et al (quoted in Vorster & Whelpton 1998: 16) regard contract as "an agreement made with the intention of creating obligations". Accordingly using this definition, a mere agreement entered into with the intention of creating obligations is sufficient to establish a contract – although not necessarily leading to a contractual obligation. It can be queried, however, whether such a definition should include the requirement of contractual obligation, as this implies that a contract only comes into being if the agreement is indeed obligatory. Following such implication, the mere intent to create obligations would not *per se* be sufficient to create a contract. However, should such mere intention be sufficient for a contract to be established, then an agreement to create obligations that does not comply with the requirements of contractual obligation would nevertheless constitute a contract – albeit void (Vorster & Whelpton 1998: 16-17).

4.2 SCOPE OF THE LAW OF CONTRACT

Generally, the law of contract comprises those rules of law that apply to the conclusion and consequences of contracts. These include the rights and duties of the contracting parties resulting from the contracts which form the basis of contractual liability (Whelpton 2002: 71). The indigenous law of contract thus determines when a contracting party is guilty of a breach of contract, what legal remedies are available to an innocent party and how

patrimonial rights stemming from a contract are terminated (Vorster & Whelpton 1998: 16).

4.3 CONCEPT OF CONTRACT IN INDIGENOUS LAW

4.3.1. **Individual character of a contract**

Although it is possible to identify general principles and various contracts in indigenous law, the individual character of each contract should always be borne in mind. Whelpton (2002: 71) emphasises that an indigenous contract is more than a mere instrument to participate in the economic and legal life of the community. Indigenous contracts primarily emphasise relations between people rather than objects of contractual performance. Legal principles regarding contracts developed in response to the needs of parties to ensure that fair justice would result from their contractual arrangements.

This concept of fairness is different, however, from that known in most Western legal systems. Whelpton (2002: 71) states that "in terms of an indigenous contract, mutual agreement which forms the basis of an economic exchange does not guarantee the contracting parties that they will receive the full measure of their bargain. It merely assures them that any performance actually rendered will be justly compensated". A practical illustration of such contract is provided by the statement that contractual justice lies mainly in bartering justice (Vorster & Whelpton 1998: 15).

For example, if four cattle have to be given in exchange for work done, and one of the animals is blind in one eye, one is a young ox and the other two are thin heifers – does the delivering of these four animals constitute

compliance with the terms of the contract? In Western law there would be doubts concerning the adequacy of such consideration, whereas in indigenous law the delivery would be acceptable. It is accepted that the cow with the blind eye can still breed and give milk and that the calves will still grow and become fat. The Tswana maxim is appropriate: *lemme ga le bolae go bolaya lefifi* (translated as "ugliness kills not, darkness kills") – which in everyday parlance means something is better than nothing. (Vorster & Whelpton 1998: 16).

4.3.2 **Consequential damages**

It is the element of debt rather than right that is important in indigenous law. Accordingly, no consequential damages may be recovered, so that if the indebted party repays what he has received, he cannot be held liable to fulfil his own obligations under the contract.

4.3.3 **Profit motive**

Moreover, the realisation of a profit is not viewed as an important aspect – especially when measured against any economic hardship it may have on the compensating parties who may be fairly poor (Whelpton 2002: 71). In addition, the making of a profit is also not viewed as a valuable motive, as it may well cause disharmony between members of the community (Whelpton 2002: 71 quoting Walker).

4.3.4 **Rights and obligations – due**

There is no general definition of contract in indigenous law. According to Schapera (1965: 142), the Batswana of Botswana describe a contract as follows: "A contract in Tswana law is basically a voluntary agreement

(*Tumalano*) between two parties, imposing obligations upon one or both and reciprocally conferring rights upon the other or both. Both the obligations and the reciprocal rights are called by the same term *tshwanelo*, for which the most suitable English translation is 'due' ".

4.3.5 **Conclusion of a contract**

The Bakwena ba Mogopa of Hebron require that a contract be concluded in the presence of the contracting parties. The maxim used is *diphoko di matlhong* (words are in the eyes). Accordingly, a contract cannot be concluded by telephone, telegram or telefax. Although currently contracts are occasionally made in writing, the vast majority are still concluded by oral agreement (Vorster & Whelpton 1998: 17). Whelpton (1991: 82) also notes that whilst witnesses are not essential to make contracts legally binding, failure to produce any such witnesses may prejudice a claim or defence.

4.4 **ELEMENTS OF A CONTRACT**

Under Western law, the elements of a contract (under which two parties are bound to perform and counter-perform) are generally indicated as:

1. An agreement between at least two parties
2. Both performance and counter-performance that is possible and determined (or at least determinable)
3. Performance that is lawful.

With this system, contractual liability generally stems from an agreement between the parties - a consensual contract. The contract creates a relation

of mutual obligation once validity requirements have been met, that is, contracts must be honoured.

4.5 CONTRACT AS A SOURCE OF OBLIGATION

According to Justinianus (quoted in Vorster & Whelpton 1998: 17), an obligation is an invisible legal tie in terms of which a party is legally obliged to perform in respect of another party. It is important to realise that a contract is only the source of an obligation and not the obligation in itself. In other words, the obligation results from a contract or some other juristic fact.

In indigenous law, the sources of obligation are threefold – from contract, delict or some other legal facts such as unjust enrichment or negotiorium gestio – the latter being regarded as quasi-contracts (referring to legal phenomena which do not meet all the requirements of a contract) (Vorster & Whelpton 1998: 18).

Before it becomes binding and creates such obligation in indigenous law, an agreement intended to create obligations has to meet several requirements including consensus, capacity of parties to contract, lawfulness, possibility and determinacy of performance and certain formalities. With regard to the Bakwena ba Mogopa, Whelpton (1991: 81-109) identifies seven such requirements.

Since a contract is generally viewed as an agreement made with the intention of creating obligations (irrespective of whether it actually gives rise to such obligations), a contract that is void creates no rights and duties *ab initio* (ie, no obligations because it does not meet the requirements of a contract). This

is to be contrasted with a voidable contract which is, indeed, a contract and does create rights and duties. However, these may be set aside later due to certain grounds/circumstances (such as misrepresentation). In the case of a natural obligation, although it is executable, it is not enforceable, as only an incomplete obligation has been created; for example a wager is an unenforceable contract (Vorster & Whelpton 1998: 18-19).

4.6 **PHENOMENON OF CONTRACT**

4.6.1 **Does the phenomenon of contract exist in indigenous law?**

Against this background, does the concept of contract exist in indigenous law and are there general principles discernable? It is noteworthy that, as Allott et al (1969: 71) point out, the first twenty two volumes of the series "Law in Africa" (published by Sweet and Maxwell of London) do not contain a treatise on the traditional law of contract. This illustrates the difficulty of generalisation in indigenous law of contract and is an indication of the diversity of approaches and views on the topic.

Whelpton notes that the phenomenon of contract is affected by differences between tribes and the degree of Westernisation. He concludes (1991: 4) that it is possible to identify general principles and different contracts – keeping in mind the importance of the individual character of each contract. With indigenous law of contract showing signs of adapting to new developments, it demonstrates that established legal principles and human values are being retained; the changes that are forthcoming are unique in nature and neither typically traditional nor Western (Whelpton 1991: 246-7).

Whelpton (1991: 250) further suggests that in looking to define indigenous contracts, one must not have regard for only one central paradigm or type, but rather holistically view the concept as "a situation with different possibilities". He emphasis the distinctive character of each contract as most important: the function of the indigenous contract is not only for material life necessities but also for social purposes, to control relations in the community and for religious reasons.

