THE INTERACTION OF INDIGENOUS LAW AND WESTERN LAW
IN SOUTH AFRICA:
A HISTORICAL AND COMPARATIVE PERSPECTIVE

by

GARDIOL JEANNE VAN NIEKERK

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PROMOTOR: PROFESSOR J CHURCH

JOINT PROMOTOR: PROFESSOR JV VAN DER WESTHUIZEN

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FOREWORD

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SUMMARY

Historically South African law has been dominated by Western law. Indigenous law and the jural postulates which underpin that law are insufficiently accommodated in the South African legal order. The Western component of the official legal system is regarded as institutionally and politically superior and is as such perceived to be the dominant system. In contrast indigenous law is regarded as a servient system. The monopolistic control of the legal order by the Western section of the population resulted in the creation of a legal order primarily suited to its own needs.

The fact that few of the values of indigenous law are reflected in the official legal system and the fact that there is a measure of conflict and tension between the fundamental precepts of indigenous law and those of Western law, gave rise to a crisis of legitimacy of the official legal system in South Africa. This in turn lead to the emergence of unofficial alternative structures for the administration of justice.

Indigenous law should receive full recognition and enjoy the same status as Western law. To accomplish this, legislative measures which entrench a distorted indigenous law, limit the application of indigenous law, or affect its status in the South African legal order, should be revoked.

Even in a multicultural society such as that of South Africa, there is a common nucleus of core values that are shared by the whole society. But different cultures have different conceptions of these basic values and their role in legal, political and social ordering. The Bill of Rights should give due recognition to the postulates which underscore both Western and indigenous law. This should be done by providing that the values the Bill entrenches, must be interpreted in their proper cultural perspective where circumstances so demand. But this will be possible only if the level of knowledge of indigenous law and its fundamental precepts is drastically improved.

Key terms: indigenous law; indigenous courts; people's courts; community courts; people's justice; colonial law; pre-colonial indigenous law; jural postulates; legal pluralism; legitimacy; Interim Constitution; Bill of Rights; value-systems.
# Table of Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>FOREWORD</strong></td>
<td>v</td>
</tr>
<tr>
<td><strong>SUMMARY</strong></td>
<td>vii</td>
</tr>
<tr>
<td><strong>GENERAL INTRODUCTION</strong></td>
<td></td>
</tr>
<tr>
<td>1. Terminology</td>
<td>1</td>
</tr>
<tr>
<td>2. Nature of the Problem</td>
<td>2</td>
</tr>
<tr>
<td>3. Approach and Method of Presentation</td>
<td>7</td>
</tr>
<tr>
<td><strong>PART I : HISTORY OF THE DEVELOPMENT OF LEGAL PLURALISM IN SOUTH AFRICA</strong></td>
<td></td>
</tr>
<tr>
<td><strong>CHAPTER 1: PRE-COLONIAL AFRICA - SOME INTRODUCTORY REMARKS</strong></td>
<td></td>
</tr>
<tr>
<td>1. Introduction</td>
<td>10</td>
</tr>
<tr>
<td>2. History and Oral Traditions in Pre-colonial Africa</td>
<td>13</td>
</tr>
<tr>
<td>3. Legal Systems and Oral Traditions</td>
<td>17</td>
</tr>
<tr>
<td>4. Summary</td>
<td>22</td>
</tr>
<tr>
<td><strong>CHAPTER II: INDIGENOUS LAW IN PRE-COLONIAL AFRICA</strong></td>
<td></td>
</tr>
<tr>
<td>1. Introduction</td>
<td>24</td>
</tr>
<tr>
<td>2. Research and Pre-colonial Law</td>
<td>25</td>
</tr>
<tr>
<td>3. The Nature of Pre-colonial Indigenous Law</td>
<td>37</td>
</tr>
<tr>
<td>4. Divisions of Law</td>
<td>38</td>
</tr>
<tr>
<td>4.a Public Law</td>
<td>39</td>
</tr>
<tr>
<td>4.b Private Law</td>
<td>47</td>
</tr>
<tr>
<td>5. Summary</td>
<td>52</td>
</tr>
</tbody>
</table>
## Table of Contents

### CHAPTER III: INDIGENOUS LAW IN COLONIAL SOUTH AFRICA

1. **Introduction** ................................................. 53

2. **The Imposition of Western Law** .................................. 56
   - 2.a **The Cape Province** ........................................ 56
   - 2.b **Natal** .................................................. 61
   - 2.c **The Transvaal** ........................................... 65
   - 2.d **The Orange Free State** .................................. 67

3. **Summary** ................................................... 68

### CHAPTER IV: INDIGENOUS LAW IN POST-COLONIAL SOUTH AFRICA

#### BEFORE 1994

1. **Introduction** ................................................. 70

2. **Official recognition and Application of Indigenous Law** .......... 72
   - 2.a **The Black Administration Act 38 of 1927** ............... 72
   - 2.b **Indigenous Law in Official Courts** ....................... 77

3. **The Internal Conflict of Laws** ................................ 82
   - 3.a **Introduction** ............................................. 82
   - 3.b **Theoretical Overview of the Internal Conflict of Laws** .... 83
     (i) **Section 1 of the Law of Evidence Amendment Act** ........ 84
     (ii) **Judicial Notice of Indigenous Law** ....................... 87
     (iii) **Connecting Factors** .................................... 93
   - 3.c **Conclusion** .............................................. 96

4. **Unofficial Indigenous Law** .................................... 98
   - 4.a.i **Indigenous Law in the Court of the Ward Headman** ...... 99
   - 4.a.ii **Indigenous Law Officially Applied by the Official** ... 99
     Courts of Chiefs and Headmen ................................ 99
   - 4.b **People's Law** ............................................. 101
   - 4.b.i **The Period Before 1985** ................................ 102
     (i) **Civic Structures in the Western-Cape** ................. 103
     (ii) **The Makgotla in Mamelodi and Soweto** ................ 107
   - 4.b.ii **The Period After 1985** ................................ 113
     (i) **The Eastern Cape** ...................................... 119
<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>(ii) The Western Cape</td>
</tr>
<tr>
<td>(iii) The Karoo</td>
</tr>
<tr>
<td>(iv) Gauteng</td>
</tr>
<tr>
<td>4.c The Period of Reform</td>
</tr>
<tr>
<td>(i) Reform from Within</td>
</tr>
<tr>
<td>(ii) Reform with the Assistance of Non-State Institutions</td>
</tr>
<tr>
<td>5 Conclusion</td>
</tr>
</tbody>
</table>

PART II: THE SOUTH AFRICAN LEGAL ORDER - A CRISIS OF LEGITIMACY

CHAPTER I: THE CO-EXISTENCE OF DIFFERENT TYPES OF LAW APPLICABLE IN A HETEROGENOUS SOCIETY - A THEORETICAL EXPLANATION

1 Introduction | 137 |

2 Official Law | 146 |

2.a State Law | 148 |
2.b Social Law | 150 |
2.b.i Autonomous Law | 151 |
2.b.ii Customary Law | 152 |

3 Unofficial or Living Law | 154 |

4 Conclusion | 155 |

CHAPTER II: JURAL POSTULATES

1 Introduction | 159 |

2 Jural Postulates in Western Law | 163 |

2.a General | 163 |
2.b Diffuse Postulates | 163 |
2.c Specific Postulates | 171 |
2.c.i Constitutional Law | 172 |
2.c.ii Private Law | 176 |
2.c.iii Criminal Law | 189 |
2.c.iv The Interpretation of Statutes | 189 |
Table of Contents

<table>
<thead>
<tr>
<th>2.c.v Procedural Law</th>
<th>191</th>
</tr>
</thead>
<tbody>
<tr>
<td>3 Jural Postulates in Indigenous Law</td>
<td>194</td>
</tr>
<tr>
<td>3.a General</td>
<td>194</td>
</tr>
<tr>
<td>3.b.i Diffuse Postulates</td>
<td>196</td>
</tr>
<tr>
<td>(i) Harmony of the Collectivity</td>
<td>196</td>
</tr>
<tr>
<td>(ii) Superhuman Forces are Superior to Man</td>
<td>201</td>
</tr>
<tr>
<td>(iii) The Identity Postulates</td>
<td>208</td>
</tr>
<tr>
<td>3.b.ii Specific Postulates</td>
<td>212</td>
</tr>
<tr>
<td>(i) Status Order</td>
<td>212</td>
</tr>
<tr>
<td>(ii) Family Idea</td>
<td>216</td>
</tr>
<tr>
<td>(iii) The Hamlet Spirit</td>
<td>222</td>
</tr>
<tr>
<td>(iv) Common-kin Principle</td>
<td>223</td>
</tr>
<tr>
<td>(v) Esteem for the Ruler</td>
<td>225</td>
</tr>
<tr>
<td>4 Summary</td>
<td>228</td>
</tr>
</tbody>
</table>

CHAPTER III: THE FOUNDATION OF JURAL POSTULATES IN SOUTH AFRICA

1 Introduction | 230 |
| 1.a The Foundation of Jural Postulates in Western Law | 230 |
| 1.a.i Judaism and Christianity | 231 |
| 1.a.ii The Graeco-Romano Tradition | 236 |
| 2 The Foundation of Jural Postulates in Indigenous Law | 246 |
| 3 Conclusion | 256 |

CHAPTER IV: INDIGENOUS LAW AND WESTERN LAW IN A NEW CONSTITUTIONAL DISPENSATION

1 Introduction | 259 |
| 1.a The Constitution and the Application of Indigenous Law | 266 |
| 2 Application of the Bill of Rights with Regard to Indigenous Law | 269 |
Table of Contents

3 Indigenous Law and Equality ................................ 272
   3.a Indigenous Law and Equality Before the Law .......... 277
   3.b Indigenous Law and Equal Protection of the Law ...... 282
      (i) Ethnic Origin, Race, Colour, Culture and Language . 283
      (ii) Religion, Belief and Conscience .................. 285
      (iii) Sexual Orientation ................................ 286
      (iv) Social Origin ...................................... 286
      (v) Gender and Sex ..................................... 292
      (vi) Summary ........................................... 304

4 Indigenous Law and the Sanctity of Human Life .......... 304

5 Indigenous Law and Freedom ................................ 308

6 Conclusion .................................................. 310

SUMMARY OF CONCLUSIONS ........................................ 324

LITERATURE CITED AND MODE OF CITATION .................... 330

TABLE OF CASES .................................................. 377

STATUTES ......................................................... 378
GENERAL INTRODUCTION

1 Terminology

2 Nature of the Problem

3 Method of Presentation

1 TERMINOLOGY

Various terms are used to denote the legal systems applicable in South Africa. In this thesis the following terms are of importance: "official law", "unofficial law", "State law", "Western law", "official indigenous law", "unofficial indigenous law", "pre-colonial indigenous law" and "living or people's law". The South African legal order comprises official law and unofficial law. The most important components of official law assessed in this investigation are State law and official indigenous law. State law is regarded as law which emanates from, and is supported or authorised by the highest political authority in the country. On the one hand, State law refers to the South African common law, that is Roman-Dutch law as influenced by English law and adapted and developed through judicial decisions and legislation. On the other hand it refers to indigenous law incorporated into legislation, or pronounced in judicial decisions. The former component of State law is referred to as "Western law", the latter as "official indigenous law". Official indigenous law further includes indigenous law which is indirectly recognised and supported by the State, but which has not yet been incorporated into State law through judicial decision or legislation.

Also various terms are used to denote the indigenous legal systems currently applicable in Africa. Although there are various such systems applicable in South Africa, they reveal sufficient similarity with regard to structure, technique and ideology to be regarded as a single family of law - hence "indigenous law" and not "indigenous laws". The term which is most commonly used is "customary law". However, this term equates species with genus, because indigenous African law is partly customary and partly statutory in origin. The term "traditional law" is not acceptable because it does
not do justice to the dynamic nature of indigenous law. "African law" has become a
generic term for law of the African continent. It comprises indigenous law or those
remnants of it which are still applied, those laws of religious and cognate origins which
are recognised by African States, laws and judicial institutions introduced by colonial
powers and the laws and decrees of independent African States. "Autochthonous law"
or "indigenous law" seems to be more appropriate terms to use. In Roget’s *Thesaurus*
"indigenous" and "autochthonous" are classified under "inhabitant-native" and under
"intrinsically-intrinsic". According to the *Concise Oxford Dictionary* these terms mean
"produced naturally in a region: belonging naturally" and "sprung from the land itself".
"Autochthonous law" is not commonly used and therefore "indigenous law", a simpler
and more popular term, is preferred to denote the indigenous law of Southern Africa.

The unofficial (or living) law of importance in this thesis, is "people’s law", "indigenous
law" and "pre-colonial indigenous law". People’s law is generated by the community
through unofficial dispute-resolution institutions. This law displays many similarities with
indigenous law and is to an extent consonant with indigenous jural postulates. Pre-colonial law is the purest form of indigenous law which has not yet been adapted
or distorted. It is not officially recognised as a system, but is to an extent applied by
unofficial indigenous institutions in the rural areas, and also unofficially by
State-recognised institutions such as the Chiefs’ Courts. Generally indigenous law
refers to pre-colonial law which has been adapted in accordance with its underlying
postulates. It is natural that official indigenous law, unofficial indigenous law and
pre-colonial indigenous law are to a large extent similar, but it should be borne in mind
that there are also fundamental differences.

2 NATURE OF THE PROBLEM

Indigenous law and the jural postulates which underpin that law are insufficiently
accommodated in the South African legal order. The Western law is regarded as
institutionally and politically superior and is as such perceived to be the dominant
system whilst indigenous law is regarded as a servient system. Over the years, the interaction between Western and indigenous law has been directed by this perceived superiority and dominance of the Western component of the law. The fact that few of the values of indigenous law are reflected in the official legal system and the fact that there is a measure of conflict and tension between the fundamental precepts of indigenous law and western law, gave rise to the cultural legitimacy crisis of the official legal system in South Africa.

Throughout the history of South Africa there had been very little reciprocal influence between the indigenous and Western systems of law that are applied in this country. Indigenous law was mostly ignored or distorted by the courts and the legislature. The superiority of the Western law still directs the practical relationship between the two systems of law, even today after the implementation of a new interim Constitution.

The dominance of Western law dates back to the time when Roman-Dutch law was superimposed upon the indigenous legal systems of Southern Africa. Although it is generally believed that Roman-Dutch law was transplanted in the Cape (because it is erroneously assumed that there existed no sophisticated legal system in this country at that time), there was originally not a transplantation. There was also no reception, because there was no desire by the local people, nor any degree of consciousness and voluntariness on their part to receive foreign law.

Although legal effect is given to certain institutions of other communities (such as Hindu and Muslim populations), indigenous law is the law that was originally applicable in this country and the only legal system other than the Western system which is, albeit to a limited extent, officially recognised. The fact that a multiplicity of

1 The only reception that took place in South Africa was the reception of English law into the existing Roman-Dutch law which started with the first occupation of the Cape by the British.

2 Van Niekerk "Indigenous Law" 34.

3 Hindu and Islamic family law are not officially recognised: see Hacq Nadvi 13-24.
legal systems exist and are observed, gives rise to legal pluralism in South Africa. Legal pluralism has been variedly interpreted. In a narrow sense it presupposes that various legal systems, which are officially recognised, apply in a territory. The relationship between the systems of law, is based on equality. In a wide sense it is the observation of various official and unofficial laws in a territory.

True legal pluralism in the narrow sense of the word does not exist in South Africa because the Western law is regarded as the dominant system whilst indigenous law is seen as the servient system. This perception flows from an ethos of legal positivism which has directed jurisprudence in South Africa for many years. Within a positivistic framework, law is monist and consists of those norms that are created and sanctioned by official State organs in accordance with a basic rule of recognition or a grundnorm. The possible co-existence of a variety of unofficial legal systems is denied and unofficial laws are regarded as culturally inferior.

In a wider sense, legal pluralism should be regarded as a factual situation which exists in a social field in which various legal systems are observed; a situation which is not dependent on State recognition of the various legal systems. Official recognition of certain legal systems and non-recognition of others have no effect on the factual existence of legal pluralism; each simply determines the status of the legal systems which are officially and unofficially observed in a territory. Legal pluralism is a result of cultural pluralism. Whereas official legal pluralism exists where the State recognises a variety of legal systems, real or "deep" legal pluralism comprises the observance of various legal systems in a legal order - some of which are officially recognised and others which are unofficially applied although not officially recognised. But whether one regards it as true pluralism or official pluralism, in this country the Western component of the official law is still regarded to be dominant and superior.

4 In this sense it would perhaps be better to speak of legal dualism, seeing that there are only two systems which are officially recognised.

5 Prinsloo "Regspluralisme" 696; Reyntjens "Future" 5-7.
This thesis involves a historical and comparative analysis of the interaction between indigenous and Western law.

In Part I the historical facts which lead to a situation of deep legal pluralism are investigated in order to establish first which systems of law are observed in this country, and secondly, to establish why the interaction between these laws is characterised by the dominance of the Western law. The reason for this dominance is perceived to lie in the supposed superiority of the Western culture in South Africa. This perception is but a reflection of a broader cultural chauvinism prevalent in the Western world in general. The exaggerated belief in the hegemony of Western culture is evinced by the fact that the Western world indisputably accepts that Europe is the cradle of civilisation.

The reasons for the assumption that African history commenced no earlier than the colonial period and the concomitant denial of pre-colonial African history are investigated in this thesis. The lack of interest in pre-colonial and preliterate law in Africa is discussed and reference is made to methods to establish preliterate history and law through oral traditions. Attention is focused on the different approaches to research in indigenous law and to the viability of explaining preliterate cultural concepts in a Western language.

The basic principles of pre-colonial indigenous law, regarded as the purest form of that law, is explained by analogy with known Western legal concepts. This is done to enable a feasible comparison between the two systems and to render the explanation intelligible to the reader unfamiliar with indigenous law. Pre-colonial law is discussed to establish the extent to which it has been influenced by the interaction with Western law and specifically by the dominant position of Western law, as well as the extent to which it has digressed from its underlying postulates.

The role of the State (through legislation) and of the State courts (through the judicial application of indigenous law and in resolving internal conflict of laws situations) in the
development of official and unofficial indigenous law is appraised. The appearance of people's law and institutions are seen as a natural consequence of the legitimacy crisis of the official law. The development of official, Western and indigenous law and unofficial law is traced through the walk of history. The course of the interaction between these laws is followed from the colonial period to 1994. The new political dispensation which commenced in April 1994, in theory removed the political reasons for the dominance of Western law and for the legitimacy crisis. This period is treated in Part II because the changed circumstances are believed to have paved the way for a fundamental change in the relationship between the applicable legal systems in South Africa and in prevailing attitudes towards the status of indigenous law.

In Part II the emphasis is on a comparison of the jural postulates which underlie Western and indigenous law respectively. A comparative-jurisprudential study is undertaken of the jural postulates upon which the legal systems under investigation rest. First a theoretical explanation is provided of the way in which the different laws which developed over an extended period and which are observed in this country, fit into the larger scheme of the South African legal order. The reasons are investigated why the historical dominance of the official law and Western jurisprudence gave rise to a legitimacy crisis in the legal order. Because legitimacy is viewed within the framework of a fundamental value consensus of the greater section of the community, this part of the thesis concentrates on the value systems which underlie the applicable laws. These values are reflected in the jural postulates or basic axioms which form the starting point for legal reasoning in the different systems of law. Attention is also focused on the legal traditions upon which these postulates are founded. The invariable characteristics of the legal systems, the result of the legal traditions in which they are founded, are explained. Here again the purest form of indigenous law, unadulterated by external influences, namely pre-colonial law, is employed to extract the underlying postulates. But this does not imply that indigenous law is static. Indigenous legal norms have changed in line with its underlying postulates, but they have at the same time also been distorted through judicial application, legislation,
insufficient knowledge of personnel who apply it, and even by traditional leaders who saw their power dwindling and sought to regain it by distorting the indigenous law.

Finally, the relevance of the interim Constitution is discussed, and specifically the Bill of Rights, in the practical application of indigenous law. Here some examples of official and pre-colonial indigenous law are taken to illustrate the conflict which exists between Western and indigenous values. The legitimacy of the official legal system is again appraised in light of the new political dispensation and proposals are made regarding the status of indigenous law, internal conflicts management and possible solutions to the conflicts between the values and legal postulates that underlie the various legal systems.

3 APPROACH AND METHOD OF PRESENTATION

The method of research employed for this study to some extent accords with the "quantitative" research approach of the human sciences. This approach comprises a scientific study and analysis of existing literature to reach reasoned conclusions.

The literature consulted for present purposes, includes legal text books and articles, legislation, anthropological writings, published and unpublished criminological and legal field-research reports, and, to a limited extent, judicial decisions.

For a number of reasons only very limited attention is paid to judicial decisions on indigenous law. The objective of this thesis is not to compare Western and indigenous legal norms as they are applied in the courts, but to assess the influence of the interaction between these systems on their respective development. On the one hand it has to be established to what extent this interaction has been causing the indigenous law to fall out of step with its underlying jural postulates and on the other hand it has to be established how it affected the legitimacy of the official legal system.

6 See, eg, Church *Marriage* 3.
For this purpose, the focus is on the jural postulates which underlie the law and not on the actual legal norms. To determine what these postulates are, the purest possible form of indigenous law, namely pre-colonial law, is employed and this makes it necessary to rely on anthropological and legal-anthropological material. Judicial decisions often reflect a distorted form of indigenous law and are therefore an unreliable source when the true underlying postulates are to be ascertained.

Because legitimacy is reflected in a value consensus of the majority of the community, jural values of the two legal systems must be compared to establish to what extent there is a disparity between them. Jural values are expressed in jural postulates. Although it is impossible to give a comprehensive list of the jural postulates which underscore the Western and indigenous law, some examples from both legal systems are compared to establish the extent to which they differ, overlap or are reconcilable. For this purpose too, only limited use can be made of judicial decisions.

Published material on living or people’s law is limited and it is for various reasons difficult to do field research in the metropolitan areas. All possible information concerning alternative dispute-resolution institutions, including unpublished reports and conference proceedings, are therefore used to research this phenomenon.

There are different approaches to the study and analysis of preliterate laws and institutions. In this thesis pre-colonial law is explained by analogy with Western dogmatic devices. This is necessary because a comparative analysis of indigenous law and Western law is undertaken, with a view to law reform. It is further necessary because official indigenous law has been adapted to incorporate some Western concepts, for example individual ownership. However, the true nature of indigenous law is always borne in mind and the postulates underlying indigenous law form the basis of the framework within which indigenous law is explained.

Statements of indigenous legal norms are in the historic present. Where necessary
reference is made to changes in that law. However, the emphasis is on the underlying postulates and it is not always necessary to trace all possible distortions or adaptations which have taken place. These are referred to, where necessary, to illustrate why official indigenous law is sometimes in conflict with its jural postulates and how it can be reformed to reconcile it with these postulates, often, in the process removing the source of conflict with Western law.
PART I

HISTORY OF THE DEVELOPMENT OF LEGAL PLURALISM IN SOUTH AFRICA

CHAPTER I
PRE-COLONIAL AFRICA - SOME INTRODUCTORY REMARKS

1 INTRODUCTION

For many years, Western culture has been dominated by a spirit of cultural chauvinism which denied Africa a place in world history, in the origin of civilisation, and in world thought. All merited cultural attributes claimed by Africa have been ascribed to European or Asian influence. Because of its pre-literate nature, Africa has even been denied a history and a law of its own. In this spirit, East and West are found to be characterised by progressive civilisation and Africa by primitive barbarism.

It is often taken for granted that the cradle of the civilised world lies in Europe. When Charles Darwin reflected that our forefathers may have originated from the African continent, the Victorian world was shocked. When the oldest hominid fossil, between one and three million years old, was discovered in 1924 in the Northern Cape in South Africa, the Western world took notice.


Africa and identified by Raymond Dart as a link in the line of man's ancestry, this was not accepted as such by the world at large. Although many questions today still remain unanswered, Africa's role in the origin of mankind has been verified by archaeological discoveries and sound scientific research. Studies in the pre-history of Africa have established the fact that the continent was never far behind in the development of the human race and that it had in fact been in the lead in the palaeolithic or Old Stone Age. It has been established that between 90 000 and one million years ago Africans started using fire; that between 27 000 and 25 000 years ago rock paintings were made in Namibia; that the San\(^2\) hunter-gatherers, whose descendants still live in the Kalahari, and who are by some regarded as the ancestors of the Khoikhoi, were widely dispersed over Southern Africa at least 14 000 years ago; that agriculture, as opposed to hunting and gathering was first practised South of the Sahara between 7000 and 4000 years ago; that the iron-age man emerged in Northern-Africa 3000 years ago; that communities practising metal work and pottery settled South of the Sahara 2500 years ago; and that the San who turned to stock farming 2300 years ago became known as the Khoikhoi.

This attitude of cultural chauvinism\(^3\) makes it equally difficult for the Western world to accept that Africa may have had some influence on European cultures and world thought. Thus, even those who acknowledge Egypt as the cradle of Greek philosophical thought, often regard it as part of Eastern civilisation and thus classify it together with Turkish, Chinese, Indian and Japanese cultures. However, cultural-historical research has revealed that Egypt, which was strongly influenced by Ethiopian culture, indeed falls within the matrix of African culture and thought. Egypt and Ethiopia are considered to be the most important African cultures of antiquity. There is evidence that Egyptian ancestry may be traced back to the Somalis and

\(^2\) Because there is no generally accepted alternative, the word "San" is commonly used by academics. However, the San themselves regard the term as derogatory: see Vorster "Towery" 70.

\(^3\) A phrase coined by Curtin 5. See generally Curtin 2-9.
the Masais, who currently inhabit Tanzania and Kenya, and archaeological finds have revealed that Ethiopia may have been populated by the San in prehistoric times.

The historical link between Africa and Europe is further evidenced by the fact that the inhabitants of Crete, considered to be the origin of the hellenistic culture, originally came from Africa - from Western Ethiopia. They roamed the Sahara until, in 2500 BC they were driven by drought to the regions surrounding the Mediterranean Sea. Crete had strong trade links with Egypt and flourished as a trading centre until it was overpowered by the semi-barbarous Greeks.

On a smaller scale but in the same chauvinistic vein, the advent of Europeans on South African soil is described as the starting point of that country's history. Only recently have scholars begun paying attention to the existence of an established civilisation South of the Sahara before the colonial invasion of the region. Whilst the colonial period should not be regarded as the starting point of African history, it should nevertheless be kept in mind that it introduced a new age of change and development to Africa. As a rule, the South African legal system is today considered to be rooted in Europe; Western law is considered to be the common law of this country. The reality of various legal systems which have grown and developed for many centuries prior to the infiltration of Europeans has been ignored to the extent that those legal systems are presently only regarded as secondary legal systems. As will be explained below, not even a new constitutional dispensation has effected any change in the superiority and dominance of the Western component of the official law.

4 According to Nöthling 23-24 Egyptian ancestry also had elements of European stock.
2 HISTORY AND ORAL TRADITIONS\(^5\) IN PRE-COLONIAL AFRICA\(^6\)

Until the 1950's pre-colonial\(^7\) history in Africa was a much neglected topic in historical research. Three reasons may be advanced why historians chose not to research the unwritten history of Africa. First, history was considered to be the study of human change and achievement and Africa was perceived to present only a “monotonous spectacle of arrested development ... the only discernible movement ... [being] the pointless gyrations of generations of savages”.\(^8\) In the same vein Africans were perceived to have an inability to grasp historical perspective which leads to an alteration of the tradition when it is spontaneously handed down from generation to generation. Secondly, some historians adopted the approach that because of the fallibility of human memory, history can only concern itself with written documents, which therefore makes it impossible to research the African oral sources of history.\(^9\)

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5 Vansina (Vansina Methodology 19-20, Vansina History xi-xii 3) describes oral traditions as unwritten, verbal accounts (spoken or sung) of the past. Oral traditions are documents of the present because they are told in the present, but they are expressions of the past because “they embody messages of the past”. They are oral messages which are used as historical sources and they are based on previous oral messages which are at least one generation old. Miller 2 defines it as “a narrative describing, or purporting to describe, eras before the time of the person who relates it”.

6 The following sources have been consulted in this regard: Rowe 155-170, Curtin 5-20, Langworthy 1-7, Nöthling 16-18 89 96-99, Vansina Methodology 1-18.

7 Strictly speaking "pre-colonial" denotes the era before the so-called "scramble for Africa" by European powers. In South Africa this would roughly refer to the period preceding the first English annexation of the Cape in 1795. It is this period of colonisation which brought Africa into real and permanent contact with the West and it is in this period that the most serious inroads into traditional indigenous cultures were made. However, in a broader sense pre-colonial could also refer to the period before indigenous communities came into contact with Westerners. In the South African context the arrival of Jan van Riebeeck at the Cape in 1652, or the first contact with earlier traders and missionaries who brought indigenous communities into contact with Christianity and a new type of economy could mark the end of the pre-colonial period. However, this influence was limited and of a selective nature and for purposes of this thesis "pre-colonial" will thus refer to the period preceding the first English annexation of the Cape. See Curtin 20-24, Prah 2-3.

8 Rowe 155.

9 Some researchers are of the opinion that pre-literate people had exceptional powers of memory which were used to transmit and continue their culture and traditions. See Vansina Methodology 4-5.
Thirdly, and stemming from the second reason, there was uncertainty about the methodology of processing oral information to reconstruct the history of pre-literate communities and the concomitant possibility of distortion of historical facts.

The teaching of history within an African framework, with the emphasis on oral traditions, originated and was mainly concentrated in tropical Africa. Countries in Africa South of the Zambezi regarded European history as their heritage and those in Africa North of the Sahara, regarded Muslim history as their legacy. From the 1950's onwards African history formed part of the syllabuses of the Universities of Ibadan, Ghana and the School for Oriental and African Studies in London. Vansina, the first author of a comprehensive theoretical work on oral traditions and methodology in history and a leading historian on pre-colonial central African history, started his career in the Congo. Together with universities in Senegal and Upper Volta, the Congo became the centre for the teaching of pre-colonial African history in Francophonic Africa.\(^\text{10}\)

Indigenous African people are characteristically a pre-literate people, that is, people without writing. Oral traditions thus form the main source of information on their past. However, it should be remembered that other historical sources, especially the ancient sources of literate communities, were often also based on oral traditions. In Africa oral traditions of indigenous communities are still practised and have not yet been taken over by the written word. Further, the fact that oral traditions have been reduced to writing in some instances has not supplanted them. Objections against the study and teaching of pre-literate African history were overcome by a critical interdisciplinary approach. Whilst the limitations of the information thus transmitted are today readily

\(^{10}\) See Van Niekerk & Vorster (eds) *Field Research in Indigenous Law* for a recent survey of the methodology of evaluating oral traditions in the legal research of pre-literate communities. Of special interest is Prinsloo’s comprehensive analysis of existing anthropological and legal material on this topic. It is noteworthy that the methodology employed in general historical research as expounded by Vansina, displays many similarities to the methods and techniques of legal and also of anthropological research. It emphasises the fact the study of all aspects of preliterate cultures should be approached holistically, although the emphasis may vary in the different disciplines.
accepted, written documentation as well as ethnographical, archaeological, palaeontological and linguistic materials are employed to reconstruct and corroborate oral information on unwritten history.\(^\text{11}\) Any distortions which may have occurred through the very method of transmitting oral history are usually detectable and may be accurately pinpointed by comparing various versions of the same events; a method which is also successfully applied to establish the accuracy of written documents.

Thus archaeological and ethnological studies have established scientifically the development in political and military organisation, techniques of social control, and the development of a copper and iron industry in pre-colonial Africa South of the Sahara. Critical analyses of various oral accounts have been used to substantiate information and to reconstruct the most likely version of historical events, much in the same way as written records were utilised to obtain a true account of European historical events. Today source material about this era in the history of Africa abounds and few people question the value of oral evidence as historical source material.

Bantuspeakers presently occupy the greatest part of Africa South of the Sahara. The San, who are regarded as the original inhabitants of the Southern African region, occupy only a small part of the South-Western corner of Africa. Linguistic research has disclosed that the Bantuspeakers originated in North-East Nigeria and the Cameroon, and from there migrated southwards and eastwards over a period of 2000 years. The collective name "Bantu" is derived from their original primeval and ancient language, Ur-bantu or proto-Bantu. It is uncertain when exactly this migration commenced,\(^\text{12}\) but it seems that their first contact with the San of Northern Botswana took place some

\(^{11}\) Vansina Methodology 17 is of the opinion that the very nature of oral traditions makes it possible to establish its reliability without necessarily always having reference to other disciplines.

\(^{12}\) There is some evidence that the Bantuspeakers have established themselves South of the equator before the end of the Stone Age: see Oliver & Fage 32-34, Curtin 31-35, Sachs Justice 95.
2300 years ago\textsuperscript{13} and that they established themselves as iron-using farmers South of the Limpopo, in the Transvaal and Natal, at least 1750 years ago (and not, as is sometimes believed and propagated, in the mid-seventeenth century, at the same time the Dutch arrived at the Cape). Dominant cultural features such as matrilineal descent, anthropomorphic art, secret societies, and cults involving spirit possession indicate cultural ties between the Bantuspeakers and the West African Negroes which transcend any apparent cultural differences such as language, or physical differences which are the result of their migration and contact with groups like the San.\textsuperscript{14}

The pre-literate tradition of the Bantuspeakers resulted from their geographical isolation at a critical stage in the development of the written word.\textsuperscript{15} When these people migrated South from Nigeria and the Cameroon, they were cut off from the Sudan civilisations where, by the end of the tenth century, the technique of writing became known. This isolation was enhanced by problems of transportation in the tropical forests and difficulties with coastal shipping. Before the development of technically more advanced ships and navigation skills in the fifteenth century, weather patterns on the West coast of Africa prevented Africans South of the Sahara from travelling northward and Europeans from travelling southward. On the East coast, in contrast, shipping conditions were ideal and Indian-Ocean trade was well developed by the end of the tenth century. However, contact between the coast and the interior was hampered by the risk of disease. Not only did yellow fever and malaria endanger the lives of the traders, but the tropical tsetse fly decimated the draft animals. Human porters had to be employed and the expansion of trade was slow. This isolation also had the effect that Islam and Christianity became established in these areas only after the eighteenth century.

\textsuperscript{13} This encounter introduced the concept of stockfarming to the San of Botswana and had a revolutionary influence on their prevailing economic and social life. Saunders is of the opinion that these San were the ancestors of the Khoikhoi, whilst Wilson & Thompson hold that the origin of the Khoikhoispeakers is unknown.

\textsuperscript{14} See generally Olivier & Fage, Curtin, Saunders.