4.6.2 **Nature of indigenous contracts**

Thus the real nature of indigenous contracts becomes clear: contractual disputes turn on not what parties mean but what they actually do ie, the manifestation of intent and not mere intent itself (Whelpton 1991: 252). Thus quasi-contracts are generally not recognised in indigenous law. The maxim referred to above "words are in the eyes" confirms not only that a contract is to be concluded in each party's presence, but also the fact that "dealings" must be evident. Thus, all dealings must be personal with no third party representation or agency possible in indigenous law of contract (Whelpton 2002: 77). The notion of a juristic person is likewise unknown (Myburgh 1985: 7).

4.6.3 **The importance of social setting in indigenous contracts**

In examining contract in Bamalete life, Walker (1969: 66) points to the importance of the tribal social setting. He compares contracts in sophisticated and developed environments with the tribal milieu, in which gift and inheritance are of far greater social prominence and economic importance. With few businesses, as such, tribesmen stand in special

relationships to each other in a family-type orientation: they seek "fair justice" in their everyday contractual arrangements in social life (Walker 1969: 25).

Roberts (1970: 62-63) however queries the extent of acceptance of the concept of contract by Bamalete courts, since all they are prepared to do in a dispute situation is to put the parties back into the same position. His view is that the courts are still feeling their way with this concept, and thus have developed few hard and fast rules whilst in this transitional phase of acceptance of the concept and development of relevant legal rules.

In his study of the Birwa in Botswana, Mahoney (1977: 65) also emphasises the social setting by focusing on the seemingly unusual practice of formal contract negotiations between relations and neighbours. He indicates that Birwa contracts should be interpreted as social (rather than specifically economic or legal) devices to contain disruptive exchanges by giving them short-term specificity.

Mahoney concludes that the purpose of the neighbourhood ploughing contracts in multi-stranded relationships was thus principally not to define minimum legal obligations and bind parties thereto. Looking holistically at the total social environment, he (1977: 65) maintains that the real purpose is to "set limits to the responsibilities of the contracting parties and prevent disruptive and intermittent but necessary transactions from damaging a valued neighbourly relationship". This again emphasises the fundamental underpinning of the indigenous law of contract: the maintenance of harmonious relations between members of the community.

Walker (1969: 71) concurs with this view, pointing out that in a marginal economy, very survival may depend upon sharing between friends and neighbours. Any dispute, therefore, is potentially damaging to the fabric of the tribe, and disputes between individuals have to be speedily settled to minimise disruption of normal social life. Thus a contractual dispute between two mere individuals cannot be allowed to persist unresolved to the possible detriment of the well being of the whole community.

4.7 **PERSONALITY AND STATUS**

4.7.1 **Personality**

Allott et al (1969: 38) examine the question of whether the concept of legal personality as distinct from individual personality exists in indigenous legal systems. Western jurisprudence regards such legal personality in terms of a right and duty-bearing unit – formulated relative to claims on and responsibility to others (ie, there must be a duty bearer for every right holder). If this is not the case, an imperfect obligation would be constituted and thus would be unenforceable.

Indigenous courts tend to view a litigant in what Radcliffe-Brown (quoted in Allott et al 1969: 38) called his "total social personality". Gluckman (1955: 23) develops this view further in his study of the Barotse judicial process. He states that a litigant comes before the judges not only as a right and duty-bearing persona, but also as an individual involved in a complex of relations with many other people. Nevertheless, Gluckman (1955: 23) does conclude (on closer examination of trials) that although considering these total

relationships, “concepts of right and duty bearing units exist as nuclei for the substantive law”.

4.7.2 **Status**

Personality is not to be confused with status, which Allott et al (1969: 46) describe as “a coherent agglomeration of a variety of specified rights and duties or capacities or incapacities”. Status relates to either a particular social function or social functions generally of its possessor, whose incidents are determined by law and imposed by law as a result of a given social or legal event; and which marks out a category within the community of similar status of holders.

It should also be borne in mind that capacity has to be viewed as specific to a given legal relationship (Allott et al 1969: 46). In original indigenous law, individuals were not independent bearers of rights and duties and thus could not enter contracts as individuals. The contracting parties were usually the family and household groups. However, in modern indigenous law, with more emphasis on the individual, the two main requisites for lawful entering of contracts are now majority and soundness of mind.

Maine’s much quoted passage concerning the movement of progressive societies from relationships governed by status to relations founded on contract has been frequently supported – particularly so by Gluckman. As previously indicated, Gluckman (1965: 40) views Barotse status as a fundamental jurisprudential concept located within a matrix of social relationships. Thus the dominance of familial and kinship relationships in Barotse society colour the specification of most doctrines and concepts of

law (op cit 39). Any default in obligations of status is punished initially by fines and ultimately by expulsion of the defaulter from his status. With Barotse society organised around multiplex status relationships, Barotse jurisprudence has carefully defined social positions/status. With Barotse law rooted in obligations between persons of set status, the emphasis in contractual law – as in status relationships – is on obligations (thus *caveat vendor* not *caveat emptor*).

It has been observed that changes wrought on pre-contract societies by colonial incorporation and by development of trade and markets have brought about the replacement of predominantly kinship (or status) based transactions by exchanges made according to impersonal and contractual market relationships. Whilst increasing Westernisation has led to more impersonal contractual arrangements, most contractual disputes, however, still revolve around interpersonal relationships within the community. Thus the above material lends weight to the conclusion that, as previously proposed, social relations still remain at the very core of indigenous legal systems in general and of contractual relations in particular.

4.8 DIFFERENCE IN EMPHASIS AND FUNCTION BETWEEN THE WESTERN AND INDIGENOUS LAWS OF CONTRACT

4.8.1 Emphasis

Finally, it is instructive to examine briefly the differences in emphasis between Western and indigenous law of contract. The fundamental difference lies in the approach to executory contracts, which are only protected in western law. In other legal systems, protection is afforded only

to executed contracts – that is, real contracts in which one party has partly or fully performed in terms of the agreement. Using the analogy of Roman law, and agreement to sell created a *jus in personam* whereas the actual sale gave rise to a *jus in rem* (when property is actually transferred).

The concept of making a purely consensual contract enforceable goes against the grain of the fundamental nature of indigenous law. Unspecialised legal systems follow a more concrete, real and visible approach than that of more specialised legal systems, which embrace abstract principles and concepts. Accordingly, abstract consent and abstract expression of intent, (characteristic of Western law) are largely replaced by apparent and observable acts from which consent becomes clear to all in a concrete way: in many juristic acts, the oral agreement is supplemented by the concrete handing over of some object.

A further point of difference between the two systems and one that has a pivotal bearing on the law of contract is that of group vs. individual orientation. In specialised systems, emphasis is placed strongly upon the individual and his rights, whereas in unspecialised systems the individual functions mainly within the context of the group.

By a process of education and acculturation, the individual accepts his or her place and rank within the community. This provides the rationale for status being at the centre of social relations in general and being of paramount importance in the operation of indigenous contracts. However, Whelpton (1991: 47) notes in relation to the Bakwena ba Mogopa that with the large movement from a rural to an urban environment, much greater individual

freedoms are now present. This brings about a diminishing emphasis on the importance of status in social relations in an urban setting – although established value systems and legal principles are not fundamentally altered.

In a sophisticated and developed environment, the function of contracts is largely to regulate commercial intercourse – to provide certainty in a complexity of deals. In the indigenous environment, however, where business undertakings are still comparatively rare, the function is more generalised and socially orientated. Hence the emphasis rests primarily on relationships between people rather than objects of performance. Thus legal principles relating to contracts develop in response to the needs of the parties to ensure that fair justice would result from their personal contractual arrangements (Whelpton 2002: 71).

4.8.2 **Functions**

Walker (1969: 66) states that in indigenous law "mutual agreement" fulfils a different function to that under Western law: "upon formation it does not offer a guarantee to each party that, provided he complies or stands ready to comply with its terms, he will receive a full measure of his bargain. What it does make certain is that any performance actually rendered will be justly compensated". This places the parties in the same position they would have been prior to the making of the contract.