\textsuperscript{15} Curtin; Nöthling.
3 LEGAL SYSTEMS AND ORAL TRADITIONS

Research into the development of the unwritten legal systems in Africa poses problems similar to those encountered in other historical research. In pre-literate societies oral tradition continues to exist at the heart of the environment from which it arose and remains an important source of the unwritten laws. Only recently have scholars begun reducing indigenous laws to writing. Vansina indicates that researchers into the history of pre-literate cultures should be acquainted with the language and social anthropology of the culture under examination. It is not surprising then that many of the scholars concerned with the restatement of pre-colonial indigenous law were trained anthropologists as well as lawyers and often had a thorough knowledge of the vernacular of the people being researched.

It has been established, with recourse to oral traditions and interdisciplinary research, that law as a method of resolving disputes was indeed known in the pre-colonial period. The methods of preserving oral information and the close relationship between law and religion in pre-colonial African societies have ensured that we have a fairly clear picture of the nature of indigenous laws in their pre-colonial phase.

16 Vansina Methodology 2.

17 See Vansina Methodology 45-46 75 111-113 139-140 for a discussion and analysis of the nature of oral traditions; the technique of understanding them; the methods of establishing distortions and evaluating accuracy of oral traditions; and the relative weight to be attached to them.

18 For instance Myburgh, Schapera, Breutz, Lestade and Van Warmelo.

19 Young 473-480.

20 See Rowe 160, Curtin 14-20, Langworthy 1-7 on the preservation of oral information by non-literate communities through songs, legends and epic poems, which are memorised verbally and transmitted from one generation to the next; or through more concrete ways such as the burying of gold nuggets in clay pots to mark important events. They also discuss the criteria for the evaluation of such oral evidence transmitted from one generation to the next. Oral evidence is regarded as a living source of traditional indigenous cultures. In fact, Allott Language 29 compares legal proverbs in indigenous law with judicial pronouncements of the House of Lords: authoritative, yet often obscure!
Curtin\textsuperscript{21} is of the opinion that pre-colonial Africa had developed sophisticated legal systems and forms of social control which made the coercive power of a State unnecessary. These indigenous forms of social control were underpinned by kinship ties and the extended family.

Indigenous law in Africa is today still typified as primitive law and displays features similar to those of other laws in the primitive phases of their development. The fact that change in the substance of indigenous law has been slow is mainly due to the isolation of the Bantuspeakers. However, this does not mean that these legal systems should be characterised as static, and neither are they inferior or in any way backward compared to developed Western legal systems. On the contrary, a different picture altogether is indicated by the mere fact that these systems have survived with relatively little change and contain elements which may assist in the development and reform of Western legal systems.

In a broad perspective the factors which brought about change in indigenous cultures also gave rise to the development of increasingly more complex societies and social organisation in Africa. Spaulding and Kapteijns\textsuperscript{22} point out that change in Africa is closely connected to the demands of material needs. Change prompted greater social differentiation within societies. The period of the hunter-gatherers (in Southern Africa the San) was characterised by very little social differentiation.\textsuperscript{23} Group solidarity was strong and the concept of chief or courts foreign in some of the San communities.\textsuperscript{24}

\textsuperscript{21} Curtin 37-38.

\textsuperscript{22} Spaulding & Kapteijns 1-6.

\textsuperscript{23} It should be borne in mind that hunter-gatherers presently still occupy parts of Southern Africa, notably the arid parts of Botswana, Namibia and Angola. Some of these communities have managed to preserve their ancient way of life remarkably well and are thus considered invaluable sources for anthropological and other research. See Wilson & Thompson 41-54 on the social structure of the hunter-gatherers in Southern Africa.

\textsuperscript{24} In other San communities there was a measure of centralisation, and political and social structures similar to those found amongst the Bantuspeakers.
The group as a whole settled disputes which were feared by the group. A so-called custodian controlled vegetable and water distribution and protected the fire. His position was hereditary.

With the decline in natural resources, a period of food production was introduced. Communities increased in size and could no longer be socially organised in the same and simplistic way as earlier. A new type of community, comprising subgroups or lineages, and based on unilineal descent, came to the fore. Increasing social differentiation occurred between males and females, the elder and the young, and the creation of a lineage elite, secured by hereditary titles, became pronounced. The change from food gathering to food production, which occurred in Africa South of the Sahara around the beginning of the Christian era, involved other cultural changes too. This period was also the iron age and the exploitation of minerals brought about political and economic change. Trade developed and expanded and so did wealthy settlements and chiefdoms.

Islam and Christianity also made inroads into traditional cultures, as did contact with European explorers. The first contact with Christianity in sub-Saharan Africa came in the fifteenth century when Christian priests escorted Portuguese navigators to Africa. In the kingdoms of Benin and Congo many indigenes were converted to Christianity. This conversion was seemingly superficial and when the Europeans withdrew from

25 Vorster "Spanning en Konflik" 1-2 points out that conflict and tension were dealt with in different ways by the community. Disputes were resolved and tensions released by talking or arguing, by fighting without weapons and even by fighting with weapons.

26 See generally Wilson & Thompson 55-74 on the social organisation and economic structure of the herders and cultivators of Southern Africa, notably the Khoikhoi, Nguni Tsonga and Venda.

27 See Spaulding & Kapteijns 3; see also Nöthling 99-100 on food production in sub-equatorial Africa.

28 See Nöthling 100-104 on metal working in Southern Africa.

29 See Wilson & Thompson 142-153 179-182 on the Sotho's skill as craftsmen and the influence of their metal craftsmanship on trade and the economy in general.

30 Fabian 381-399, Paden & Soja vol II 193-200.
these territories the inhabitants reverted to their traditional beliefs and practices. In the eighteenth century freed slaves from the New World who were repatriated to Sierra Leone and Liberia, spread the gospel also in the Gambia, Gold Coast and Nigeria. The European Christian mission-movement started in the nineteenth century and in this period conversion to Christianity took place on a more solid and substantial basis. Literacy, vocational training and medicine were the three major fields of activity practiced by the missionaries. However, the missionaries' intolerance of indigenous religious practices, customs and beliefs gave rise to an independent church in Africa. The local churches which broke away from the mission churches may be divided into the "Ethiopian" churches and the Zionist movements. The former retained their European orientation after they had broken away and the only difference is that now they have an independent leadership of their own. The latter accommodated indigenous forms of worship and broke away from the mission-church orientation. Although magic is strongly opposed,\(^{31}\) polygyny is allowed. Today Christianity remains a minority religion in Africa.

In contrast Islam\(^{32}\) gained more ground in Africa because of its basic tolerance of indigenous customs and beliefs. In fact, Islam in Africa has a specific African character which distinguishes it from its Asian counterpart. The adoption of Islam in Africa was usually accompanied by the acceptance of an Islamic legal system. There are four schools within the Islamic legal tradition, and the system most commonly adopted in Africa is known as Maliki. This legal system is considered to be the most traditional Islamic legal system and is tolerant of indigenous custom and institutions. It is estimated that approximately a quarter of the African States have a Muslim majority or that one in three Africans is Muslim. This is not surprising in view of the Islamic heritage of the Northern part of the African continent. The line of Islamic influence can be drawn from the West to East coast above the tropical rainforest belt. Certain parts

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\(^{31}\) The Zionist movement's alternative to traditional magic e.g., is their holy water and strong prayers.

\(^{32}\) See generally Abu-Lughod 545-567, Padan & Soja 81-84 201-203, Nöthling 105 139 148 149 on the impact of Islam on Africa.
of sub-Saharan Africa were also influenced by Islam through religious-military methods. Although there are sections of central and mostly Southern Africa which have experienced only a minimal Islamic influence, Islam is generally regarded as an indigenous religious system in the African continent as a whole.

Cultural change is significant in the development of a legal system which, itself, is also an aspect of a community's culture. African culture is characterised by the fact that it is accommodating; change is not experienced as substitutionary. Indigenous legal systems in Africa have been responsive to change by integrating change without displacing the existing legal structure, technique and ideology. Therefore, although certain changes have taken place by adopting new rules to accommodate changing conditions, the nature of indigenous law has remained largely unchanged. An example of this accommodating nature of indigenous culture is the fact that although the Christian religious system has been accepted, indigenous customs and beliefs are still adhered to. Indigenous ideas and principles have also not been replaced by Islamic doctrine and the Islamic religious system is accepted merely as an additional system of belief. Feyerabend describes the same feature in ancient Greece as a "... tolerance in religious matters which later generations found morally and theoretically unacceptable and which even today is regarded as a manifestation of frivolous and simple minds". He explains further, that "[a]rchaic man is a religious eclectic, he does not object to foreign gods or myths, he adds them to the existing furniture of the world without any attempt at synthesis, or a removal of contradictions". The same feature of basic tolerance is also observable in Islam, which in Africa has a different African character.

The period between the establishment of the first white settlement at the Cape in 1652 and the first British occupation of the Cape in 1795 was marked by a systematic subjugation of the Khoikhoi and the San (Khoisan). In the smallpox plague of 1713 a

33 This feature of indigenous law is discussed in more detail in Part II.11.3.b.i(iii).
34 Feyerabend 245.
large part of the Khoikhoi population was destroyed. In 1739 the last armed resistance by the Khoisan took place in the South-Western Cape and in 1740 the remainder of these landless and indigent people in the Western Cape became labourers. By 1795 the Khoikhoi had all but become extinct and the San had of necessity been driven to a small Western area of the country.

The position of the Bantuspeakers was quite different. Although their encounters with the Westerners from 1652 onwards were also marked by conflict, their numbers prevented their destruction in the way the Khoisan were decimated. The first real influence on their culture and interference with the application of their laws and institutions began in the late eighteenth century when the British first occupied the Cape. Therefore, the discussion of the characteristic features of the pre-colonial indigenous laws will focus on the law of the Bantuspeakers as it applied prior to 1795.

4 SUMMARY

The utilisation of oral traditions has made it possible to study pre-literate history and law. In the next chapter the nature and principles of pre-colonial indigenous law will be discussed. Reference will be made to the different approaches to the applicability of oral traditions and their documentation in language intelligible to the Western reader.

It should be borne in mind that in establishing the principles of indigenous law researchers had to interpret oral traditions. Although the methods of preserving oral traditions and the close relationship between law and religion in pre-colonial African societies may ensure a fairly clear picture of that law, the fact that researchers have had to interpret these oral traditions, presents one with a measure of uncertainty regarding the true state of affairs in pre-colonial times. Therefore, it is only possible to

35 Saunders 45.
36 Saunders 39-41.
say that the principles discussed in the following chapter are as far as can be ascertained the true principles which ordered pre-colonial indigenous society.
CHAPTER II

INDIGENOUS LAW IN PRE-COLONIAL AFRICA

1 Introduction
2 Research and Pre-colonial Law
3 The Nature of Pre-colonial Indigenous Law
4 Divisions of Law
   4.a Public Law
   4.b Private Law
5 Summary

1 INTRODUCTION

Despite the variety of legal systems encountered in Africa South of the Sahara and despite the fact that they cannot be traced back to a common ancestor,¹ traditional indigenous legal systems constitute a legal family, similar in structure, technique and ideology.² These systems developed to meet the demands of the ancient and primitive societies inhabiting the area and were adapted to their needs over many centuries. Being based on common values, they were accepted as legitimate. They have been described as bodies of immemorial rules which emanated from uninterruptedly followed practices and which were crowned with morals and religion.³

¹ M'Baye 140.
² See below Part II.11.1. Pre-colonial African law must be distinguished from the law which evolved in modern-day Africa, law influenced and sometimes distorted by Western influence, and law in a constant state of flux due to continual political changes taking place on the continent. Kodwo Mensah-Brown 16 noted that there is "no legal system in contemporary Africa that is uniquely African". He divides contemporary African legal systems into "clusters of inherited or adopted legal cultures" and ascribes their basic similarities to "shared territorial legal systems of the predecessor colonial states". In cases where there were no colonial power, the African legal system is classified with reference to the Western model it has adopted.
³ See M'Baye 140.
In this chapter an overview is given of pre-colonial indigenous law. The nature and principles of this law can be discussed only once it has been established that *legal systems* did indeed exist in pre-colonial and primitive times. For this reason it is necessary to explain certain opposing views about the status of indigenous normative systems of social ordering as legal systems. Closely connected to this problem is the question of how to approach research into such normative systems of behavioural control. It is usually difficult to separate the method of research, the philosophical approach to law in general and indigenous law in particular, and even the language used to record one's findings. What is sure, though, is that oral traditions have an important role to play in research of this nature.

2 RESEARCH AND PRE-COLONIAL LAW

The conflict usually lies between the behavioural approach and the rule-centred approach to the study and explanation of primitive or indigenous legal systems.

The first approach focuses on the process of social ordering and dispute resolution to establish the norms which regulate pre-literate societies. In order to avoid ethnocentrism, a conception of law, wide enough to encompass a society's own views on its mechanisms of social ordering, is adopted, thus side-stepping the problem of finding a Western-style definition of law which could encompass indigenous law. Law is regarded as facts, not rules, and is determined through the study of so-called trouble-cases. Indigenous law and custom are thus viewed not as a coherent, consistent and rational set of rules which is deductively employed to determine the outcome of a dispute. It is regarded rather as a reserve of knowledge which everyone is expected to know. It is not the exclusive domain of certain experts in the community, but common property of all the members of the community.

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4 Harris 224-229; Genn 138-143; Lloyd 790-797; Bennett Sourcebook 8-17; Young 474-480; Hund "Roles of Theory" 208-214.
Adherents of this approach are usually also committed to the doctrine of legal realism.\textsuperscript{5} They focus on the facts of legal experience rather than rules; they concentrate on the study of court cases. This rule-scepticism in the context of legal anthropology may be described as an attempt to show that law is but a guess at what the courts may do in a particular case, and that legal rules do not exist.\textsuperscript{6} However, the intention of the proponents of this approach is probably not to negate rules completely, but to indicate that in addition to technical legal analysis, dispute settlement could reveal important information on how the law works and how it could be improved.\textsuperscript{7} Indigenous law may also be studied through personal observation of the daily life of small-scale communities.\textsuperscript{8} In both the study of trouble-cases and the study of the daily life of communities accepted types of oral tradition are used to reconstruct pre-literate cultural information.\textsuperscript{9}

Researchers who follow this approach usually regard indigenous communities as so unique that no aspect of their culture, including their law, can be explained in terms of Western concepts and principles.\textsuperscript{10} For example, the Dutch Adat Law School, in their research into Indonesian adat law, attempted to observe indigenous Indonesian law through oriental eyes and refrained from employing any Western concepts and principles.\textsuperscript{11} Feyerabend\textsuperscript{12} observes, by analogy with styles in painting and drawing,

\textsuperscript{5} See eg Hund "New Legal Anthropology" 211-223.
\textsuperscript{6} See Allott "Social Anthropology" 7; see generally Frank 679-682, Lloyd 659-661. Frank makes a distinction between rule-scepticism and fact-scepticism. According to him the rule-sceptics regard the formal legal rules which are enunciated in court decisions as the cause of legal uncertainty, because they are unreliable guides in the prediction of court decisions. The fact-sceptics regard the elusiveness of facts as the primary cause of legal uncertainty.
\textsuperscript{7} Genn 112-119.
\textsuperscript{8} Hund & Van der Merwe 39 42-46.
\textsuperscript{9} See Vansina Methodology 141-164.
\textsuperscript{10} Bohannan Tiv 4-6 8 120; Roberts 13.
\textsuperscript{11} Prinsloo "Principles" 15-16.
\textsuperscript{12} Feyerabend 230.
that "... there are no 'neutral' objects which can be represented in any style, and which can be used as objective arbiters between radically different styles. The application to languages is obvious". And the application to law is obvious too. Thus, legal phenomena, or concepts, or principles are not universally applicable to, or in all legal cultures. Anthropological research should be conducted without reference to, and independent of the researcher's own cultural background. Only after all possible information on the group under study has been collected, will a comparison of the Western and indigenous systems of law be in order. The comparison would then indicate whether the anthropological information thus collected can be reproduced in Western terms or whether it has a logic of its own which cannot be found in any Western language. But, although key concepts and principles should never be made clearer (with reference to Western concepts and ideas) than the collected material indicates, it may be useful or even necessary as a temporary aid for further research to clarify them in such a way. Familiar (Western) definitions and concepts should not be employed prematurely to explain or translate collected material. Instead, further study and collection of more material should be used to explain the material already collected.

Criticism which is generally levelled against this trouble-case method of investigation is that it involves an extremely lengthy process of establishing what the law is, that is, one of studying how it works in practice, employing the vernacular and creating neologism. In Africa time is notoriously not on the side of the researcher. Some thirty years ago Allott warned that, although valuable, there was a major obstacle to the

13 Feyerabend 230.

14 "Premature" here indicates that such methodology is not completely ruled out but that it should be employed with caution.

15 Feyerabend 250-252.

16 Allott Language 30.
study of indigenous law through comprehensive analyses of court proceedings.\textsuperscript{17} This obstacle was

"the rapid disappearance, before our eyes, of the traditional systems that we have proposed to study. A generation ago there would not have been this difficulty; but today the traditional tribunals have vanished in many African countries. ... If we want to act, we must do so with extreme speed ... [O]ur precious raw material, the indigenous legal institutions, which we can neither preserve \textit{in situ} nor rebuild elsewhere, is being overwhelmed by the onward rush of modernity. Before it sinks for ever beneath the tides of history, we must capture its figuration and inner meaning."\textsuperscript{18}

Moreover, in indigenous law there are many informal dispute-settling institutions such as family councils and regimental and age-group institutions which settle disputes out of court. Therefore, court decisions are too restricted a source to determine the true law of a community. The normative aspect of legal rules, which serve as guidance to human behaviour, should not be disregarded in a community that is by nature non-specialised and in which many informal institutions enforce legal rules.

The second method, the so-called rule-centred approach, focuses on a framework of Western concepts and ideas in an explanation of indigenous law. The reason is that it is believed that research which is not accompanied by a comparative analysis in legal terms, understood by jurists generally (that is, in legal terms derived from a Western background), loses some of its value.\textsuperscript{19} Factual information is obtained through the study, analysis and comparison of existing literature and rule directed

\textsuperscript{17} A comprehensive study would include, amongst others, the complete recording of proceedings, the analysis of the legal background to disputes, arguments and issues involved and of the way they were handled by those concerned with the case, the analysis of the language in which the case was presented, and an isolation of proverbs and maxims. Such an endeavour would also require expert lawyers, linguists, sociologists, recording technicians, guides and informants.

\textsuperscript{18} See also Allott "People as Law-makers" 4-5.

\textsuperscript{19} See generally Allott \textit{Language}; see also Allott "Social Anthropology" 16-18, Cotran 161.
interviews with experts on indigenous law. Western legal dogmatic devices are then employed to explain the phenomena. Law is regarded as a cultural universal which, as a system of social control, may be compared to language. In the same way as lingual phenomena, as cultural universals, may be jurisprudentially explained despite the vast differences between the various languages, jural phenomena may be explained by making use of universal jurisprudential ideas and concepts.

Some researchers employ Western jurisprudential concepts and ideas to explain indigenous jural phenomena, but nevertheless adopt a trouble-case method of investigation and isolate law from other social norms by making use of institutional criteria. They define indigenous law in terms of institutionalised customary norms. For example, Pospisil, who believes that law manifests itself in a decision passed by a legal authority, is of the opinion that there is no qualitative difference between indigenous law and Western law because the most important attributes, functions and processes of law are present in both. His studies focus on law in process. Gluckman who also studies indigenous law as established in dispute resolution, concludes that the central concepts of law (such as right, duty, guilt, innocence, crime, delict, negligence and contract) are present in most legal systems although their attributes vary around the central idea.

Prinsloo, a member of the Centre for Indigenous Law at the University of South Africa, gives a useful explanation of the application of the rule-centred approach

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20 The use of informants is also an accepted method of applying oral traditions in the search for preliterate cultural information. See Vansina *Methodology* 22-31 190-194 on the role of informants in research into preliterate cultures; see also Prinsloo "Principles" 18-30.

21 See Myburgh *Papers* 31-32. Allott *Language* 6-9 too compares law with language and regards both as forms of social expression or social behaviour which are moulded by society. He regards both as vehicles of communication and control which, in turn, mould the society in which they function.

22 Pospisil *Anthropology* 341-342.

23 Gluckman *African Traditional Law* 6-22.

24 Prinsloo "Principles" 6 4-32.
employed by this centre in their study of indigenous law. He explains that

"[a]ll field data, whether obtained through interviews or by observance, should be evaluated critically. For a critical evaluation the data is tested against the requirements of logic, the norms of juristic science in general and the norms of indigenous law in particular. The researcher's ability to identify consistent and conflicting information and his knowledge of indigenous law are important" (my emphasis).

He is also of the opinion that whilst neologism\(^{25}\) has some merit in certain circumstances, "Western legal terms as such should not be rejected when [they] concern universal legal phenomena" (my emphasis).\(^{26}\)

The concepts of "requirements of logic", "norms of juristic science in general" and "universal legal phenomena" should be used with extreme care. To explain indigenous law by analogy with Western jurisprudential concepts and ideas may prove constructive in a comparative analysis of indigenous law and Western law with a view to law reform.\(^{27}\) This is specifically relevant in a situation of legal pluralism where both indigenous and Western law are observed. However, the true nature of indigenous law should always be kept in mind and the postulates underlying indigenous law should form the basis of the framework within which indigenous law is explained. Thus, the requirements of logic should be evaluated within an indigenous framework and one should guard against the imposition of a formal Western concept of logic as a universally applicable criterion for the critical evaluation of oral data.\(^{28}\)

\(^{25}\) Neologism in this context refers to the use of new terms and concepts in analysing indigenous law. An indigenous approach is adopted to the study of indigenous law instead of fitting indigenous "concepts into the familiar categories and terminology of Western jurisprudence". Prinsloo "Principles" 16.

\(^{26}\) Prinsloo "Principles" 16.

\(^{27}\) Fuller 33 is of the opinion that in Western law there are analogues of almost all phenomena characterising indigenous law.

\(^{28}\) Hesse xiii 38 39 too opposes what she terms the "universability" of "our [Western] conceptual frameworks". She denies the possibility of accurately applying logic in science and sees logic only as an ideal to which no theory could ever perfectly attain. Moreover, although belief
In the eighteenth century Aristotelian logic was elevated to the only, and universally applicable, form of logic. But logic may refer either to the study of the structures inherent in a certain type of discourse or to the results of such a study. Therefore, the logic inherent in different types of discourse may differ from each other and from the familiar principles of formal logic.\textsuperscript{29} Research results which seem logical in indigenous legal anthropological discourse may for instance seem quite illogical in Western legal discourse; or the study of the structures inherent in indigenous legal discourse may follow a system of logic which differs from that of a study of Western law.\textsuperscript{30} Moreover, there is a close link between rhetoric\textsuperscript{31} and logic, and rhetoric is closely connected to the development of communities and their institutions.\textsuperscript{32} Rhetoric and logic should therefore not be perceived as uniform, universally applicable concepts, but should be assessed in the cultural framework of the specific community under investigation. Legal oratory may be regarded as a bridge between law and fact and both law and fact fall within the realm of living speech,\textsuperscript{33} which is generally understood to be a social creation and which depends for its validity on a society's common understanding. It is clear that language cannot be separated from its cultural context. This brings one back to the warning that preconceived ideas, definitions and concepts, which are understandable and clear to the Western researcher, should not be blindly and prematurely employed where anthropological research results seem unclear or

\begin{itemize}
\item \textsuperscript{29} See Feyerabend 252ff, Hesse xiii 33-39. Fuller 13 explains that it is the "internal" logic of a legal order which often makes it difficult to explain it to an outsider.
\item \textsuperscript{30} One may take this a step further and apply the principle to the notorious repugnancy clause. What may be repugnant in one legal culture need not necessarily be perceived as repugnant in another.
\item \textsuperscript{31} Grassi 18-21 describes rhetoric, "or the speech that acts on the emotion", as the speech which is the basis of rational thought.
\item \textsuperscript{32} See Grassi 32 72-75; see also Mooney 80.
\item \textsuperscript{33} See Mooney's interpretation of Vico on the tradition of rhetoric. Mooney 76 77.
\end{itemize}
incomplete in the light of allegedly uniform and universally applicably principles of logic.\textsuperscript{34}

It is furthermore questionable whether universal legal phenomena indeed exist. It should be borne in mind that although certain legal phenomena may be consistently applicable in Western systems of law, the possibility exists that they may not necessarily fit into an indigenous frame of reference or legal culture. Legal phenomena should be distinguished from facts of which legal systems take cognisance. Murder, or the killing of another individual, for instance, is a fact to which most\textsuperscript{35} legal systems attach certain consequences. But depending on the postulates underlying the legal system, the fact of killing would be perceived differently in different legal systems. The Oxford Dictionary describes "phenomenon", in the philosophical sense of the word, as "the object of a person's perception; what the senses or the mind notice". Thus, depending on a legal system's perception of the fact of killing, it may take cognisance of it and attach certain consequences to it, or it may not take cognisance of it at all because it is perceived differently in a different legal culture. Thus, a legal phenomenon entails the perception of facts, in a certain manner, within a legal culture.

In the final analysis indigenous legal phenomena should not be forced into Western categories or distorted to adapt to the postulates underlying Western law. The nature of a society's law and culture should form the context of research into indigenous law. Prinsloo\textsuperscript{36} points out that in drawing up a memorandum, inappropriate material such as definitions, classifications and examples of Western law should be omitted. Research methods should be combined and not be mutually exclusive. They should supplement each other in a critical analysis in search of the truth. He also underlines

\textsuperscript{34} Feyerabend 250-252.

\textsuperscript{35} "Many" may be more correct in this context. One should move away from the Western paradigm which is generally used as a frame of reference. It is possible that legal systems exist which have not been contemplated because they fall not only outside the Western legal tradition, but also outside familiar legal traditions such as Eastern, religious, traditional or socialist.

\textsuperscript{36} Prinsloo "Principles" 16; see also 10-14 23.
the importance of a knowledge of related social and economic structures and cultural values in an understanding of a legal system and, in line with Vansina's view, of knowledge of the vernacular and anthropology. The School for Oriental and African Studies in London successfully restated the civil law of various African countries\(^\text{37}\) within reasonably short periods of time by employing such a comprehensive method of research.\(^\text{38}\)

Both the trouble-case method and the rule-centred approach primarily make use of oral traditions to establish the unwritten indigenous law. The real difference in approach lies in the methodology of their control and analysis of the material established through the use of oral traditions, and in their view of law in jurisprudence. Ideally one should adopt a combination of the rule-centred and behavioural approaches to the study of indigenous law. Both these approaches may be criticised if applied rigidly. Both may be employed fruitfully if utilised with caution. It is important to make a comparative study of the various research methods to develop a holistic view of the study of indigenous law. In addition to the methods referred to above, consistent anthropological methods and techniques should be employed to obtain information. Written material should also form part of the pool of information. As indicated, all these methods are to an extent dependent on the critical evaluation of certain oral traditions. The oral information should thus be carefully assessed and controlled to establish its reliability and accuracy.

Strict adherents to the rule-centred approach to indigenous law often have a narrow, ethnocentric, Western view of law and procedure and misunderstand the non-specialised character of group-orientated indigenous cultures. The real danger of this approach lies in the fact that indigenous law does not easily fit into Western definitions of law and may thus be considered as custom and not law. Because of the

\(^\text{37}\) The law of marriage and divorce, succession, property, agreements and civil wrongs of countries such as Kenya, Malawi, Ghana, Swaziland, Tanzania, Zambia, West Cameroon and Botswana were restated.

\(^\text{38}\) See Allott "Social Anthropology" 12-18.
close link between law, custom, religion and other social norms in indigenous cultures, anthropologists and jurists alike have often felt compelled to believe that these societies are lawless societies governed by the power of custom alone. The absence of physical coercion and authorised institutions to enforce norms, as well as the absence of the concept of state and formal legislators in a narrow Western sense, have been regarded as further indicators pointing to the absence of law in indigenous communities. Driberg very aptly remarks that "European observers have often doubted the existence of law in African societies, because generally the paraphernalia which we associate with law are absent".

However, by employing Western concepts but always keeping the true nature of indigenous cultures in mind, certain features of indigenous law suggest that institutions analogous to those encountered in Western cultures may be identified and that indigenous law is distinguishable from mere recurrent customary behaviour.

Prescripts are not automatically adhered to by members of indigenous communities. Although peaceful co-existence and social order are not maintained through physical coercion in the Western sense of the word, there is an indication of some control. Indigenous law has been regarded as a program for living together, manifesting itself in norms which are visited by sanctions when breached. Where in indigenous law reconciliatory measures fail, sanctions may be enforced by an order of a court or recourse may be had to extra-judicial sanctions such as self-help following personal injury or feud action. Sanctions may take on various forms. Religious sanctions

39 See generally Allott "Social Anthropology" 7-12.
40 Driberg 166.
42 Fuller 11.
43 Sanction is here used in a broad sense, being an endorsement or confirmation by the community through its institutions.
are all pervasive in indigenous law and depend on the concept of the wholeness of the living and the dead ancestors. The fact that law is also supported by the ancestors, provides a very strong inducement to obey the law. This is evidenced by the fact that many offences are regarded as defilement\(^45\) of the community and that reparation is only complete when certain purifying rituals\(^46\) have been conducted. Ridicule and ostracism are legal sanctions unknown in Western law but very effective in indigenous law.\(^7\) This is not surprising, in the light of the importance of an individual's position as member of the community.\(^48\)

Sanctions are not always disapprobatory, as is the case in criminal law which by its nature involves punishment. Approbatory or approving sanctions follow the nomination of a successor to the position of head of a household, or the rites of passage indicating transitions (such as birth, puberty adulthood, marriage) in the life cycle of individuals. It should nevertheless be noted that indigenous law is more willingly adhered to by members of the community than is the case with Western law. On the one hand this may be attributed to the close link between law and the metaphysical norms of morality and religion to which members readily adhere and the fact that protection and continuity of these norms are assigned to the elders of the community. On the other hand it could be attributed to the fact that customary law originates from within the community and is not imposed from the outside.\(^49\) Indigenous law has an internal aspect, which is necessary for the preservation of group solidarity, and which

\(^{44}\) Elias 60-75 stresses the fact that all sanctions in indigenous law are not of a religious nature and that there is in fact law enforcement in the Western sense of the word.

\(^{45}\) In indigenous law "defilement" denotes both physical and spiritual pollution.

\(^{46}\) Fuller 6 points out that ritual and ceremonies in indigenous law are forms of communication. This interpretation should be seen in the light of the lack of abstraction in indigenous law and the preference for the concrete.

\(^{47}\) "Ultimately the sanction for the enforcement of all laws is the consent of the people...": Elias 75.

\(^{48}\) See below Part II.II.3.b.ii(iii).

\(^{49}\) M'Baye 148.
distinguishes it from mere habit. This internal aspect of indigenous law refers to the fact that the rules are not only obeyed, but that they are consciously viewed as standards of behaviour by individual members of the community and that violation of those standards is met by some sanction. Thus, adherence to indigenous law is the result of a communal acceptance of the law as an integral part of the social organisation: it is obeyed because of the belief that it is in the interest of the community and that it is the only way in which the society can function properly.

The notions of an abstract ruling figure such as a State in Western terminology and of a separation of governmental powers are foreign to indigenous law and are, as mentioned above, relied on as indicators that indigenous law should not be considered to be law. However, in indigenous law all functions of rule are assigned on behalf of the people to the ruler. Although indigenous court structures and institutions for the hearing and settling of disputes differ from the Western models, they have proved to be an effective means of maintaining order. Procedure is ultimately aimed at reconciliation and arbitration, but a clear distinction is drawn between legal norms which are accepted as binding, and social norms which are adhered to because they are highly regarded. Despite the absence of formal legislators, legislation also forms a source of indigenous law. Such legislation is usually unwritten and may take the form of decrees issued by the ruler, decrees by the ruler-in-council, institutional legislation applicable to exclusive groups such as secret societies, and legislation democratically passed in public assemblies.

50 Lloyd 348-350 792.
51 Driberg 166-167.
52 So effective that they continued in existence despite Western influence and interference. In fact, there is presently a movement to adapt them to modern circumstances and utilise them in metropolitan areas. See Part I.IV.4.b.iii below.
53 Indigenous public law is discussed in more detail below.
THE NATURE OF PRE-COLONIAL INDIGENOUS LAW

Pre-colonial indigenous legal systems share certain characteristic features, some of which are still discernible despite the shroud of colonial influence. Although indigenous law has today to some extent through legislation, codification and restatement by Westerners been reduced to writing, it is essentially oral law and remains largely unwritten. It is preserved in the memories of people and orally handed down from one generation to the next. The fallibility of human memory makes it uncertain and difficult to ascertain. It was once remarked that each time an old man dies in Africa it is as though a library has burnt down.\textsuperscript{54}

Indigenous law is inherently conservative and group-oriented in that members of the group share their rights and responsibilities in accordance with each individual’s status within the group. But the group is not an independent self-contained unit. It comprises individuals who often re-act upon it and who may even sometimes change its character.\textsuperscript{55} Thus the law is aimed at the preservation of group solidarity. Collectivism in indigenous law, that is, the fact that rights and duties are shared, is often referred to as a lack of individualism in that law. This lack of individualism should be clearly distinguished from individualisation. Individualisation is an important feature of indigenous law and concern for the individual takes a very high priority in everyday life. In this regard the following may be noted. In dispute resolution special care is taken that substantive justice is done and that the individuals involved are reconciled.

In criminal law it is the individual’s mental health, consciousness and sobriety which determine his responsibility for his act. In the case of assault the victim is allowed to inflict upon the attacker an injury similar to the one he had suffered. Amongst the Zulu the culprit responsible for the injury of another in a kraal encounter, has to visit the injured party frequently and offer assistance in sympathy.

\textsuperscript{54} M’Baye 150. For this very reason it is important to restate the traditional indigenous law, despite the obvious criticism which is usually leveled against such restatements.

\textsuperscript{55} Elias 85. On the importance of the individual within the group; see generally Elias 76-95.
Because of the importance of agriculture in indigenous communities, indigenous law may further be described as peasant law in which land plays a central role. The concept of land in indigenous communities has been largely misunderstood in Western jurisprudence. Its position must be seen within the framework of communality. Thus, neither the land, nor the sky or the sea, can belong to an individual, because these are shelters of the ancestors and belong to the community as a whole. The right to use land is usually linked to kinship structures and changes continually. Rights vest in the group as a whole. Land is not regarded as a marketable commercial commodity. It cannot be bought or sold and land rights are acquired through allocation by the ruler, exchange, loan, gift, cultivation or administrative action such as a reward from public resources. Boundaries are not clearly demarcated. Organisation and use of land is viewed in terms of social relationships. Space is thus genealogically mapped. This is so in the case of smaller local communities as well as larger tribes. Conflicts that occur usually pertain to grazing and water rights. Attachment to land is explained with reference to a magico-religious devotion to graves and shrines of deceased ancestors.