Most contractual arrangements are made between kinsfolk and in-laws (ie, persons already related by status). Transactions between strangers establishing legal relations remain on the periphery of such status relationships (Allott et al 1969: 46). Moreover, Whelpton (1991: 51) notes

that whilst certain general principles of the law of contract can be identified with the Bakwena ba Mogopa, the individual and distinctive character of each contract still has to be borne in mind. The functions of indigenous contract relate not only to material life necessities but also to the wider scope of community relations and religious obligations.

As mentioned earlier, indicative of the function of contracts in the wider social milieu, is Mahoney's study of the Birwa, where he demonstrates that ploughing contracts were made primarily to promote community harmony.

Gluckman, (1965: 271) in his insightful analysis of the Barotse, shows that their society is dominantly organised around multiplex status relationships. Hence the function of the law of contract in many indigenous legal systems cannot be viewed in isolation, and the Law of Persons, Things and Obligations are all inextricably linked and involved in one another. For instance, property is viewed as important only insofar as it knits together persons in different status relationships (ie, obligations from property ownership are emphasised rather than rights in property itself)(Gluckman 1965: 166-7). Both contract law and status relationships thus emphasise the importance of obligations as their primary function: Lozi law does not seek to identify abstract rights over things but rather claims on persons in respect of things.

With Lozi contract law functioning against a background of multiplex status realtionships (marked by mutual give and take), the principal obligations upheld by Lozi law are those of generosity and forbearance. Thus the broader function of indigenous contract law, in particular, is to play an

integral part in the overall objective of indigenous law in general: to maintain harmonious relationships between members of the community. The observance and upholding of obligations of both generosity and forbearance will thus diminish the frequency of occurrences of disputes with their concurrent disharmony – to the overall benefit of the community in general.

Chapter 5

MATERIAL ELEMENTS OF CONTRACTS IN INDIGENOUS LAW

With regard to indigenous law generally, the extent to which there are legal requirements for a contract to be valid is not clear, although certain general principles can be deduced for the effective functioning of an agreement. In particular, Whelpton (1991: 81-109): identifies the following six requirements (with regard to the Bakwena ba Mogopa of Hebron): there must be

1. Consensus
2. Performance that is both possible and determinable
3. Lawfulness as the aim of the contract
4. Delivery of performance or part performance
5. Contractual capacity of the parties
6. Adherence to any prescribed formalities

5.1 ELEMENTS

These elements will now be examined in more detail with a view to establishing a broad framework for the requirements of contractual validity.

5.1.1 Consensus

An agreement comes about through an offer by one party and an acceptance of the offer by another. For a valid agreement there must be consensus between the parties about the material elements of the contract. If a mistake exists about such a material element of the agreement, there is no agreement between the parties (Prinsloo & Vorster 1990: 6). Since consensus about

performance and counter-performance is essential for a valid agreement, if consensus is obtained improperly (eg misrepresentation or coercion) then the contract is voidable at the option of the prejudiced or threatened party.

In the case of misrepresentation, the party who has been misled may resile from the transaction: in this instance, both parties have to restore what they have received in terms of the contract. However, if the prejudiced party decides to adhere to the transaction, he may either limit his claim to the value of the object agreed upon or insist that the agreed object be delivered instead of the misrepresented article. Misrepresentation does not often occur, since in indigenous societies generally it is not customary to take something without first verifying both its nature and value. In this regard Whelpton (2002: 73) quotes the Swazi maxim *emaswati akamtsatsi kati asesakeni* "the Swazi will not buy a cat in the bag".

Finally, undue influence is no ground for voidability of a contract.

5.1.2 **Performance must be possible and determinable**

Performance must be possible at the time the agreement is concluded. If one of the reciprocal performances is not possible when the contract is entered into, such contract is void (ie, no performance is due under the contract). Also, any property delivered in terms of the agreement must be returned. Prinsloo & Vorster (1990: 7) cite an example of the exchange of five sheep delivered for a specific ox (which was dead when the agreement was entered into): such sheep had to be returned. Moreover, the same principle applies when the parties make the existence of the contract dependent on the assumption that performance is possible (ie, in

the above example – the ox does exist). No damages can be claimed under such circumstances.

Moreover, in the case adventitious impossibility when the debtor was innocent, negligent or fraudulent and the creditor has incurred expenses in awaiting performance, the latter cannot claim reimbursement of such expenses (op cit 7 and 8). In accordance with the real and concrete nature of indigenous law, it is deemed that a party should not incur expenses before the actual delivery of the property – Prinsloo & Vorster (1990:7) quote the Tswana maxim *o se ke wa sugela ngwana thari mpeng* – "one cannot make a caross for a baby before the baby is born". However, any expenses directly related to the fulfilment of the contract are allowed.

Whilst the concept of warranty is known in indigenous law, in practice, it appears to be of little significance, because in most indigenous contracts the subject matter of the agreement is physically present whilst the parties negotiate the contract (Whelpton 2002: 74).

Walker (1969: 72) states that when the property is not physically present or if the agreement is made subject to the buyer's inspection, then the seller does warrant that the property will conform to his description and such description forms part of the basis of the agreement.

5.1.3 **Lawfulness**

An unlawful transaction is not recognised and no action is allowed. Prinsloo & Vorster (1990: 9) discuss an interesting case before a Bakgatla Court, where a claim for rainmaking was disallowed. Whilst reasons were not

specifically stated, the experts proposed that both impossibility of performance and unlawfulness of the transaction could have been grounds for disallowance of the claim, since the purpose of the contractual claim was to defraud a local community in need of rain.

5.1.4 **Performance**

A mere agreement does not form the basis of contractual liability in indigenous law. Liability only arises from real (executed) contracts in which one party has performed or partly performed in terms of the agreement. Whilst promises remain unperformed, no remedy is available if one party repudiates, and a party can only demand counter performance after having performed in terms of the agreement (op cit 10). Prinsloo & Vorster (1990: 10) cite the following examples to illustrate this point: for liability in a contract of exchange to arise, it is necessary that there be a valid agreement and delivery by one party of the thing agreed upon. In the case of a contract of independent service, remuneration cannot be demanded before the work has been completed.

5.1.5 **Capacity**

As indicated earlier, according to original indigenous law, membership of the agnatic group was important and not individual status factors. Prinsloo & Vorster (1990: 21) confirm that the family head in consultation with members of his family concluded contracts on behalf of the family. He was liable for the fulfilment of obligations under contracts entered into by him or by a member of his family acting with his consent. Since capacity to contract is essential to give effect to a contract, any purported alienation of family property without the family head's consent was voidable at his

instance. "Family head" means the husband and after his death his successor or, if the successor is a minor, the guardian of such successor. Although members of the wider family group could contract with one another, members of the same agnatic group could not do so, since the family head represented all the members of the household and controlled the household estate.

Today, however, individual property is being increasingly recognised and can be exchanged by its owner, provided he has capacity so to do. Such capacity is granted to all majors who are of sound mind. Minors (minor children and certain classes of women) must first obtain consent from their fathers or guardians before they can dispose of their individual property. Failure to obtain such consent renders the transaction voidable at the instance of the respective father or guardian (op cit 21-22).

Whelpton (2001: 14) points out that amongst the Swazi, individual family members are allowed to initiate agreements, but that they have to consult certain categories of relatives: the degree of involvement and consultation depends on the nature and subject matter of the particular contract.