4 DIVISIONS OF LAW

In indigenous law, by analogy with Western jurisprudential concepts, it is possible to distinguish certain broad categories and divisions that also occur in Western law. Western dogmatic devices are here used as descriptive aids to illustrate that the legal systems encountered in Africa prior to colonisation had reached a seldom appreciated level of sophistication. The categories and divisions described below are not meant to be rigid pigeon holes into which indigenous law should be forced, and should furthermore not be regarded as an exhaustive list. Western devices are merely used to translate the indigenous systems in order to make them more understandable to

56 M'Baye 149; see also Paden & Soja 39-40, Dalton 71-72.

the Western reader. Indeed, it should always be borne in mind that the categories in indigenous law do not necessarily correspond to those in Western law for the very reason that a people's legal system forms part of its culture and is inextricably linked to its social structure and arrangements. Thus, in the light of the non-specialised character of its culture, distinctions in indigenous law are often very subtle. Some of the more interesting divisions and principles, unadulterated by Western influence as far as can be ascertained, will be discussed. Statement of the rules is in the historic present, irrespective of whether or not these norms still exist.

4.a  Public Law

In Western law a distinction is drawn between private law and public law. However it should be borne in mind that even in Western jurisprudence the basis for such a distinction remains a vexed problem and that the boundaries between private law and public law are gradually fading. It is often assumed that public law does not exist in indigenous law. However, it is possible in indigenous law to isolate on the one hand rules pertaining to the individual as member of the group, and on the other hand rules pertaining to the community as a whole, to state structures, or to political organisation and the administration of justice.

The issue of a division between public and private law in primitive societies is often reduced to one of a distinction between a crime and a civil wrong. Typically it is suggested that indigenous law does not differentiate between crimes that offend the

58 A distinction between private and public law is also closely connected to the question of the horizontal application of the Interim Constitution: See Part II.IV.2; see also Friedmann 377-382, Van Aswegen "Bill of Rights" 2. Critical Legal Studies commentators criticise efforts to draw a distinction between private and public law on two grounds: First the State is inextricably involved in what is supposed to be the realm of private law; and secondly, coercion and what they call "choicelessness" often characterise the private law sphere: see Kelman 102-109 232-233 253-257.

59 On indigenous criminal law, the following sources were consulted: Schapera Handbook 46-52, Prinsloo Publiekreg 170-236, Myburgh & Prinsloo Public law 73-135, Elias 110-144, Bohannan Tiv 116-146, Cotran & Rubin 101-200, Myburgh "Crime" 5-6, Myburgh "Satisfaction" 20-23, Myburgh "Punishment" 43-44, Myburgh "Assault" 81-83, Van Blerk "Theft" 90-93, Van Niekerk
public as a whole and for which public redress is sought, and wrongs against individuals for which private redress is sought. This view is based on the notion that indigenous law is aimed at the maintenance and restoration of an equilibrium in the community through arbitration rather than punishment, or on the fact that indigenous procedure allows for the hearing of civil and criminal matters in the same set of proceedings. It is further based upon Maine's pronouncement that in primitive jurisprudence true criminal law did not exist but that primitive penal law was in fact the law of civil wrongs.  

Certain crimes in Western law, such as theft of private property, damaging private property, culpable homicide and assault are regarded as civil wrongs in some indigenous communities. Yet, the fact that individual crimes in Western and indigenous law do not correspond does not imply that indigenous criminal law does not exist. From the very earliest times it existed, if in an amorphous form, in the violation of taboos laid down by ancestral spirits, in witchcraft resulting in death, in incest and in persistent theft. These crimes concern not only the individual perpetrator or victim but the community as a whole and are believed to be automatically visited by the wrath of the spirits which finds expression in penalties such as infertility of the soil, drought, blindness, or similar detriment. These are sanctions in the form of retribution which emanate from the superhuman, and which reflect the close relationship between the living and deceased ancestors in indigenous culture.

The purpose of the death penalty or ostracism is not necessarily to punish offenders, but to protect the community against the outrage of the ancestors. Acts such as treason, witchcraft, incest and adultery with royal wives are some of the earliest crimes acknowledged as such in indigenous communities. It is significant that incest and adultery with the royal wives are regarded as two of the most serious crimes in

Comparative Study 24-29, Ogwurike 171, Leach 21-33, Read 39-44 51-52.

60 Maine 379.
61 Kelsen 58.
indigenous law, whilst murder, which ranks very high on any Western list of crimes, has not always been regarded as a crime. Yet this is in line with the all encompassing position of kinship in indigenous culture and the preservation of group solidarity. Kelsen is of the opinion that the importance of socialisation and group solidarity lies in the increased protection it offers the individual. Incest and adultery with the royal wives threaten the whole fabric of the collectivity in which kinship roles are clearly defined and in which everyone is related by kinship ties.

Although criminal and civil matters arising from the same facts are dealt with as a whole and tried in the same set of proceedings, in indigenous law the court distinguishes clearly between the fine and the damages awarded and frames the sentence to include both compensation and punishment. This is done, for instance, by allowing an assault victim to inflict upon the attacker an injury similar to the one he has suffered. The sentence for murder, which is either regarded as a crime or a civil wrong, serves as satisfaction for the particular group whose member has been killed and as satisfaction also for the community as a whole. It seems that the talion principle applies in indigenous criminal law. Vengeance and retaliation are important agents of moral control and retribution is an all-pervading power in primitive societies.

An offender's group is collectively responsible for a crime he has committed. The

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62 See Diamond *Primitive Law* 228.
63 Kelsen 53-54.
64 Incest covers a much wider range of relationships in indigenous law than it does in Western law.
65 See Leach 31-32.
66 The accused is put to death in a way similar to that in which the victim has been killed.
67 Satisfaction is awarded for the worry, sorrow or fright caused by the death of the member of the group.
68 This is also the case in the law of delict.
69 Kelsen 53 56.
group shares patrimonial liability, but cannot share corporal punishment. The family of a person convicted of witchcraft, or of violation of allegiance to the ruler, is executed with him because they are regarded as participants and therefore as public enemies. In the case of adultery, which is considered a crime, the adulterer may be killed summarily. The female participant in the adulterous liaison, who is regarded as participant in the crime is sometimes killed as well and this is seen as action taken against the group who has given her in marriage, yet another example of group responsibility for criminal behaviour. Summary action taken against a criminal without trial is regarded as self-help to obtain public satisfaction for the outraged community and as such goes unpunished.

Certain crimes are regarded as a defilement of the community and bear supernatural consequences. This defilement has to be cleansed by rites of purification. Where the commission of a crime has a defiling effect on the community, the fine (an animal) is regarded as an animal of disgrace. It is slaughtered (to take the place of the offender) and eaten as a purificatory and conciliatory meal. The slaughter of the animal also serves to indicate that the fine has no connection with patrimonial restitution. Self-help to obtain public satisfaction for serious crimes is lawful. It may take the form of lawful feud action, for instance cattle looting as satisfaction for the abduction of a women, or the burning or amputation of a cattle thief's hand. In the case of incest the culprit is summarily killed for the polluting moral threat to the community and cleansing rites are performed at the place where the incest or the incestuous birth has taken place.

Because the application of indigenous criminal law has been abolished or severely limited in many African countries today, the restatements and descriptions of traditional indigenous criminal law are of enormous value. The works on indigenous criminal law

70 Her group of origin retains limited guardianship (which is regarded as a patrimonial right) over her.

71 In indigenous law animals are usually paid as a fine.
in fact preserve a rapidly disappearing branch of law.\textsuperscript{72}

Indigenous procedure and evidence\textsuperscript{73} present one of the branches of indigenous law which has been best preserved and which is today still widely practised in both unofficial and official indigenous courts in Africa. Since rights are shared by the agnatic group and responsibility is collective, civil disputes within the group, such as breach of discipline, crime or the violation of regimental or age-group rules, are settled by mediation or corrective action. Such disputes are not taken to court. The best known informal dispute resolution institutions are family councils and regimental courts. Family councils are concerned with all matters affecting the harmony within the family group. In civil procedure there is always the possibility of informal settlement by a family council which plays an important role in informal procedures preceding any court hearing. The decision of a family council is not binding but may be taken into consideration by the court. The family council's goal is to reach a peaceful settlement out of court through conciliation. The council may in deserving circumstances even administer corporal punishment. Regimental courts are concerned with matters affecting regimental duties or initiation schools.

Despite the fact that criminal and civil matters may be adjudicated upon simultaneously and despite that criminal and civil procedures are principally the same, a clear distinction is drawn between punishment and compensation. In contrast to the highly technical character of Western law, indigenous procedure and evidence are relaxed


and non-technical in nature and decisions are based on merit. Procedure is inquisitorial and the presiding officer plays an active role in eliciting evidence. Legal representation is unknown and agnates, assisted by representatives of their jural community, assist members involved in court proceedings. Judicial precedent is not strictly followed but may be taken into account as a guideline in difficult cases.

Women are only present when involved in a case as complainants or witnesses. In such cases the venue of the court has to be moved away from the cattle kraal which usually adjoins the court. This is so because women's periodic ritual impurity is believed to have a detrimental effect on the cattle and consequently on the agnatic group. Criminal cases may be taken directly to the Chief's Court but it is customary and preferable that a case first be investigated by the court of the jural community, that is by the Court of the Headman. Appeals lie to a higher court. The presiding officer may himself refer a case to a higher court. Because trials are conducted orally and no official records are kept, the presiding official or his representative attends the appeal. In the interest of persons involved, trials are conducted and appeals heard speedily, lest important evidence of which there is no written record be forgotten.

Indigenous law has a free system of evidence which emphasises cogency or the weight of evidence rather than the admissibility thereof. There are no rules regarding the admissibility and relevance of evidence. Hearsay and circumstantial evidence which are not corroborated are admissible but carry little weight. Evidence on character and previous convictions are admissible and due to the close-knit nature of the community, judicial notice is taken of certain facts without proof being required. Real or material evidence, such as physical appearance, tracks of stolen livestock and physical objects seized from a culprit, carry considerable probative weight. The importance attached

74 It is interesting that when Socrates appeared before a people's court at the age of seventy, facing charges of being a speculative philosopher and evil-doer who meddled with things under the earth and in heaven, of corrupting the youth and of being an atheist, he introduced his defence by saying that truth and a just decision were more important than the use of formal procedure and technical skills: see Van der Westhuizen "Socrates" 31.

75 This is also a feature of the Continental legal systems.
to tangible evidence is consonant with the lack of abstraction in non-specialised cultures. Extraordinary methods of obtaining proof, such as divining, ordeal and torture are sometimes employed. Certain presumptions are operative in indigenous law, such as the presumption that an initiation candidate is not fully blameworthy. Although there are some exceptions in the law of the Northern-Soto, trials are generally not conducted under oath. Cross examination and questioning are regarded sufficient to establish the truth and the court comes to a conclusion by objectively evaluating evidence.

Some authors are of the opinion that the standard of a reasonable man plays an important part in the standard of evidence. There are no rules regulating the burden and measure of proof, but it seems that proof on a balance of probabilities is regarded as sufficient. An accused is as a rule not asked to plead. Confessions and admissions carry much weight and admission of guilt may bring the case to an immediate end. A case is never officially closed.

Allott’s often quoted description of the character of indigenous law of procedure and evidence, captures its essence:

"At the heart of African adjudication lies the notion of reconciliation or restoration of harmony. The job of the court or an arbitrator is less to find the facts, state the rules of law, and apply them to the facts than to set right a wrong in such a way as to restore harmony within the disturbed community. Harmony will not be restored unless the parties are satisfied that justice has been done. The complainant will accordingly want to see that the legal rules ... are applied by the court. But the party at fault must be brought to see how his behaviour has fallen short of the standard set for his particular role as involved in the dispute, and he must come to accept that the decision of the court is a fair one. On his side he wants an assurance that once he has admitted his error and made recompense for it he will be reintegrated into the community."

76 Gluckman "Order" 184-198; Prinsloo Publiekreg 280.
77 Allott "African Law" 145.
Indigenous public law is also manifested in the rules regulating government structures, the powers of organs performing legislative, executive and judicial functions, and in administrative rules regulating the exercise of executive powers and the relationship between the executive and the people. The fact that government functions are not performed by separate organs, or that an abstract ruling figure such as the State cannot be identified, evidences the non-specialised nature of indigenous law, and not necessarily the absence of public law.

The ruling family, represented by a chief or a king (the ruler, who is the genealogical highest ranking male of the ruling family), forms the nucleus of indigenous constitutional law. The position of this family is entrenched by rules ensuring the authority of its members. The position of ruler is hereditary. He stands outside the realm of private law. There is no separation of judicial, legislative or executive functions, and the ruler is the highest legislative and executive authority as well as the supreme judicial official. Whilst legislation may only be passed at the highest level, administrative and judicial organs are encountered at all levels of government. The realm is divided into jural communities under headmen. The ruler reigns in consultation with his private council and the representative council. His private council consists of members of the ruling family, chosen on merit. The ruler’s consultation with this council is highly confidential and takes place in private. It is consulted in all matters but in very unimportant matters, such as the dispatch of a messenger, it is merely informed of the instruction. In turn this council has to ensure that chiefly duties are exercised satisfactorily. The representative council consists of members of the private council and of the headmen of the jural communities who represent the people. A ruler’s actions are only valid if exercised in-council.

78 The ruler is chief legislator, executive officer and judge.

79 With regard to indigenous constitutional law the following sources were consulted: Myburgh Papers 55-63 99, Prinsloo Publiekreg 25-79, Myburgh & Prinsloo 1-23.
Indigenous administrative law too revolves around the ruler. He is head of the tribal administration and responsible for its proper functioning. He is further responsible for the maintenance of public order and safety and may exercise the power to stop faction fights or other disturbances of the peace. He is responsible for the protection of private persons and property, as well as the tracing and prosecution of criminals. Execution of judgment is ensured by the ruler. He is in charge of the granting of membership of the chiefdom and has to grant permission to a family who intends to leave. Banishment orders may be granted only by the ruler. Other administrative functions include the consideration of petitions, the organisation of initiation schools, and control of land matters. He has to be notified of births deaths and marriages. Leadership of age regiments falls on the shoulders of the highest ranking son of the ruling family. The ruler acts in-council in all administrative matters.

4.b Private Law

Indigenous private law is today still widely practised in Africa. Family law and the law of succession are the two aspects of indigenous law which have the most far-reaching influence on the lives of black Africans and are, as a result, the best known. These branches of law have been extensively investigated and restated by both anthropologists and jurists and have been reformed to adapt to changing modern circumstances. These are also the fields of law which have been subject to most distortions.

An important feature of the so-called pre-colonial private law is the fact that members of the group share their rights and duties. A person’s share in rights and obligations depends on his status and this is determined by rank, gender, marital condition and

80 See generally Myburgh Papers 63-67 99-100, Prinsloo Publiekreg 80-169, Myburgh & Prinsloo 24-72 for a detailed exposition of indigenous administrative law.

81 Boys of the same age group and initiation school form age-regiments. These regiments make up the army and may be conscripted to defend the chiefdom. They are also responsible for public services such as the cultivation of tribute fields and the building of dams.
physical maturity. Abstract concepts, such as that of juristic persons, are unknown in non-specialised indigenous legal systems. Because rights and duties are shared, concepts of dependents, support or maintenance and inheritance within a family group are unknown. Estates do not vest in individuals but in the group as a whole. Holleman\textsuperscript{82} describes the traditional indigenous conception of wealth and an estate as

"the capacity to maintain and reproduce one's own kin-group as an organic unit to safeguard its spiritual and material well-being by being able to propitiate the ancestral spirits. ... [T]he estate is primarily regarded as the capacity of the kin-group to reproduce itself, and ... wives and children - that is, their reproductive value - are regarded as natural 'assets' of the estate ... [S]ince the reproductive assets are by far the most important ... the Shona conception of estate is organic rather than economic in Western sense".

Within this framework it is not difficult to comprehend that the law of succession entails succession to the position of head of a group in accordance with certain rules regarding descent, rank, male promigeniture, birth and the like.

In terms of the Western theory of rights, three kinds of rights in indigenous law concern a group's estate and may thus be compared with patrimonial rights. These are rights in things (analogous to the real rights in Western law),\textsuperscript{83} rights to performance, and rights of guardianship.

The law regulating contractual relations has been a much neglected field of study in indigenous law and it is only recently that comprehensive theoretical studies in the indigenous law of contract have appeared in legal literature. Contracts\textsuperscript{84} in indigenous

\textsuperscript{82} Holleman 263.

\textsuperscript{83} It appears that ownership is the only real right recognised in indigenous law.

\textsuperscript{84} The following materials provided information on contracts in indigenous law: Myburgh Papers 91-92 112-113, Prinsloo & Vorster "Elements of a Contract" 6-20, Prinsloo & Vorster "Parties" 21-25, Whelpton Inheemse Kontraktereg 24-34, Schapera "Contract" 201-209, Elias 152-155, Gluckman "Ideas" 213-220.
law can be concluded only between different groups. Because of the lack of abstraction in these non-specialised legal cultures, it is only natural that the contracts of indigenous law resemble real contracts in Western law. The concept of a consensual contract and that of contractual liability flowing from a mere agreement are unknown. Contractual liability arises only after performance by one of the parties.\(^8\) In a recent study of the contract law of the Bakwena ba Mogopa of Hebron, Whelpton\(^8\) indicated that many features of pre-colonial indigenous law are still discernible today, namely the nature of the contract as a real contract, the informal way in which it is concluded, the fact that contracts are concluded in the presence of both parties, the absence of prescription and set off, and the fact that, as a rule, no provision is made in contracts for interest.