5.1.6 **Formalities**

It would seem that no set formalities are required for conclusion of contracts. Whilst most agreements are entered into verbally in the presence of witnesses, such presence is not essential for contractual validity – witnesses are important only for evidential purposes (Prinsloo & Vorster 1990: 9). It is important to note that in indigenous law of contract, the court will not exclude any evidence: all evidence is admissible and will be judged on its

merits by the court. Indigenous law of evidence is strongly inclined towards the concrete: a witness is described as the eyes or ears of the party by whom he is called (Myburgh 1985: 7). Moreover the court plays an active part in examining both the contracting parties and any witnesses called. By utilising these two approaches, the court is enabled to determine the truth – and demonstrably so in front of the community members present at the hearing of the dispute.

Moreover, as indicated earlier, it is also common practice that the property to be transferred be either produced or specifically named at the time of agreement (Whelpton 2002: 74). Family members are usually also present to discuss the conditions of the agreement, so that should any dispute arise, such members would be able to testify as to the agreed conditions. Nowadays with the increasing influence of westernisation, more contracts are being reduced to writing.

5.2 **SPECIAL TERMS**

Prinsloo & Vorster (1990: 11) indicate that, although unusual, it is possible to qualify a contractual obligation by special terms which have an effect on the operation of the contract.

5.3 **PARTIES**

5.3.1 **Representation**

From the available sources it is not clear whether representation is known in indigenous law. For example, with regard to the Tswana, Coetzee (quoted in Whelpton 2002: 77) cites the conclusion of a marriage as a well known

example of representation, whereas Whelpton (1991: 121) concludes with regard to the Bakwena ba Mogopa (who are also Tswana) that representation is not known. A case may be made out for the keeper and intermediary being examples of representation, but this may in fact be confusing mandate with representation. Whelpton (2001: 12) quotes the Swazi maxim *sitfunwya asibulawa* "a representative cannot be punished" – implying that a representative does not become involved in any right or obligation under the contract.

5.3.2 **Substitution, delegation, cession and pledge**

Generally, substitution does not occur in indigenous law. Since traditionally agreements were made between agnatic groups rather than individuals, the need to substitute an individual in a contractual relationship did thus not arise. Moreover, with the basis of contractual liability lying in agreement plus performance or part performance by one party, substitution of a party is rendered difficult without first terminating the existing contract (Whelpton 1992: 126-8). Also Prinsloo & Vorster (1990: 23-24) state delegation and cession are not known in indigenous law, whilst it is also doubtful whether pledge is known. Whelpton (1991: 133-4) concurs and points out that with regard to pledge, the placement of property in the possession of another may serve as proof of existence of a debt rather than as security for the debt (emphasising the real and concrete nature of contracts).

5.3.3 **Suretyship**

Although the concept of suretyship is well known and much utilised in the Western law of commerce, in indigenous legal systems it is unlikely that there is a need for such a concept since a debt does not prescribe in

indigenous law. In this regard, the Swazi say *licala aliboli* and the Tswana say *molato gaobole* – ie, a debt arising from a contract does not decay. Both Prinsloo & Vorster (1990: 24-25) and Whelpton (1991: 135-137) state that suretyship is not known, with Whelpton (2001: 13) adding that the Swazi say in this regard *utigwaze ngesakhe sikhaili* – "you stabbed yourself with your own spear". Thus the concept of suretyship is purely consensual (ie. is only an agreement to which no contractual liability would attach).

5.4 **ASPECTS OF ENFORCEABILITY**

In closing this section, it is important to distinguish various aspects of enforceability. If a contract is void, it creates no obligations *ab initio*, since contractual requirements have not been met. A voidable contract however is a contract (with rights and duties having been created), but such rights and duties may subsequently be set aside due to some particular circumstance present at the time of the conclusion of the contract (eg. misrepresentation). An unenforceable contract creates an incomplete obligation, which cannot be enforced legally (eg. a wager).

5.5 **BREACH OF CONTRACT**

Breach of contract may occur when a party to a contract fails to perform or perform properly in terms of the contract. Prinsloo & Vorster (1990: 14) state that breach may take the form of delay in fulfiling the obligation, repudiation of the contract, defective performance or prevention of performance. Moreover, it is important to note that with no contractual liability flowing from mere agreement, repudiation of a promise before either performance or part-performance by one of the parties does not amount to breach.

5.6 REMEDIES FOR BREACH OF CONTRACT

Since the emphasis is on restoration of harmonious relations between both the contracting parties and in the community at large, the approach adopted is to place the parties back in the position they were before the agreement rather than the position they would have been in after the agreement (Whelpton 1991: 140). The principal remedy is to be found in specific performance, but where this is not possible for some reason, the prejudiced party is allowed to resile from the contract (Prinsloo & Vorster 1990: 14-18). In the latter case, the prejudiced party often accepts a lesser performance on the basis that something is better than nothing. Prinsloo & Vorster (op cit 16) quote the maxim *lemme ga le bolae go bolaya lefifi* – "ugliness does not kill, darkness kills", while Whelpton (1991: 148) quotes *bobe bogaisa lefifi* – "ugliness is better than darkness". Both these maxims serve to emphasise the subjective relationship between the parties rather than their performances *per se* (Whelpton 2002: 75). Where one of the parties repudiates the agreement by refusing to accept the other's performance or by disputing the terms of the agreement, the parties would first try to give effect to the contract – requiring specific performance. Also compensation for reasonable expenses incurred in anticipation of full or proper performance is allowed (Prinsloo & Vorster 1990: 15-16).

5.7 TERMINATION OF CONTRACTUAL OBLIGATIONS

5.7.1 Performance

Termination of contractual obligations is effected by rendering performance: once a debtor has performed properly in terms of the agreement, his

obligations have been fulfilled (Prinsloo & Vorster 1990: 18). Where a creditor is prepared to terminate an obligation by releasing the debtor from his obligation to perform, the creditor has to notify the debtor of the proposed release and the debtor has to accept the offer to terminate the obligation (ibid 19).

5.7.2 **Novation and settlement**

Under novation, a previous agreement is terminated prior to entering a new agreement, whereas settlement entails settlement of a dispute about the existence of a debt arising from an agreement. Although both novation and settlement are known in indigenous law as ways of terminating contractual obligations, it is doubtful whether this could be novation and settlement as known in western law. Whelpton's (1991: 164-66)research amongst the Bakwena ba Mogopa shows that it is not possible to amend rights and duties resulting from a specific obligation without also terminating the original agreement.

5.7.3 **Set-off**

Moreover, Whelpton (2002: 76) states further that set-off is also unknown in indigenous law – illustrating again the real and concrete nature of indigenous law of contract, in which each agreement of debt is regarded as an independent agreement which is dealt with separately.

5.7.4 **Prescription**

Likewise, the real and concrete nature is again emphasised in the fact that no prescription of debts exists in indigenous law of contract. No matter how long the creditor fails to exercise his rights, he cannot forfeit his obligatory

rights (Prinsloo & Vorster 1990: 20). Thus both moments in and the passage of time are insignificant and generally not attended by consequences (Myburgh 1985: 8).

In chapter 6 reference will be made to four specific types of indigenous contracts (viz lobolo, mandate, gift and independent service) to illustrate the practical application of the general principles discussed above.

Chapter 6

THE BASIS OF CONTRACTUAL LIABILITY IN INDIGENOUS LAW

Having examined the wider parameters of the indigenous law of contract, this chapter seeks to focus on the core issue of this study: what is the basis of contractual liability? At the risk of oversimplification, contractual liability in indigenous law can be stated as stemming from an agreement plus performance or part performance of one of the parties. Accordingly, protection is afforded only to executed contracts in indigenous law, emphasising the real and concrete nature of indigenous legal systems. In contrast in western law, excutory contracts (ie. mere promises) are afforded protection (Allott et al 1969: 77).

6.1 EXECUTORY CONTRACTS

Thus a mere agreement or intention is insufficient to establish contractual liability in indigenous law, as it does not give rise to a relation of mutual obligation between the parties (Whelpton 2002: 72). Accordingly, whilst promises remain unperformed, no remedy is available if one party repudiates the agreement.

In this respect, the indigenous legal position accords with that which obtained in early Roman law, where a *causa obligationes* was required in addition to consensus to create an obligation. Should no such *causa obligationes* have existed, the agreement was regarded as a *nudum pactum* and thus unenforceable by way of action. As Allott et al (1969: 72) state a

nudum pactum was not enforceable without some fulfilment. *Causa* was the grounds of agreement and it had to be fulfiled in a material sense in early Roman law: hence possibly the *libripens* weighing his copper. This situation led Maine to state that contracts in early Roman law were "reciprocal conveyances of property" – implying that unfulfilled executory contracts were not enforced (ibid 73). In Roman law an executory agreement to sell created a *jus in personam,* whilst an executed agreement of sale gave rise to a *jus in rem* (accompanied by a transfer of property).

Allott et al (1969: 73) examine the views of Gluckman, Epstein, Ghai and Ibik and conclude that in the African legal systems they studied, executory contracts were unenforceable. They quote Mr Justice Coker of Nigeria who states "a feature of the customary law of Nigeria is that it emphasises the distinction between executed and executory contracts, and the problem of execution as against formation. Customary law does not support that the real matter to be ascertained is the intention to take on oneself a legal obligation, whether it be described as causa or consideration or "drink" as in Ghana". Whilst an arrangement like the Ghanian "drink" is commonly used in many African cultures to seal a contract, this provides only evidence of intention to enter into serious legal relations – of particular import in pre-literate societies. Such an arrangement did not however found contractual liability, as generally some movement of property was essential with most tribes. Allott et al (1969: 73) also cite Poirier as indicating the similarities of African law with the law of the Middle Ages in Europe, when to sell a house the hinge of the door had to be transferred, or a piece of soil was required to transfer a parcel of land (ie. a concrete and readily observable approach). However, there is one dissenting voice in the review of the Tswana law of

contract: Schapera (1965: 142) states that a mere promise is sufficient to make an agreement binding among the Batswana of Botswana and by implication to establish contractual liability. Allott et al (1969: 73-74), however, examine the cases cited by Schapera and conclude convincingly that Schapera's statement is not supported by such cases. Some of the cases which Schapera cites as being bare promises in contract, which were enforced, were, in fact, suits in damages for cattle trespass and impregnation of an unmarried girl. These "agreements" were in reality admissions of delictual liability, presumably taken by the court as evidence of liability and admitted assessment of damage. Another case cited concerning marriage is in fact an example of a real contract: the woman was induced to marry a man on his admitted promise that he would not marry polygynously. When he wanted to take a second wife the court told him he must carry out his promise. Since the woman had married on the understanding that there had been considerable fulfilment on her side, Allott et al conclude that the decision could hardly be described technically as enforcement of a "bare promise". Yet another case cited and more difficult to assess – regarding the hiring of services (to build a house) – also does not appear to constitute sufficient authority to support Schapera's contention that bare promises are enforceable.

6.2 **EXECUTED CONTRACTS – PERFORMANCE**

Accordingly, although in indigenous law, contractual obligations are based on an agreement between two parties, liability only arises after performance or part performance by one of the parties in terms of such agreement (Whelpton 2002: 72). Once one party has so performed, such party cannot reclaim performance on the ground that it was not due. An obligation to

perform does not arise, however, before one of the parties has performed in full or in part. Whelpton (1991: 70) quotes several applicable maxims in connection herewith:

a. No legal consequences flow from an agreement alone: the Bakwena ba Mogopa say in this regard *lentswe la maabane ga le tlhabe kgomo* – "Yesterday's word does not slaughter an ox".

b. The parties can change their minds at any time. The Bakwena ba Mogopa say *motlhalefi o fetola mogopolo wa gagwe* – "A clever man changes his mind".

c. The appropriate Swazi sayings are *umumtu ulala agucuka* – "a man changes his mind"
or *litsemba alibulali umganga kudliwa bafati* – "hope does not kill".

(footnote in Whelpton 2002: 72).

Whelpton (2002: 72) states further that since indigenous contracts are real contracts, where a party must perform first in terms of the agreement but fails to do so, he/she cannot be sued by the other party. Prinsloo & Vorster (1990: 10) cite examples (see Chapter 5 section 1.4) to illustrate this point concerning both exchange and independent service. Only the party who has performed has the right to claim counter-performance. Prinsloo & Vorster (1990: 10) use the example of A and B agreeing that A will obtain a large clay pot from B by filling it with grain at B's home, and A fails to bring the grain: here no liability exists.

A party also cannot demand the return of what has been delivered pursuant to an agreement of exchange – for example, before the other party has made counter-performance. What has been delivered in terms of an agreement

cannot be regarded as undue. Neither can the return of a gift (made pursuant to and agreement) be demanded – this is illustrated by the maxim *seyakgosing ga se boe* – "what has been given out cannot return" .

6.3 **SPECIFIC CONTRACTS**

Four specific contracts in indigenous law (viz lobolo, mandate, gift and independent service) are now examined to illustrate the context of contractual liability.

6.3.1 **Lobolo**

Lobolo is probably the most important contract in indigenous law, and even in modern times this contract is commonly encountered. The necessary performance and counter-performance are to be found in the transfer of the marital guardianship (for the purpose of marriage) over a woman by her group, on the one hand, and delivery of property (usually cattle and nowadays money) by the bridegroom and his group on the other hand.

Accordingly, this lobolo contract may be described legally as an agreement between the parties concerned by which one party undertakes to deliver a certain female person as a bride for a certain male person – in return for the delivery of cattle or other property. Formerly, the parties were family groups of the man and the woman, whereas nowadays the parties may even be specific individuals viz the man, the girl and her father (Vorster & Whelpton 1999: 131).

6.3.2 **Mandate**

Mandate in Roman Dutch law is a contract in terms of which the mandatory undertakes to carry out an instruction or commission for another. Nathan (1990: 77-78) examines the concept in indigenous law and concludes that the Bafokeng and Bakwena ba Mogopa both recognise mandate – the gratuitous carrying out of an instruction (calling it *molaetsa*). However, they do not consider it a contract as it does not entail liability (ie, no liability stems from a mere agreement). With regard to the Bakgatla, they also recognise mandate (and call it *taelo*), but no action is available to enforce it if the mandatory fails to carry it out or carries it out incorrectly (be it innocently, negligently or intentionally). The applicable maxim is *go roma go monate, mme go go tlhapise pelo* – "it is nice to send but it does not please". Thus mandate is regarded more as a favour in the social milieu and as such, not directly entailing legal liability (Nathan 1990: 78). In such instances this phenomenon is not viewed as being clothed with sufficient concreteness or reality to be incorporated into the framework of the indigenous law of contract.

6.3.3 **Gift**

This is an example of a unilateral contract but a multilateral legal act. It is termed unilateral because in this instance only one party undertakes the duty to perform. As Whelpton (2002: 78) states "in indigenous law the giving and receiving of gifts can stem from various motives, for example to perpetuate kinship or friendship ties , to pay respect or to show gratitude". Subject to the general principles of indigenous law of succession and the patrimonial ties within the household and between the constituent houses, a family head is free to transfer property from the general estate to any

individual by means of a gift. Such donations between members of the same household are based on contract in terms of the indigenous notion of a family sharing rights and duties, and of a family being represented by its head. Nowadays a person having full contractual capacity can donate his or her personal property to a non-relative.