Rights of guardianship are rights over persons. Guardianship may be classed as falling within the ambit of a group's patrimony.\(^8\) This may be explained as follows: guardianship entitles the group, amongst others, to an individual's earnings and services. In the case of a woman, services encompasses her labour and reproductive capacity. Children born to a woman fall under the plenary guardianship of her group who then has the right to their services and earnings. Marital guardianship or a limited right of authority over a daughter is transferred to the group of her husband and marriage goods are transferred to her group in consideration of the marriage.\(^8\)

Damages are awarded following the infringement of the right of guardianship over an individual. In the case of seduction and rape of an unmarried woman damages are

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86 Whelpton *Inheemse Kontraktereg* 248; see also Prinsloo & Vorster "Elements" 10-11 20, Prinsloo "Exchange" 36 on the law of contract in the former Boputhatswana.

87 See Myburgh *Papers* 23-28 110 111 112, Holleman 262-263.

88 Church *Marriage* 36-37. Marriage goods should not be seen as a quid pro quo for the transfer of authority over the daughter, or for the daughter herself, but rather as performance in terms of a contract. This contract is comparable with a real contract in Western law.
awarded for the reduction of value which may be obtained by the group when giving
the victim in marriage. In the case of adultery, rape or abduction of a married woman,
damages are awarded for the diminution of the value of the group’s right of authority
over the woman or for their deprivation of her services as worker and child bearer.
Pregnancy and child birth following the perpetration of these delicts increase the
amount of damages, because of the additional costs incurred. Also in the case of
homicide damages are awarded for the infringement of the right of authority.

Members of a group not only share patrimonial rights but also personality rights.89
Rights to physical integrity and honour do not fall within the estate of a group. This
is illustrated by the fact that whatever is in self-help seized by the group, the
personality right of which has been impinged upon, or is handed over to it, is usually
destroyed. This is done to indicate that it has nothing to do with patrimonial gain.
Where it is not destroyed, the satisfaction lies in the patrimonial comfort brought about
by the animals that were handed over, and which now fall within the group’s estate.
Violation of honour is in addition always regarded as having a polluting effect on the
group and therefore has to be neutralised by purification rituals.

As explained above, the law of delict or civil wrongs, is closely connected to criminal
law. It is today applied in a very restricted form.89 In indigenous law, infringement of
a right may establish delictual liability. Again, the concept of group rights and liability
apply. Delictual liability incurred by a member is thus shared by the group. Because
the head represents the members of the group, an erroneous inference is often drawn

89 See generally Myburgh Papers 31-49 114-115. Very little has been written on the indigenous law
of personality. Myburgh’s analysis of indigenous law of personality appears to be the first and
most comprehensive exposition of this field of study.

89 Bodily injury also encompass worry, sorrow fright and dismay.

91 The following works were consulted on delict in indigenous law: Myburgh Papers 13-49,
Schapera Handbook 46-52, Elias 110-144, Bohannan 74 116-146, Cotran & Rubin 101-200,
Myburgh “Crime” 5-6, Myburgh “Satisfaction” 20-23, Myburgh “Punishment” 43-44, Myburgh
“Assault” 81-83, Van Blark “Theft” 90-93, Van Niekerk Comparative Study 24-29, Ogwurike 171,
Leach 21-33, Read 39-44 51-52.
that he is individually liable for delicts committed by a member of his group. The notion of the infringement of a right within a group is unknown in indigenous law. Such an infringement of a right is dealt with in criminal law, or as a violation of regimental or age-group rules. When, therefore a member's behaviour embarrasses his group, or causes them loss, his age-group or regiment punishes him.

Relief is usually afforded in the form of damages and satisfaction and these two forms are clearly distinguished. A delict is often regarded as the infringement of a personality right, for which satisfaction is awarded, in addition to the infringement of a patrimonial right. Self-help and feud action are accepted means of obtaining satisfaction for the infringement of a right. Some actions are regarded as pollution of the group and are remedied by purificatory rituals. Murder, for instance, is regarded as a violation of the right of authority for which damages may be awarded, a violation of the group’s right in their bodies, as well as a violation of the honour of the group. Death is perceived to cause pollution, which affects their honour. Feud action sometimes takes on the form of blood vengeance and the killing of members of the culprit’s group. Satisfaction is also obtained by means other than feud action. Thrashing or killing of a culprit caught red-handed, as well as vendetta against a person responsible for the death of a member killed by witchcraft, are familiar ways of obtaining satisfaction. Satisfaction may further be obtained through a court order. Where a court orders payment of an amount in excess of the value of a stolen thing, or in excess of damage to property, it includes both satisfaction and damages. The satisfaction being awarded in this case for the trouble caused. In those cases where assault is regarded as a delict, the court orders satisfaction in the form of lashes or, in accordance with the principle of talion, permits the victim to inflict similar injuries on his attacker. Injury resulting from institutionalised action incurs neither criminal nor delictual liability in indigenous law. Examples of such actions are stick fighting and herd boys' fights; initiation; physical marking of an adulterer caught red-handed; torture and ordeal, which are regarded

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92 The death of the relative causes sorrow.

93 Myburgh Papers 36.
as procedural institutions to elicit evidence; and cleansing ceremonies, resulting in physical injury or discomfort, to remove defilement.

5 SUMMARY

As far as can be determined, pre-colonial indigenous law is the purest possible form of indigenous law. It is the law which has not been adapted or distorted, through judicial application or legislation or even by some sections of the indigenous community. This law will be employed to extract the underlying jural postulates of indigenous law. It will be used as the yardstick to determine the extent to which indigenous law, distorted through its interaction with Western law, is consonant with indigenous jural postulates. This law will also be referred to to illustrate the invariable characteristics of indigenous law which are attributed to the legal tradition upon which it is founded.
CHAPTER III

INDIGENOUS LAW IN COLONIAL SOUTH-AFRICA

1 Introduction

2 The Imposition of Western Law
   2.a The Cape Province
   2.b Natal
   2.c The Transvaal
   2.d The Orange Free State

3 Summary

"It is the defect of our administration of Native Law that we have tended constantly to be wiser than Nature, and to cut out points of Native Law not because they are contrary to the jus naturale but because they conflict with what Lord Coke called the 'artificial and acquired reasoning' of our own advanced legal systems."^2

1 INTRODUCTION^1

Proceeding from the premise that at the time of colonisation there indeed existed indigenous legal systems and established modes of social ordering, it must now be determined to what extent the development of these indigenous laws and dispute-resolution institutions had been influenced by the imposed Western law. Furthermore, in order to grasp fully the position of indigenous law, and the relationship between that law and Western law in South Africa today, it is necessary to recognise

1 See Part I.1.1 for a demarcation of the colonial period.

2 Brookes 191.

3 The following materials have been consulted with regard to the position of indigenous law in the colonial period: Olivier & Fage 162-173, Hosten 186-194, Brookes 1-35, Omer-Cooper 35-49, Olivier & Atmore 53-65.
the socio-political circumstances prevalent here when the first official policies regarding the administration of the indigenous populations and their institutions were formulated.

Long before the first British annexation of Cape in 1795, Europeans had through missionaries and traders made some incursions on the traditional indigenous cultures of Southern Africa. When the Cape, established as trading post and refreshment station for the Dutch East-India Company, could no longer provide for the colonists' need for a market for the sale of their produce, some settlers started moving out of the area to the East. They became stock farmers, farming with cattle which they had traded from the Hottentots. These farmers, in their trek to the east, overpowered and dispersed the Hottentots and Bushmen. However, in the Bantuspeakers a stronger, more organised people was encountered and their conflict resulted in the so-called Kaffir Wars of the late eighteenth century.

The Dutch East-India company had little interest in the Southern African interior, their main interest in this part of Africa being its strategic position. The company's judicial administration of the Cape during this period was primitive and not well-ordered. The highest court, the Raad van Justitie which was established in 1685, as well as all the lower courts were initially staffed by laymen and almost until the end of the Batavian rule by inexperienced lawyers. It was only at the end of that rule that lawyers, trained at academic institutions in the Netherlands, were employed in these courts. It naturally follows that little attention was paid to the administration of justice in the interior. Because of the British policy that the laws of a conquered territory would remain in force until altered by the conqueror, the changeover from Dutch to English rule in 1795 made little difference to the laws of the interior settlements or the indigenous populations.

4 Hosten 188.

5 Allott "Aboriginal Rights" 92; see generally 90-93 on the effect of colonisation on indigenous laws of British colonies.
The period of British rule too was characterised by the same spirit of Western cultural chauvinism which had been experienced from the very first encounter between the indigenous populations and the Westerners in Southern Africa.\(^6\)

The administrators of the various territories, to a greater or lesser extent, all aspired to civilise the indigenous population and to oust their barbarous laws and customs.\(^7\) Where indigenous law was recognised, it was subject to the strict application of a repugnancy clause. The various policies towards these peoples and their cultural institutions were somewhat dependent on those in charge of what was then known as native administration. Thus, the policy of the Natal administration during Shepstone's office reflected his sympathetic attitude to the indigenous community. In fact, he was often criticised for an attitude of non-interference in the traditions of the indigenes and for his consistent refusal to civilise the indigenous tribes.\(^8\) In contrast, the Cape administrators were known for their all encompassing drive to civilise the indigenous tribes.

By the middle of the nineteenth century South Africa was divided into various

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6 See Curtin 5 on the concept of cultural chauvinism; see also Part I.1 General Introduction, Roberts & Mann 18, Allott "Aboriginal Rights" 88 93. At 88 Allott points out that colonial expansion was legitimised by international law. The doctrine applied that "only States in the formal Western sense had international legal personality and participated in the benefits and burdens of international law .... Territories which lacked a formal system of government and law comparable to those prevailing in the 'States' could be treated as 'unoccupied' or ownerless territory or 'terra nullius', and hence were open .... to acquisition by an outside 'State' despite the will of the inhabitants". Tso 225-226 describes this attitude of the colonisers in America thus: "The false assumption is that the dominant society operates from the vantage point of intellectual, moral and spiritual superiority. The truth is that the dominant society became dominant because of military strength and power."

7 Allott "Aboriginal Rights" 87 explains the colonial powers' dualistic purpose in their African expansion thus: "Humanitarian, altruistic and civilising purposes were also often put forward as justifications for such expansions and occupation .... For many of the colonisers who waged war on the indigenes before seizing their territories and exploiting their resources, these justifications were no more than a cynical cover for enrichment. But at the same time one must recognise the less self-regarding and genuine desire of many to bring civilisation and enlightenment, as they saw them, to the benighted."

8 Whether this policy flowed from an understanding and respect for the Zulu culture, based on real knowledge of their tradition, or whether it was for political reasons or personal ambition, remains speculation.
autonomous areas - two of which were British Colonies (Natal and the Cape), numerous indigenous kingdoms (the Zulu and Basuto being the largest) and two Boer Republics (Transvaal and the Orange Free State). The population at that stage consisted of about 300 000 Europeans and 2 to 3 million indigenes. The administrators of these territories all had different attitudes towards the administration of the local population, but the Inter-colonial Native Affairs Commission of 1903-1905 saw as ultimate goal for the administration of justice the improvement of indigenous law and its eventual assimilation into colonial law.

2 THE IMPOSITION OF WESTERN LAW

2.a The Cape Province

An official policy for the administration of the indigenous population of the Cape was first implemented around 1830. At that time the colonial secretary, Sir George Murray, instructed that whilst the indigenous population should not be allowed to retain ownership of the territory which was permanently occupied by the Colony, they should nevertheless not be expelled from the land of their birth by force. He saw it as necessary that they be removed "from temptations which must attach to their close proximity to the borders of the Colony: and it would be not only sacrificing the ultimate hope of their civilisation, but the immediate welfare of an extensive district of the colony, to allow the Cafres to retain their present locations ...". 10

At first, the British government tried to shirk responsibility for the indigenous people. Thus, in 1833 a treaty system was introduced whereby direct rule of the indigenous population could be avoided and indigenous tribes could be controlled through treaties


10 Brookes 13.
with their chiefs. Through this system administration of the indigenes was left wholly in the hands of the chiefs who had to administer their tribes in accordance with indigenous law and custom. An example of such a treaty whereby direct rule of the local populace could be avoided, was Benjamin D'Urban's proclamation of the territory between the Kei and Keiskamma rivers as British territory, while at the same time expelling the indigenous tribes. This treaty was never fully implemented. It was followed by another treaty in terms of which it was agreed that the chiefs and their people would become British subjects and would fall under the control of the Cape government, but that they would retain their laws and customs. A treaty of 1836 recognised the independence of the tribes living east of the Great Fish River, granting them the right to administer their own laws and customs. Other treaties were concluded with various other tribes until 1845. These treaties introduced total territorial segregation. In 1840 and 1845 it was agreed that individuals converted to the Christian religion could be exempted from certain indigenous law practices if so desired.

During the period under discussion various territories were annexed to the Cape proper. After the so-called War of the Axe, all treaties were abolished and the territory between the Kei and Keiskamma rivers was annexed by the British. This province became known as British Kaffraria. The province was regarded as a reserve for the indigenous population and the High Commissioner as Paramount Chief. Although the

11 The first such treaty was concluded between Sir Benjamin D'Urban and Andries Waterboer of the Griqua tribe on 11 December 1834.
12 The Province of Queen Adelaide.
13 One obvious reason for this was that the indigenous tribes refused to be expelled from the territory.
14 Only certain of the more serious crimes were excluded from the jurisdiction of the chiefs. See Cape Native Laws & Customs Commission (1883) 15.
15 Territorial segregation was also an important incentive for the Voortrekker's move away from the Eastern Cape.
16 Cape Native Laws & Customs Commission (1883) 15.
inhabitants were allowed to administer their own indigenous laws and practice their customs, all their decisions and acts were subject to the revision of colonial officials. At a special meeting with the chiefs of the territory, their position as British subjects was explained to them. Besides the fact that they were from that time expected to obey the laws of England and to force their subjects to do so too, they were to "disbelieve in and cease to tolerate or practice witchcraft in any shape", to "acknowledge no chief but the Queen of England and her representative", and to "abolish the sin of buying wives". The Cape policy towards the administration of the indigenous population was directed at their civilisation, and in this process Western laws and institutions were relied on.

Although from the earliest times the Cape never sought to recognise indigenous laws, the administrators of British Kaffraria were as early as 1849 forced to recognise the principle of collective responsibility where stock theft was concerned. Furthermore, certain practices, such as the distribution of unmarried girls among the chief and his men, were made punishable. The application of Western law to the indigenous population proved to be so problematic that British Kaffraria remained under martial law (until 1859), thus ensuring that the magistrates had a free hand in resolving disputes in accordance with indigenous law while at the same time the Cape government steadfastly refused to recognise that system. In 1865 this territory became annexed to the Cape. Yet the magistrates of British Kaffraria, as well as the indigenous judicial officers, never stopped applying indigenous law, even after martial law was suspended and the territory made subject to colonial law. The Cape Native Succession Act of 1864 and the Kaffraria Native Succession Ordinance of 1864 were the first official instruments which recognised indigenous law.

The Native Laws and Customs Commission of 1883 found that in view of the fact

17 Brookes 33.
18 Cape Native Laws & Customs Commission (1881) xi-xii.
19 Cape Native Laws & Customs Commission (1883) 18-20.
that indigenous law had been unofficially applied by magistrates and unofficial indigenous institutions alike, that law should be recognised as an uncodified system of common law. It further warned that because it was so interwoven with the indigenous culture the abolition of indigenous law would be both dangerous and futile. Moreover, it was found that such a step would refute the Colony's object of civilising the indigenous population through the gradual importation of Western laws and institutions into their community. Finally, it was suggested that a code and regulations of indigenous law be drafted which would leave the indigenous law which is not opposed to the universal principles of morality and humanity, and which would secure a uniform and equitable administration of justice in accordance with civilised practice. The Commission found that owing to the fact that there was no certain and uniform system of indigenous criminal law, it would not be advisable to codify that part of the indigenous law. It was suggested rather that the colonial criminal law should be codified - at the same time remedying its defects and incorporating "some laws and principles of procedure dear to the natives".

However, the Cape government took no decision regarding the position of indigenous law and gave no effect to the Commission's recommendations. Magistrates still unofficially applied indigenous law as an uncodified system of common law in civil cases between blacks, whilst the Cape High Court refused to apply that law in the absence of statutory indication to that effect. The position in the Cape province had far-reaching consequences for the indigenous community. This was especially felt in the sphere of family law. In Ngqobela v Sihele the presiding judge remarked that it was regrettable that although provision was made for the recognition of Muslim unions, traditional indigenous marriages were not regarded as proper marriages. It is ironic that indigenous-law unions are today, more than a century later and after the

20 Cape Native Laws & Customs Commission (1883) 20.
21 Cape Native Laws & Customs Commission (1883) 23.
22 See Ngqobela v Sihele (1893) 10 Juta 346.
23 (1893) 10 Juta 346.
introduction of a new constitutional dispensation, still not regarded as being on a par with western marriages.

When the Transkeian territories were annexed\(^\text{24}\) by the British (1877-1894), provision was made for existing laws to remain in force because the inhabitants of the territory were not sufficiently civilised to be subjected to the ordinary laws of the Colony.\(^\text{25}\) Provision was further made for the governor of the territory to determine a date at which the territory would become subject to colonial law. This happened in 1879, when the application of indigenous law was restricted to civil cases between blacks. Its application was further made subject to a repugnancy clause.\(^\text{26}\) The implementation of the repugnancy clause obviously brought about changes to the traditional indigenous law. Certain indigenous institutions, such as levirate unions and initiation dances, were for example forbidden.

It is interesting to note that those indigenous marriages that were registered, were accorded full recognition under the Transkei and Griqualand East Regulations pertaining to courts of law. The patrimonial consequences of such registered marriages were taken to be the same as those of Western marriages. The position of children from such marriages too was the same as that of children born of Western marriages. Divorce and related issues could only be decided by a Magistrate's Court. This Act also determined that colonial law would apply to cases of both testate and intestate succession. A penal code was drawn up by the Cape Native Laws and Customs Commission in 1883, and the principle of collective responsibility regarding stock theft was incorporated into this code.\(^\text{27}\)

\(^{24}\) See the Transkeian Annexation Act 38 of 1877; see also Cape Native Laws & Customs Commission (1881) xviii.

\(^{25}\) Cape Native Laws & Customs Commission (1881) xviii.

\(^{26}\) In terms of Proclamations 110 and 112 of 1879; see also Cape Native Laws & Customs Commission (1881) xvii-xix.

\(^{27}\) In Natal the principle of collective responsibility was generally recognised and not limited to stock theft.
With the annexation of Basutoland,\textsuperscript{28} which had been in a continuous land struggle with the Orange Free State, it was determined that although the territory would become part of the Cape, it would remain for the time being under its own indigenous laws and customs and would not become subject to the laws of the colony. The general provisions regarding the administration of justice in this territory were similar to those for the Transkeian territories.\textsuperscript{29}

Southern Bechuanaland which was constituted Crown Colony of Britain in 1885, was annexed to the Cape in 1895. Northern Bechuanaland was declared a British protectorate. The only interest Britain had in that desert country was its strategic position as buffer between the Cape and the expanding Transvaal. Administration of justice was left in the hands of the traditional Tswana rulers. It was provided in Proclamation 2 of 1885 that the Tswana chiefs would have exclusive civil and criminal jurisdiction over their people. The criminal jurisdiction was only restricted in respect of some serious crimes. The Cape policy of non-recognition of indigenous laws and institutions never applied in that territory. Until 1924 there was no connection between the indigenous and Western courts in Bechuanaland, not even a system of appeal.

2.b Natal\textsuperscript{30}

After the battle of Blood River, the approximately 6,000 European settlers were faced with the administration of approximately 25,000 blacks. Their policy was one of territorial segregation\textsuperscript{31} and to rule the indigenes who remained in the white area

\textsuperscript{28} In terms of the Basutoland Annexation Act 12 of 1871 (C).

\textsuperscript{29} Cape Laws & Customs Commission (1881) xiv-xix; see xiv-xviii for a discussion of specific changes brought about by proclamation and how the position in Basutoland differed from that in the Transkeian territories.

\textsuperscript{30} See the following sources on the position of indigenous law in Natal: Brookes 22-32 41-87 191-193, Brand 188-195, Bennett Application 43-44, Olivier Inheemse Reg 33-35, Matthews 341-249.

\textsuperscript{31} Indigenes were retained in the whites-only territory in as far as they were needed for agricultural labour.
Natal was annexed by Britain in 1843. In the transitional period between the annexation and the actual coming into office of the new government in 1845, the territory experienced an influx of more than 100,000 Zulu returning to the land of their birth. In 1845 Shepstone was appointed as Diplomatic Agent to the Native Tribes. In the same year Roman-Dutch law was recognised as the common law of Natal and made applicable to the exclusion of any other law prevailing in the territory. In giving effect to the recommendations of the Natal Native Commission of 1946-47, a location system was introduced in Natal whereby the Zulu were settled on land set aside for that purpose. Administration of the province was solely in the hands of Shepstone. When the colonial government refused to finance the office of superintendent to administer these locations, Shepstone placed the burden on the former tribal rulers, and where these could not be traced, chiefs were appointed for the purpose.

Shepstone, who kept the peace amongst the indigenes, who controlled them but failed to civilise them, had a thorough knowledge of, and respect for indigenous tradition, language, laws and custom. He was very popular and well respected by the Zulu community. Conflict arose between Cloete, Special Commissioner for the province of Natal, and Shepstone. Cloete was of the opinion that the indigenous population of Natal should be subject to Roman-Dutch law, while Shepstone felt that indigenous law as a whole should be recognised and applied by all courts. In 1849, indigenous criminal and civil law were recognised and made applicable to the indigenous

32 Brookes 23.
33 Ordinance 12 of 1845.
34 Brookes 43. He was criticised for this attitude by Merriman before the Inter-colonial Commission of 1903-1905: "You have not elevated the Natives in Natal; you have not raised them; you have not educated them; they are barbarians and you have designedly left them in a state of barbarism" (Quoted by Brookes 47).
35 In terms of Ordinance 3 of 23 June 1849.
population, in as far as it was not opposed to the principles of humanity observed throughout the civilised world. The adjudication of indigenous crimes which could be regarded as being opposed to the principles of humanity was later restricted to colonial courts only. Roman-Dutch law was abrogated in as far as the indigenous population was concerned. Indigenous chiefs were appointed as government officials; white government officials were appointed to control the administration of justice in accordance with indigenous law; and appeals were instituted to the Lieutenant-General, Shepstone, who officially replaced the Zulu monarch as paramount chief of the Zulu nation in 1850.

Already at that stage the Natal administration started changing the indigenous legal system, not only through the repugnancy clause but through memoranda to the chiefs instructing them to bring about certain changes in the indigenous-law position. The aim with these instructions was ultimately to civilise the indigenous population by bringing their law into line with the Western standards of justice and civilisation. Ironically, the compulsory death penalty for murder was introduced in this manner: "He who intentionally kills another ... shall die himself ... he shall follow his murdered brother; his children shall be fatherless and his wives widows, and his cattle and all other property shall become forfeited".36 This policy was endorsed by public executions which were ordered to serve as example to the indigenous population. The Exemption from Native Law Act37 provided for the exemption of indigenous law in certain cases, but did not apply to persons married to more than one wife. In 1869 regulations regarding customary unions were published. These regulations dealt with the forms and registration of such unions; consent of the bride; the amount of lobolo payable; grounds for dissolution; and the role of the chief in the conclusion of unions.

The codification of Zulu law never formed part of Shepstone's policy. He supported the Transkeian idea that indigenous law differed from tribe to tribe and that it had to

36 Brookes 52-53.
37 Law 11 of 1864 as amended.
be determined from case to case. In 1878 a Code of Zulu law was drawn up as guide for all courts (colonial and indigenous) to the unwritten indigenous law. Unfortunately, magistrates regarded it as a binding Code of traditional law and rarely deviated from it. This Code made serious inroads into the traditional law position, amongst others divesting the chiefs of their power. A Board of Native Administration was to revise this Code from time to time so that it could keep up with the natural development of the indigenous Zulu law. However, changes and amendments suggested by the Board were never implemented.

Law 19 of 1891 officially codified Zulu law, made it applicable to all blacks residing (not necessarily domiciled) in Natal, and repealed the Code of 1878. Included in the new Law were rules and regulations of an administrative nature which were foreign to indigenous law. These were, amongst others, regulations regarding the registration of customary unions, limitation of the amount of lobolo payable and prescription periods for lobolo debts. This Law has been described as a conglomeration of traditional Zulu law, martial law and colonial law. It is unfortunate that no provision was made for the amendment of this Law other than by parliament. The result was that the Law was never brought into line with new developments in Zulu law. This Code was for the first time amended in 1932.

The Native High Court, instituted in 1898, was fortunately enabled to apply indigenous law other than that contained in the Code. In the densely populated black areas special courts for the administration of indigenous law, subordinate to the Magistrates' Courts, were instituted and again abolished in 1896. In 1897 Zululand formally became part of Natal. In 1898 magistrates were officially empowered to hear civil cases between blacks in accordance with the indigenous law. Appeals lay to the Native High Court. Chiefs' Courts retained their civil jurisdiction, except in all matrimonial cases, but their criminal jurisdiction was limited to members of their tribes and limited to less serious crimes. Appeals lay to the Magistrates' Courts.

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38 Brand 194; Bennett Application 44 points out that this codification was seen as an ideal opportunity to amend the traditional law and that the traditional law was distorted in the process.
Customary unions, which had to be registered, enjoyed full recognition in Natal and no court was entitled to declare such a union immoral. The Natal Commission of 1906, which presented a comprehensive report on the administration of the indigenous Zulu population, proposed many innovative ideas towards the so-called native policy, but the administration of justice was conspicuously omitted from the report, leaving it in the hands of the Magistrates' Courts.

2.c The Transvaal

The first presidential election in the South African Republic took place in 1872. At that stage the Republic was ill-organised, poor and in dire need of trained administrators. The territoriality principle applied and all persons residing in the territory were subject to Roman-Dutch law. The black population was seen as a threat to the well-being of the territory and their integration into the community was low on the administrators' list of priorities. Legislation which saw the light during this period was rarely implemented. The first legislation of consequence for indigenous law in the Transvaal, was Act 3 of 1876. In terms of this Act indigenous marriages were denied the status of lawful marriages and separate locations were set aside for black occupation.

The Transvaal was annexed by Britain in 1877. One of the reasons for the annexation was the failure of the Republic's Native Policy. Shepstone's son who became Secretary of Native Affairs of the territory, was of the opinion that it was unjust to subject the black population to a law that was quite foreign to them. During the British rule, which ended in 1881, most of the old legislation was abolished and the position of indigenous law regulated by Ordinance 11 of 1881. This Act gave recognition to indigenous civil law. On regaining independence, the Transvaal re-enacted this


40 This land remained the property of the republic because blacks were not allowed ownership of land.

41 Brand 250.
Ordinance in Law 4 of 1885. In terms of this Act indigenous civil law seemingly received wide recognition, but it was subject to a repugnancy clause. Unfortunately the courts interpreted the repugnancy clause so widely that it severely curtailed the application of the Act. Consequently, indigenous marriages were regarded as being against the principles of civilisation and were not recognised as lawful marriages. The ordinary courts' consistent refusal to recognise customary unions was confirmed by Law 3 of 1897, which declared civil or Christian marriages the only lawful marriages. Although lobolo was not expressly forbidden, the courts regarded the institution as repugnant to the general principles of civilisation. Further, because Law 3 of 1897 did not mention the payment of lobolo in the conclusion of marriages, this institution too was regarded by the courts as against the Republic's statutory law. Indigenous law was never codified in the Transvaal.

The position of the ordinary courts with regard to the administration of indigenous law was as follows: The president of the Republic was recognised as supreme chief, adopting the powers vested in the paramount chief. Under the president followed a hierarchy of white officials who also served as courts of appeal. Commissioners' Courts were instituted in densely populated areas. Civil disputes in these courts were adjudicated upon under indigenous law, subject to a repugnancy clause. Chiefs' Courts were recognised and had concurrent jurisdiction with the Commissioners' Courts. Indigenous law had to be proved in the same way all customs had to be proved. Indigenous criminal law was not recognised and all people were subject to the existing Western criminal law. Magistrates' Courts had no jurisdiction with respect to indigenous-law disputes and could not apply that law. In contrast the Supreme Court did have such jurisdiction and served as court of appeal for the Commissioners' Courts. This had a detrimental effect on the position of indigenous law which was very often held to be inapplicable because it was considered being against the general principles of civilisation.

The war of 1899 - 1902 resulted in the occupation of the South African Republic by Britain but no real changes in the policy towards or the position of indigenous law
were brought into effect.

2.d The Orange Free State

It is interesting to note that the position regarding the recognition of indigenous law in the Orange Free State and the Cape were rather similar. Indigenous law and institutions were only accorded recognition in the locations or reserves set aside for the occupation by blacks. However, their reasons behind this policy differed. Brookes explains:

"Under the impression that Natives were so barbarous that their laws must be worthless, the Orange Free State has failed, with one or two minor exceptions, to recognise Native law at all. Under the equally mistaken impression that any differentiation between Europeans and Natives in the Law Courts meant oppression for the Natives and an infringement of the principle of equal justice for all the Cape Province has similarly withheld all recognition of Native Law."  

It seems that while the Free State supported the idea of permanent inequality between the races in all spheres of life, in theory the Cape promoted equal rights for all civilised men.

Considering how small the black population of the Free State was, it is not surprising that the administrators did not pay much attention to the formulation of a policy for the recognition of indigenous laws and institutions and the administration of

42 The following sources provided information on the Orange Free State: Matthews 260-265, Brookes 119-120 194-195, Brand 200-201, Bennett Application 45-46, Olivier Inheemse Reg 37-38.

43 Brookes 181.

44 One has to consider the fact that the Cape always looked upon the indigenous population as being in need of civilisation.

45 See Matthews 260.

46 The indigenous population of the Free State consisted largely of an overflow from the other areas surrounding this province.
the indigenous communities under their control. There were two reserves for the indigenous people in this area. In the Thaba 'Nchu reservation, which was annexed Barolong territory, indigenous marriages were fully recognised. When the Witsieshoek reserve came under control of the Free State, the chief of the tribe inhabiting the area was given limited civil jurisdiction in respect of members of his tribe. His jurisdiction was not limited to indigenous law cases, but to ten pounds sterling, whether the dispute arose in indigenous or Western law. Appeals lay to the Commandant's Court of equity and from there to the ordinary courts who could only apply Western law unless expressly otherwise indicated by legislation. Indigenous criminal law was not recognised and Western criminal law applied to all persons.

Elsewhere in the Free State indigenous law was not recognised. Law 26 of 1899 made an exception and recognised customary unions where succession and inheritance by the offspring of such a union came to bear and where parental control and custody of the children were concerned. The proviso was that the father and mother had accepted each other as spouse and lived accordingly. However, the position of the children in such cases was determined as if the parents had contracted a civil marriage. Their position therefore differed radically from the position in indigenous law. Contrary to indigenous law the party without fault was awarded guardianship of the children on the dissolution of the marriage.

3 SUMMARY

This period in the history of South Africa illustrates the use of law as an instrument of change and development, an instrument in the civilising mission of the colonialists. Law, which is central to conflicting interpretations of morality and culture, has been

47 See Quinian 79-91 for a survey of the history of Witsieshoek and the formation of indigenous tribes by the settlers residing in the area.

48 Pospisil "Culture Change" 128 observes that because law uses rewards and punishments as its sanction and because it applies to the whole of society, law can be very effective and the major instrument for effecting culture change.
described as the battleground in the scramble for access to resources and labour, and for power and authority. Under colonial rule the law which was imposed upon the indigenous population was authoritarian in nature. This law remained true to its constitutive history as imperial power and dominated lesser legal orders. The indigenes did not support the imposed law. They either ignored it and unofficially maintained their indigenous laws and institutions, or, in some instances, obeyed the colonial laws for fear of punishment by colonial officials. Colonial policies laid the foundation for the official policy towards indigenous law and the judicial administration of the indigenous population in South Africa in later years. Major political transitions, such as when South Africa became a Union and then a Republic brought about little real adjustment to the indigenes' position and in consequence newly formulated Union and Republican policies that seemed outwardly different, in fact varied little from those that went before. Likewise the indigenous population's attitude towards these policies did not change over the years. Official law was largely ignored and unofficial law and institutions grew in importance.

49 Roberts & Mann 36.

50 Fitzpatrick "Imperialism" 99 comments that a "[l]aw could fulfill the imperatives of Enlightenment and relate to an essential humanity, yet treat parts of that humanity in radically different ways because of their radically different position in the scale of civilisation or in evolutionary development"; see also generally Fitzpatrick "Imperialism" 100-104.