The gift is a clear example of the real nature of contracts in indigenous law: a mere agreement to give something to someone establishes a debt but no contractual liability. Thus the donee cannot institute an action for delivery against the donor without performance. It is the delivery of a gift that makes the agreement into a contract and at the same time satisfies the obligation to perform in terms of the agreement. Once given, the gift cannot be reclaimed, since what is delivered is what was owed (ibid 78). The Tswana say in this regard *seyakgosing ga se boe* – "what has been given out cannot return" – ie a gift remains a gift. Although a gift is unilateral and entails no obligation to reciprocate, it is customary among many people to give a return gift – often as a greeting or sign of goodwill. In many indigenous cultures van Niekerk (quoted in Whelpton 2002: 79) states that failure to give such a return gift may be regarded as a form of disrespect. This, in turn, may lead to social tensions and bring about possible disharmony within the community.

6.3.4 **Independent service**

The fourth type of contract is that of independent service which is well known, with the service being rendered without supervision of the employer and usually being not of a continous nature. For a valid contract of independent service, the parties have to agree about both the nature and

extent of the work and whether any customary payment applies (Whelpton 2002: 84).

A special and currently topical form of independent service concerns the professional services of traditional healers. Their services encompass a wide spectrum of activities and may include the treatment of illness, performance of a ritual, protection of people and property against harm, and the treatment of both people and property to effect fertility and prosperity (Vorster 1990: 53). With such a diverse collection of activities, the contract usually entails specific and explicit agreement about the actual service required and the payment. Parties usually agree in general terms about the type of work, whilst customary fees will generally be applicable. Once such customary fee has been paid (performance), the traditional healer is contractually bound to render the service to the best of his/her ability (Whelpton 2002: 84). In the case of illness – often requiring a sustained and continous programme of treatment – it is customary that the final fee is only due once a cure has been effected (ie. final counter-performance). Vorster states (op cit 54-57) that such a contract is terminated once the treatment is successful and the final fee delivered. It should also be noted that the services of traditional healers in Kwa Zulu Natal are partially regulated by provisions in codes of Zulu law.

6.3.5 **Summary**

Accordingly, in all four the above spheres of lobolo, mandate, gift and independent service (together with suretyship as discussed earlier), it is again clearly illustrated that agreement alone is not sufficient to lead to contractual liability. The appropriate Tswana maxim is *sa theko se*

amoganwa diatleng – "the thing bought must change hands" (Vorster & Whelpton 1998: 24).

However, Prinsloo & Vorster (1990: 10) state that a mere agreement is not without jural effect, citing the example where a party can be compelled to accept performance when it is offered: in the case of exchange, a party cannot avoid the obligation to exchange by returning or refusing the object of the other party's performance.

Moreover, there is also confirmation by Prinsloo & Vorster (ibid 11)of the similarity between Tswana law of contract and the Roman and the Germanic law – pointing to the real contract being typical, and to the consensual contract being unknown in all these legal systems (with authorities cited being Coetzee, Lee and Wessels). They concur further with the view that it is typical of African legal systems generally that contractual liability arises only after something has been transferred or after some other performance has been effected (with authorities such as Gluckman, Walker and Ghai being cited).

6.4 **QUASI-CONTRACTS**

For the sake of completeness, the phenomenon of quasi-contracts is now briefly considered. A quasi-contract is a contract that does not satisfy all the legal requirements for a contract; liability in quasi-contracts arises from performance without agreement. This is based on one of the two following instances. The first is enrichment (as illustrated by the *thula* custom whereby a junior house incurs an obligation for repayment of lobolo taken from a senior house to establish that particular junior house). The other

instance is *negotiorum gestio* (illustrated by *isondlo* which is payment of compensation to a person for the care of a child who is not a member of his group)(Vorster & Whelpton 1998: 29-30).

6.5 SPECIFIC OBLIGATIONS

Finally, mention is made of two specific obligations based on performance, which do not arise from either contract or quasi-contract. *Ukufakwa* is defined by Bekker (1989: 337) as "an agreement to pay a loan or debt from the dowry to be received for a girl"; by means of designation, the plaintiff will become co-owner of the lobolo if and when it is delivered (Vorster & Whelpton 1998: 30-31). *Ukubambisa* is an obligation to ensure performance. The basis of such obligation is the constructive delivery of moveables in respect of a debt: the movable are returned if the debt is settled and forfeited if the debtor defaults (Vorster & Whelpton 1998: 28-29).

Accordingly, the real and concrete nature of indigenous law is seen in contracts, quasi-contracts and certain specific obligations where performance is the ultimate key factor.

6.6 DEFECTIVE PERFORMANCE

Given that performance or part-performance is required to establish contractual liability, what if such performance is delayed, defective or rendered impossible? Prinsloo & Vorster (1990: 14-16) - using an example of thatching a house – confirm that generally part-performance by one party renders him/her liable to complete the work (with regard to delay). In the case of defective performance, proper or specific performance could be

demanded or alternatively compensation for the cost of correcting the defect could be claimed. Where performance is rendered impossible by one party, the other could resile from the contract. Moreover, Walker (1969: 70) states that a debtor who is "absolutely unable" to perform may be required by the court to offer what he has. The appropriate maxim is *lemme gale bolae go bolaya lefifi* – "ugliness kills not, darkness kills" – ie, Something is better than nothing.

6.7 **CONCLUSION**

The above examples clearly illustrate that only performance or part-performance establishes liability in the indigenous law of contract. With liability arising only from real contracts, no remedy is available if one party repudiates the agreement. A party can only demand counter-performance after first having performed in terms of the agreement (Whelpton 2002: 74).

In closing this chapter, it is again emphasised that prescription of a debt is unknown in the indigenous law of contract. A debt does not decay and must be paid: it is always due no matter how long ago it was incurred. This again illustrates the real and concrete nature of the indigenous law of contract: if liability has been established, there are no "artificial " time constraints or limitations imposed to preclude the fulfilment of such liability. Even the death of the debtor party will have no effect on the debt, since his successor will be liable for its settlement (Whelpton 2002: 74).

Chapter 7

CONCLUSION

The material set out in the preceding chapter has to be viewed in the context of the operation of the indigenous law of contract in particular and of the function of indigenous law in general. That function must also in turn be viewed against a background of social processes which operate outside the strict parameters of the legal system, but which are nevertheless closely entwined therewith.

7.1 ROLE OF CONTRACTS

Thus Whelpton (1991: iv) concludes that although, with the Bakwena ba Mogopa, it is possible to identify general principles and different contracts, the individual character of each contract must always be borne in mind, since a contract is more than a device for establishing the economic and legal implications of a legal transaction. It also fulfils an important role in the social environment of an indigenous community. This wider dimension is known to the community and the parties have regard to the possible social ramifications in their contractual relationships. Such knowledge and appreciation comes both from attendance at court proceedings and from the process of enculturation whereby the councillors and elders of the community pass down their experience and knowledge. Moreover, the indigenous courts are also cognisant of the important social dimension, and will not hesitate to apply considerations of a morally and ethically persuasive nature – to adapt strict legal principles in order to achieve "social justice".

Furthermore indigenous contracts show their own individual characteristics, with the aim of a contract being subjective rather than objective. Contracts are real in nature and although reasonable expectations are fulfilled, contractual justice lies mainly in the sphere of reciprocality or a "quid pro quo" basis (Whelpton in the Afrikaans text of his thesis talks of "ruilgeregtigheid" – 1991: iii).

7.2 RESOLUTION OF DISPUTES

With the important accent on the social dimension, it is perhaps not surprising that Whelpton concludes (ibid) that most contractual disputes are resolved outside of legal institutions. The social elements of such disputes are often better understood and more readily appreciated outside of court proceedings, and accordingly negotiated settlements and mediators are often used to resolve contractual disputes. This ensures that contractual justice incorporates a measure of social justice where account is taken of community expectations.

Whelpton (2002: 75) clearly illustrates this wide dimension when he examines the primary function of indigenous contracts in perpetuating harmony within the community (quoting Walker 1969: 71). Whilst reference to this function has already been made earlier in this study (chapter 3 section 6), Whelpton's exposition is so neatly summarised that this paragraph bears repetition. He states that "…. the primary function of indigenous contracts is to ensure the perpetuation of harmony through the speedy resolution of disputes. There is concern for justice to the individual, but it must often yield to the greater interest of the community as a whole in

preserving harmonious relations between its members. This interest is not borne solely of altruism, but reflects a recognition that in a marginal economy, survival may depend upon sharing between friends and neighbours and upon the customary links between members which call for economic exchange. Any dispute, therefore, is thought to be of potential damage to the fabric of the community as whole."

Allott et al (1969: 71) emphasise that the indigenous law of contract was not as well developed as the laws of family relationships, succession and inheritance, the constitution, and property. Most transactions involving the production and exchange of goods and services took place between kinsfolk and in-laws (ie, parties already related by status). Thus transactions involving strangers (outside status relationships) were both rare and on the periphery of legal relationships. In such status-bound transactions, one can readily appreciate the appeal that the real and concrete nature of indigenous contracts had to the parties involved. Of particular appeal would be the simplicity engendered by contractual liability being established by visible performance or part-performance of one of the parties to the agreement.

7.3 **PROCEDURE IN CONTRACTUAL DISPUTES**

Moreover, the indigenous law of contract has no place for a detailed enquiry into the intentions of the parties or the minutiae of terms of agreements or their interpretation. In most non-literate societies, reliance is placed on easily observable and understood performance or part-performance to establish contractual liability. Furthermore, in most indigenous legal systems (illustrating their non-specialised nature) cases are not presented by lawyers (with specialised legal knowledge and training). No representation

is deemed necessary, as members of the community are able to argue the fundamental merits of a case in simple, unequivocal and readily understood terms before their chiefs and councillors. Every adult male is recognised as a fit and proper person to appear in court – irrespective of whether he is well versed in the law of his community (Myburgh 1985: 5). Every man may thus question litigants and witnesses and also express opinions on the matter before the court.

In turn, the indigenous courts, in deciding contract cases, will be cognisant of the value of eliciting everyones' arguments and listening to them all: the general opinion of all those present at the hearing is important. Moreover, these courts appreciate the persuasive force of the moral values of the community and will strive to take account of such principles in reaching a decision. A "just decision" in the context of indigenous law of contract thus involves a highly skilled selection and application of both legal and moral principles which will be socially acceptable in terms of community conscience and group cohesion.

This may seem an antithesis to a Western jurist trained typically in accordance with strict legal parameters. However, in an indigenous contract context, such seemingly extraneous factors are overlooked at the expense of the maintenance of communal harmony. Contracts thus have to be viewed in terms of the broader perspective of their effect upon the social life of the community – with legal decisions thereon ensuring that the persuasive force of communal mores is upheld. It is of fundamental importance to keep in mind that indigenous contracts essentially emphasise relations between people rather than objects of contractual performance.

Such a "socially just decision" must thus reflect community values which emphasise social solidarity. As an example of a "just" decision, in the law of succession, the division of an estate into equal shares between beneficiaries may not be "just" and may additionally harm relations between family members and may jeopardise communal harmony.

7.4 **DISPUTE SETTLEMENT**

When contractual disputes do reach the courts, however, Ghai (quoted in Allott et al 1969: 76) observes that "in no sense can it be said that African courts enforce contracts; what they do is to settle disputes arising out of a contract. More often than not, the courts will settle a dispute by cancelling the contract; they put the parties back in their original position, where this is possible". Moreover in protecting only real executed contracts, African traditional laws of contract show what Ghai calls (quoted Allott et al 1969: 77) "a striking ability to reach the person in possession of the goods in question".

Here, once again, the emphasis on performance or part-performance by one of the parties comes to the fore in looking to a "movement" of goods or services to establish contractual liability arising out of an agreement. Whether one follows Whelpton's view that it is possible to identify general principles and different contracts, or whether one holds that there is no general model of contract – with each transaction being regarded as a specific complex of rights and obligations (Gluckman 1965: 176), the basis of contractual liability remains the same: viz performance or part-performance.

7.5 AIM OF RECONCILIATION IN DISPUTE PROCESS

With indigenous courts settling underlying social problems, the aim is to reconcile disputing parties within the community and to restore social harmony. Individuals are helped or persuaded to accept the community's *boni mores* – the standards of social behaviour and conformity (with the accent on extra-legal diverse traits such as friendliness and generosity). Contractual disputes, in addition to the legal issues/aspects, have further cultural, social and (to a lesser extent) psychological dimensions. Social tensions are relieved or diffused and the prevalent community moral code is applied and upheld.

Customary law is an established system of immemorial rules which evolved from the way of life and natural wants of the people, the general context of which was a matter of common knowledge, coupled with precedents applying to special cases which were retained in the memories of the chief and his councillors (Bekker 1989: 11). Thus there is no established code or strict set of rules to be applied, but rather the customary application of a particular rule and/or the formulation of more general rules in the wider societal context.

However, lest it be thought that indigenous peoples in this "customary" environment are lacking in legal acumen, it would be well to bear in mind the words of van Warmelo in 1948 (quoted in Myburgh 1985: 13). Although stated in terms of the Venda law of delict, they would appear to hold good for indigenous law in general: "It has been thought that these

people are unable to grasp the finer distinctions of law ……. How different is the truth". If one superimposes upon this demonstrated acumen, the ability to incorporate the social, cultural and psychological dimensions of a dispute, it becomes evident that the settlement of a contractual dispute involves a sophisticated and multi-faceted juristic approach.

The courts, in seeking out the broader issues underlying contractual disputes, are also acting as custodians of the community's fundamental values – with value judgements being applied in an endeavour to maintain social harmony. Any prospective "deviant" behaviour on the part of one of the contracting parties is censured and the individuals are thereby helped to conform to accepted social norms for the good of the community in general. The aim of the indigenous law of contract is to reconcile people – not only with each other but also with the community at large.

Solutions to contractual disputes can thus form a buttress of a traditional society's moral code - an instrument of moral reinforcement maintaining social stability at the expense of the individual's self-centred rights or demands. Holistic and acceptable solutions are sought to relieve social tension by removing potentially disruptive dispute problems. Universally accepted principles of morality and humanity are invoked as part of the legal solution to a contractual dispute.

Moreover, the wealthy elements in the community cannot use the medium of contracts to further their own selfish interests and thereby increase their wealth. If hardship would be engendered for the other contracting party in such a situation or if any potential social disharmony was envisaged, the

indigenous courts would not hesitate to emasculate the wealthy contracting partys' claims and apply human/community justice. Profit is not a worthy motive and no elitist protection exists – the greater good of the community will generally prevail in indigenous legal systems. Cultural perceptions of group (as against individual) importance are reinforced with contracts being viewed in a family/group, community and cultural setting.

7.6 CONCEPT OF *UBERRIMAE FIDEI*

There is an apparent contradiction between what Gluckman (1965: 175) terms "the idea of social life as a process of *uberrimae fidei*" and the view of contract where no obligation arises from a mere promise or bare agreement. What of the concepts of honour and the sanctity of a man's word in general social intercourse? Whilst the judgement of the community on the breaker of a promise is severe, such approbation extends only to community mores and does not reach into the legal realm to be armed with legal sanctions. Only when a promise is accompanied by action by one of the parties – in the form of the transfer of property or rendering of services (ie. performance or part-performance) – is a legal obligation established. This clearly illustrates the real and concrete nature of indigenous law of contract. It is the resulting obligation and relationship that is thereupon clothed with *uberrimae fidei.* In upholding this concept, the continuation of harmony within the community is thereby ensured. Members of the community are involved in a complex of relationships with many other people, and it is to the resolution of contractual disputes involving such intertwined relationships that the indigenous law of contract is applied.

As previously mentioned, the indigenous law of contract primarily emphasises relations between people rather than objects of performance. Indeed, Myburgh (1985: 8) sees the emphasis on the real and concrete aspects as stressing not the relations between persons but the persons themselves as entities acting by virtue of the relations. This people-centred approach is clearly illustrated in the following two maxims expressing group orientation and humanness (quoted in Vorster & Whelpton 1999: 13):

Sotho - *Motho ke motho ka batho*

Zulu - *Umuntu ngumuntu ngabantu*

meaning "a person is a person in relation to other people".

At the same time, expression is given to the general moral code and values of the communities as a whole. Thus in seeking human justice, established values are applied to both supplement and often lessen the sometimes harsh effects that would flow from a decision based solely on the application of strict legal principles.

7.7 **EFFECT OF CHANGE**

With regard to the effect of change in sphere of indigenous law of contract, Whelpton (1991: iv) concludes that although customary law is showing clear signs of adapting to new developments, there is also proof that established legal principles and human values are being retained. However, these changes are unique and are neither typically traditional or western (with regard to the Bakwena ba Mogopa).

When the culture of a community changes, so must the law, which must be adapted to the new circumstances – reflecting new rules and mores of the community. However it should be borne in mind that the deep-rooted

principles of the indigenous law of contract are so entwined with the emotions of the people that they will be more resistant to change. Notwithstanding this, it is to be noted that the whole of customary law is, and will be, in a state of change to make it compatible with the Constitution (Maithufi 2002: 67). This is especially so with regard to giving more protection to individuals as opposed to group rights (ie, conflicting with the basic communistic nature of customary law).

In a time of swift cultural change (which is deciding the destiny of indigenous people), Myburgh (1985: 12) pleads for a clear juristic statement and elucidation of the principles underlying indigenous law – "since at any given time the present can only be fully understood in the light of the past"

Indigenous law should thus not be regarded as stagnant, but should be viewed as a dynamic process of both adaption and change (Labuschagne & van den Heever 2002: 89-90). Moreover legal rules only function effectively if they can be synchronised with the dynamic social and psycho-cultural environment in which they operate. Adaptations in indigenous contract law will include those brought about by legal acculturation.

Moreover, it is possible that future adaptations may well involve the use of the *ubuntu* concept; in this regard, the *sisa* contract features such concept prominently. Here the owner places some of his animals in the care and control of another for an indefinite period. The understanding is that the keeper will enjoy the use of the animals, but the ownership will remain with and any increase will accrue to the owner. This contract represents a special contract in indigenous law: it is not a contract of loan, of bailment nor of

letting or hiring. One of the principal objectives of this contract is – in the spirit of ubuntu – to provide assistance to needy relatives and other members of the community with no animals – to acquire the use of the livestock. A modern form of the *sisa* contract occurs where a person is working in the urban areas and buys cattle with his income. These cattle are then farmed out to a kinsman or other person in the rural areas (Vorster & Whelpton 1999: 135).

With the above points in mind, it is therefore unlikely that any change affecting the basis of contractual liability would be accepted into the indigenous law of contract, since such a change would involve a fundamental departure from its very real and concrete nature (requiring performance or part-performance). There exists no possibility of compromise: executory agreements or promises will remain the sole province of western legal systems and will not be integrated into indigenous legal systems, since the principles upon which executory liability in contract are based are completely foreign to and at variance with the basic tenets and concepts of the indigenous law of contract.

7.8 INDIGENOUS CONTRACT LAW AND ECONOMIC DEVELOPMENT

However, Walker (1969: 75) – in examining contracts among the Bamalete – queries whether existing indigenous contract law is in any way suited to the requirements of economic development. He concludes that in so far as the current system maintains tribal integrity and ensures security through customary exchanges of goods and services, it should be retained (in the current non-specialised and under-developed economic field). Nevertheless,

he argues that it may well be unsuitable in promoting the expansion of entrepreneurial activity, and proposes two alternative reform measures. The first is the acceptance (within the existing framework of indigenous law of contract) of principles which honour the value of bargained-for consideration. This he regards as unlikely, since tribal courts would not readily accept unfamiliar concepts of Western law (which are both difficult to understand and against the grain of traditional thinking). The alternative, he suggests, is the exclusion of contracts from the jurisdiction of local courts, which would ensure security for the entrepreneur in the development environment. This would then leave indigenous courts free to maintain their traditional umbrella role as healer of tribal differences, and place the development of more complex mercantile law in the hands of higher courts.

In replying to Walker's study, Roberts (1970: 62-63) views indigenous contract law as being in a transitional state, where it is slowly moving away from traditional positions towards adoption of some principles of common/civil law. He concludes that no definitive rules have yet been formulated in this regard and emphasises that indigenous courts are still feeling their way in the gradual process of transition.

7.9 **SOCIAL ENVIRONMENT**

Law is an essential component of community life: indigenous law and social change must be examined together to be incorporated into a living law in indigenous communities (Whelpton 1991: 245). Whelpton's (1991: iv) research amongst the Bakwena ba Mogopa also confirms that most contractual disputes were decided outside of a legal forum by negotiation, mediation and conciliation – with resort to the courts for conciliation only if

the parties were unable to resolve the situation amongst themselves. Since a mere promise or bare agreement found no contractual liability, such promises and agreements are considered and dealt with only in the realm of the socio-moral (and not legal) environment.

With contracts being used not only for material life necessities but also for social purposes and to control community relations, the real nature of indigenous contract law becomes evident in that it is what people do (and not what they meant) that is important. The manifestation of intention is thus the crucial factor and not merely the intent *per se*: contractual obligations result only from actions and dealings in the form of performance or part-performance.

In determining contractual validity and to establish contractual liability, it is essential that the reasonable expectations of the parties will be implemented. This means that indigenous contract law must function within the community environment and take account of community relations – hence the *quid pro quo* basis referred to earlier. Thus the terms and conditions of contracts can be legally adapted to the living rules and values of the community, with all aspects of the contract conforming to and taking into account such community values.

Due to its flexible nature, indigenous contract law is able to develop or adapt to reflect the changing lifestyle of the community. Thus indigenous contract law is embued with a distinctive character embracing both a complex combination of social processes and the realities of social life on the one hand and incorporating cultural change and development on the other.

It is against this background that indigenous contract law seeks some positive action or dealing to establish contractual liability – that is both evident and readily understood by community members. Hence only performance or part-performance by one of the parties to the agreement meets this requirement. If one superimposes this aspect upon the primary function of indigenous law to ensure perpetuation of harmony in the community through speedy resolution of disputes, then the practical rationale for the basis of contractual liability becomes both self-evident and readily appreciated.

7.10 **HOLISTIC FOCUS**

Moreover, the basis of contractual liability cannot be established solely by looking to the indigenous legal system alone. It has been demonstrated that a holistic (and of necessity a multi-disciplinary) approach is necessary to both establish and understand such basis. No apology is made for having drawn extensively on material of an anthropological and sociological nature in this study to seek out the wider contexts within which indigenous legal systems function.

Thus community and interpersonal relationships – both complex and inter-twined entities – are at the centre of indigenous contract law (which in itself is also very people-orientated). The maintenance of good relations in a dynamic society is ensured by indigenous contract law being applied in a flexible manner (with a concrete, real and visible approach) to give expression to community values.

Disputes on contractual matters are settled – either by mediation, negotiation, conciliation or by court hearing. Whilst the settlement 'environment' is primarily legal, the decision taken involves value judgements on moral principles. Thus in endeavouring to reconcile the parties, a 'just' decision will be sought, which will be in accordance with the society's known and established mores. Furthermore, disputing parties appreciate that their conflict – in disrupting established social relationships – poses a potential threat to the stability of the community. Any settlement reached will thus be based on 'social' (human) justice, and be acceptable to the community as a whole – both as a reflection of communal values and also as a practical measure to restore cohesion and harmonious relations.

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