51 Brookes 202 renounced this imposition of law that did not "reproduce the ideas and customs of those to whom it applie[d]" and the "manipulation of Codes and judicial decisions in order to bring about changes in Native life" as "reprehensible, impolitic and unscientific".
# CHAPTER IV
## INDIGENOUS LAW IN POST-COLONIAL SOUTH AFRICA BEFORE 1994

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Introduction</td>
</tr>
<tr>
<td>2</td>
<td>Official Recognition and Application of Indigenous Law</td>
</tr>
<tr>
<td>2.a</td>
<td>The Black Administration Act 38 of 1927</td>
</tr>
<tr>
<td>2.b</td>
<td>Indigenous Law in Official Courts</td>
</tr>
<tr>
<td>3</td>
<td>The Internal Conflict of Laws</td>
</tr>
<tr>
<td>3.a</td>
<td>Introduction</td>
</tr>
<tr>
<td>3.b</td>
<td>Theoretical Overview of the Internal Conflict of Laws</td>
</tr>
<tr>
<td>(i)</td>
<td>Section 1 of the Law of Evidence Amendment Act</td>
</tr>
<tr>
<td>(ii)</td>
<td>Judicial Notice of Indigenous Law</td>
</tr>
<tr>
<td>(iii)</td>
<td>Connecting Factors</td>
</tr>
<tr>
<td>3.c</td>
<td>Conclusion</td>
</tr>
<tr>
<td>4</td>
<td>Unofficial Indigenous Law</td>
</tr>
<tr>
<td>4.a.i</td>
<td>Indigenous Law in the Court of the Ward Headman</td>
</tr>
<tr>
<td>4.a.ii</td>
<td>Indigenous Law Unofficially Applied by Official Courts of Chiefs and Headmen</td>
</tr>
<tr>
<td>4.b</td>
<td>People's Law</td>
</tr>
<tr>
<td>4.b.i</td>
<td>The Period Before 1985</td>
</tr>
<tr>
<td>(i)</td>
<td>Civic Structures in the Western-Cape</td>
</tr>
<tr>
<td>(ii)</td>
<td>The Makgotla in Mamelodi and Soweto</td>
</tr>
<tr>
<td>4.b.ii</td>
<td>The Period After 1985</td>
</tr>
<tr>
<td>(i)</td>
<td>The Eastern Cape</td>
</tr>
<tr>
<td>(ii)</td>
<td>The Western Cape</td>
</tr>
<tr>
<td>(iii)</td>
<td>The Karoo</td>
</tr>
<tr>
<td>(iv)</td>
<td>Gauteng</td>
</tr>
<tr>
<td>4.c</td>
<td>The Period of Reform</td>
</tr>
<tr>
<td>(i)</td>
<td>Reform from Within</td>
</tr>
<tr>
<td>(ii)</td>
<td>Reform with the Assistance of Non-State Institutions</td>
</tr>
<tr>
<td>5</td>
<td>Conclusion</td>
</tr>
</tbody>
</table>

## 1 INTRODUCTION

By 1910 indigenous law was recognised to some extent in all the areas which were to constitute the provinces of the Union of South Africa. This law differed from the true
pre-colonial traditional indigenous law.¹ It reflected the historic interaction between the original pre-colonial law and the law of the colonisers, and often exposed the colonisers’ disdain for indigenous laws and systems of social ordering. It has been referred to as a European invention which fitted into the European model of colonial rule and which found expression in the concept of indirect rule.² On their part the indigenous communities abided by the transformations in their laws and institutions so that they could gain access to resources and labour, and they often made representations about their law and institutions to give them greater validity in the eyes of both the Westerners and the indigenous population.³

In South Africa this process of adapting indigenous law to suit the purposes of the white administration as well as those of certain sections of the indigenous population is an ongoing one. It challenges the very survival of indigenous law in this country. The unjust indigenous legal system, which is far removed from both the pre-colonial legal system and its institutions, and the true indigenous law adapted in accordance with its underlying postulates, is often presented as authentic indigenous law. It will be argued that this distorted indigenous law is no longer in step with its jural postulates and that it is perceived as inherently discriminatory by those who struggle for equality between male and female and old and young. But it is also this law which is perceived,

¹ Roberts & Mann 21-22 refer to it as "precontact native law".
² Roberts & Mann 6-9 19-23 24; on 9-23 they discuss the "making of colonial legal systems". They view the legal systems which are observed in Africa as a "single interactive colonial legal system ... [which] was forged over time by Africans and Europeans pursuing interests and beliefs of their own" (8-9).
³ For example, Quinlan 80-91 describes the colonial formation of various tribes in the Witsieshoek area. The early settlers in that area concluded a treaty with the leader of a refugee group, Mokhachane, in which the group was identified as a tribe and the leader elevated to the status of chief. This identification and elevation was based on certain false assumptions of the social ordering of the indigenous population inhabiting the area. The indigenous population acceded to the formation of this tribe, as well as to that of other tribes in the area, for economic reasons. On 111-112 Quinlan describes the concepts of "tribe" and "chief" as ideological resources which "served the colonial governments of the mid 19th century to categorise groups of African refugees from the settler wars ... . The content of these concepts was shaped by the African need for land, the colonialists' control of the highveld and their propensity to allocate territories to recognisable African groups".
together with the official Western law, to be illegitimate and which gave rise to the emergence of an alternative people’s law and alternative dispute-resolution institutions.

2 OFFICIAL RECOGNITION AND APPLICATION OF INDIGENOUS LAW

2.a The Black Administration Act 38 of 1927

By the time of Union, there was no conformity in the mass of diverse laws which regulated indigenous law. It was only natural that this disparity in the colonial legislation caused grave injustice in the administration of justice for the black population. The need for the homogeneous recognition and administration of indigenous law had become a necessity. A legislative project for the unification of colonial legislation which was launched in 1912 and culminated in a uniform Native Disputes Bill. This Bill provided for the obligatory application of indigenous law in certain specified civil cases between blacks. The Bill never became legislation.

The colonial legislation was eventually consolidated in the Black Administration Act of 1927. This Act provided for a separate court system for blacks and for the limited recognition of indigenous law throughout the Union of South Africa. The promulgation of this Act was not only effected with the interest of the black population at heart, but it was also done for reasons of practical efficacy (shortage of manpower) and political utility (indirect rule). It was not only a desire for uniformity which prompted the promulgation of this Act, but another, less overt need to promote tribalism and chiefly

4 See generally Hoexter, HSRC 129-136, 155-156, 142-144, Corder & Davis 2; see also Part II.1.1 and Part II.1.4 below where the concept of legitimacy is discussed in more detail.

5 See also Garthorne 258-259.

6 Act 38 of 1927.

7 During the colonial period and after Union there were both a shortage of funds and a lack of officials available to perform judicial functions amongst the indigenous population. In later years the use of traditional leaders to perform judicial and administrative functions under control of State management developed into a convenient policy of indirect rule.
authority. It was believed that a return to indigenous institutions would deflect the challenge posed by the growing urbanised community.\textsuperscript{8}

The entrenchment of traditional institutions in legislation and their incorporation in State administration have been criticised for its stultifying effect on progress and development. Roberts and Mann\textsuperscript{9} point out that indigenous law and institutions are not unchangeable pillars of indigenous society. They regard the concept of an unchanging tradition in any society, whether Western or African, as a fallacy. Institutions, such as chieftancy and dispute-resolution processes, should merely be seen as stages in a process of social development. Laws and institutions are reflections of economic, political and social imperatives.

It is indeed true that the incorporation of indigenous law in legislation may have had a stultifying effect on the development of indigenous law, simply because the legislation did not make provision for the natural development of that law in accordance with changing values. But it should be borne in mind that the indigenous population in South Africa has largely ignored State manipulation of its law and has continued to apply it unofficially and without any restriction - in the rural areas in a very pure form, and in the urban areas in an adapted form.

The official recognition of indigenous law was made subject to a repugnancy clause.\textsuperscript{10} Section 11 (1) of the Black Administration Act determined that indigenous law would only be applicable in as far so it was not against the principles of public policy or natural justice. In practice the principles of public policy and natural justice were as a matter of course interpreted within a Western frame of reference. This repugnancy

\textsuperscript{8} See Bennett Sourcebook 62. It should be borne in mind that the Chiefs' Courts that most resembled traditional institutions, functioned only successfully in rural areas and the Commissioners' Courts which also operated in urban areas had little resemblance to the traditional institutions.

\textsuperscript{9} Roberts & Mann 4 6 7.

\textsuperscript{10} See generally Van Niekerk Comparative Study 61-64.
clause still applies today, although it is now embodied in different legislation. In the process criteria such as justice, morality, equity, good conscience, order, humanity, public policy and natural justice are used to restrict the application of indigenous law rules, whether of a procedural or substantive nature.

Indigenous Courts of Chiefs and Headmen were instituted and granted limited civil and criminal jurisdiction. These Courts, still in operation today, were under the judicial and administrative control of the State. Chiefs' Courts functioned separately from the ordinary courts of the land. Respect for chiefs as traditional leaders declined as they were increasingly regarded as State officials and as their people were increasingly unable to exercise control over them. The incorporation of chiefs into the State administration also had the effect of transforming the traditional role of such institutions. Indigenous chiefs were at the same time empowered and subordinated - their chiefly authority reinforced (by their incorporation into the State system) and diminished by State control (by the application of the repugnancy clause and the limitations placed upon the application of indigenous law).

Criticism levelled against chiefs, the duality of their functions as administrative and judicial officers, the fact that they adjudicate cases which fall outside their official criminal jurisdiction, the fact that many are illiterate, and the fact that their decisions are


12 Although they were theoretically linked to the ordinary courts through a system of appeal to Magistrates' Courts, such appeals resembled trials de novo, because Chiefs' Courts are not courts of record.

13 In indigenous law a ruler's powers are checked by the people. He always acts in council (the council consisting of representatives of the people), he has to be adequately trained and old enough before he may assume office and he may be publicly criticised with impunity under certain circumstances: see Myburgh Papers 55-57. This traditional system was undermined by the State control of chiefs and the appointment of persons other than hereditary chiefs to these positions.

14 See Roberts & Mann 32-36.
not reported\textsuperscript{15} often stems from a misunderstanding of the principles underlying indigenous law and institutions and from the fact that indigenous and imposed Western value systems are sometimes difficult to reconcile.\textsuperscript{16} But despite such criticisms Chiefs' Courts have proved surprisingly resilient to Western influence and State intervention. All over Southern Africa Chiefs' Courts have proved their ability to adapt to new circumstances and to overcome the stigma of colonisation, indirect rule and apartheid.\textsuperscript{17}

Commissioners' Courts\textsuperscript{18} were instituted as an inexpensive and simple means to resolve civil disputes between blacks. These Courts were presided over by officials of the then Department of Native Affairs who had a discretion to apply either indigenous law or the general law of the land. Judicial notice of indigenous law could be taken by the commissioners and legal representation was allowed.\textsuperscript{19} Magistrates lost their civil jurisdiction over blacks in those areas where Commissioners' Courts were instituted. Appeals lay to courts specially instituted for that purpose\textsuperscript{20} and only in exceptional circumstances were further appeals allowed to the Appellate Division of the Supreme Court. Although the supreme Court had concurrent jurisdiction with the Commissioners' Courts, high costs and unfamiliar procedures practically placed it out

\textsuperscript{15} See eg Bekker's report on the role of the judiciary in a plural society.

\textsuperscript{16} An example is the fact that the appointment of uncles to assist chiefs in court cases has been regarded as nepotism by some who criticise the institution of Chiefs' Courts. However, in traditional society elderly family members with their superior experience and knowledge not only of the law, but also of the social circumstances of the group, often assist the chief. They are regarded as built-in checks of political and judicial power.

\textsuperscript{17} For instance, in Zimbabwe, Chiefs' Courts, which were abolished at independence, were reinstated in 1990: see generally Bennett \textit{Sourcebook} 59-60 63-64, Van Niekerk \textit{Comparative Study} 131-133.

\textsuperscript{18} Bennett \textit{Sourcebook} 80-82; Van Niekerk \textit{Comparative Study} 66-70; Olivier \textit{Inheemse Reg} 40-44.

\textsuperscript{19} S 16 of the Black Administration Act 38 of 1927.

\textsuperscript{20} Magistrates presided over these Appeal Courts for Commissioners' Courts. But they had a limited knowledge of indigenous law and for that very reason often rejected the commissioners' judgments.
of reach of black litigants. The racial segregation in the administration of justice created by these developments seemed but a logical extension of the territorial and cultural segregation maintained in the colonial period.²¹

In 1957 criminal jurisdiction in respect of crimes committed by blacks were conferred upon Commissioners' Courts. They were not empowered to apply indigenous criminal law as courts of first instance. However, they could apply indigenous criminal law when functioning as a court of appeal for the Courts of Chiefs' and Headmen. Over the years Commissioners' Courts lost all credibility, especially when their criminal jurisdiction later included the enforcement of the notorious pass laws. Much criticism was levelled against them for their lack of judicial independence, specifically in criminal cases, and against the judicial officers' insignificant knowledge of indigenous law.²²

In 1983 the Hoexter Commission found in its fifth report into the structure and functioning of the courts that it was unrealistic and unreasonable to restrict urban blacks to Commissioners' Courts for civil litigation. It was also found that separate criminal courts for separate people was unnecessary, humiliating and repugnant.²³

As a result Commissioners' Courts and the Appeal Courts for Commissioners' Courts were abolished in 1987.²⁴

Black Divorce Courts were instituted by the Black Administration Amendment Act of 1929²⁵ and are today still in operation. These Courts were instituted for the adjudication of nullity, divorce and separation suits between blacks, as well as related questions. The Courts may not deal with lobolo or bogadi claims, but often decide on questions of custody, maintenance and property. They apply Western law only.

²¹ See generally Part I.III.
²² It should be kept in mind that judicial officials were allowed to take judicial notice of indigenous law on the false premise that they had a specialised, expert knowledge of that law.
²³ Hoexter 409; see generally Bennett Sourcebook 81-82.
²⁴ By the Special Courts for Blacks Abolition Act 34 of 1986.
²⁵ S 10 Black Administration Amendment Act 9 of 1929. See generally Bennett Sourcebook 85-87.
Procedures are more flexible and costs lower than in the ordinary courts. Yet, in proportion to the average income of litigants, costs are still high. These Courts will stop functioning when the Magistrates' Court Amendment Act of 1992\(^\text{26}\) comes into operation at a date yet to be determined. The function of those Courts will then be taken over by so-called Family Courts.

### 2.b Indigenous Law in Official Courts

Today, indigenous law is accorded limited official recognition in South Africa. It is applied by the Courts of Chiefs and Headmen, Magistrates' Courts, the supreme Court, Appellate Division, Small Claims Courts, Short Process Courts and Family Courts.\(^\text{27}\) The indigenous law applied by these official courts often bears little resemblance to the living indigenous law. It consists mostly of law established by judicial precedent or codified in the Natal Code, and is applied by judicial officers who are not versed in indigenous law. Until 1988, if not established by judicial precedent or in the Natal Code, indigenous law had to be proved in the same way that custom, had to be proved in that it differed from the general law of the land. After the introduction of the Law of Evidence Amendment Act,\(^\text{28}\) all courts were given a general discretion to take judicial notice of indigenous law. The introduction of this new measure made no substantial difference in the actual application of indigenous law and today its ascertainment is still through judicial precedent, the Natal Code or text books.\(^\text{29}\) The result is a typical black letter law, far removed from the reality of the living indigenous law and applied in a judicial system little trusted by the largest section

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26 Act 120 of 1993.

27 Act 120 of 1993 which makes provision for the institution of Family Courts has not yet come into operation.


29 There is no statutory provision for a presiding officer to call to her assistance assessors to give advice on matters of indigenous law. However, expert witnesses may be called to give evidence on the existence of a rule of indigenous law: see Bennett Sourcebook 140-141.
of the community it is supposed to serve.\footnote{30 See Part I.III and Part I.IV.4.}

The abolition of the Commissioners' Courts and Appeal Courts for Commissioners' Courts was favourably accepted in light of the injustice caused by their continued existence. Unfortunately, their abolition caused a hiatus in the accessibility of justice which has not yet been remedied. The Magistrates' Courts which have taken over their functions are often unaffordably expensive to black litigants and they function with typical Western style formality. Moreover, the recent Magistrates' Courts Amendment Act\footnote{31 Act 120 of 1993 which will come into force at a date to be determined.} which affects very extensive amendments to the Magistrates' Courts Act, missed the opportunity of rectifying the intolerable situation where magistrates, who are authorised to apply indigenous law, are not obliged to receive any training in that law.

Although the State has tried to facilitate access to justice, the reforms were undertaken without any reference to the special needs of the indigenous community. The institution of Small Claims, Short Process and Family Courts as well as the provision for mediation in certain civil cases bear witness to this. Although the introduction of these Courts and special procedures seems to be a movement in the direction of a simplified, non-technical, inquisitorial procedure, in substance it is nothing more than reform imposed from above.\footnote{32 The simplified, informal procedure of these courts may be regarded as an indication that reference could have been had to existing indigenous dispute-resolution structures. However, there are those who hold the view that pre-capitalist dispute resolution structures cannot serve as model for the informal courts in modern capitalist societies: see Bennett Sourcebook 89.} The Short Process Courts and Mediation in Certain Civil Cases Act\footnote{33 Act 103 of 1991.} makes provision for mediation in certain civil cases, before or after summons but before judgment. A mediator has to take an oath to "administer justice to all persons alike without fear, favour or prejudice and, as the circumstances of a particular case may require, in accordance with the law and customs of the Republic..."
of South Africa applying to the case concerned).\textsuperscript{34} Apparently one may assume that "law and customs" here also include indigenous law.\textsuperscript{35} The process of mediation before trial reminds one strongly of indigenous procedural law. Persons bringing a matter before an indigenous court are as a rule asked whether they have tried to solve the problem through the mediation of their family councils. If this is not the case, they are referred back for mediation. Only where the family councils are unable to settle the matter is it adjudicated by the indigenous court.

Unfortunately, mediators too are not required to have any knowledge of indigenous law and are appointed from the ranks of advocates, attorneys and magistrates with at least five years training. They are subject to the administrative control of the magistrate of the district in which they function. It is a pity that there is no provision in this Act that where the circumstances require, the mediator be knowledgeable in indigenous law and that the mediation proceedings be conducted in a language with which the parties are conversant. This would have been expedient especially in light of the fact that a mediator's order in respect of issues such as any settlement reached by the parties, any amendments of pleadings, and any agreements concluded between the parties, forms part of the records before the court in the subsequent trial. A settlement reached during mediation is deemed to be an order of the Court.

The Act further makes provision for simpler, less technical procedures in Short Process Courts. Presiding officers, or adjudicators of these courts, who are required to have the same qualifications as the mediators described above, have the same jurisdiction and powers as magistrates. They take the same oath that mediators have to take on coming into office. The procedure in these Courts is simplified. Although legal representation is permitted, any rule of evidence may be abandoned for the expeditious and cost-saving disposal of the case. Evidence is given under oath.

\textsuperscript{34} S 2(3) Act 103 of 1991.

\textsuperscript{35} Although indigenous law does not form part of the general law of South Africa, it is recognised and applied as secondary legal system. See also Prinsloo "Nuur Geïntegreerde Hofstelse" 78-79.
plaintiff may withdraw his claim at any stage of the proceedings and reinstate it at a later date with the consent of the Court.\textsuperscript{36} There is no appeal from a judgment of a Short Process Court but mediation proceedings as well as proceedings of Short Process Courts are subject to review by the Supreme Court in certain circumstances.\textsuperscript{37} Again, it is a pity that no provision was made for the inclusion of persons trained in indigenous law, or even of chiefs, to act as adjudicators where the circumstances require. Again a golden opportunity was lost to integrate the indigenous courts and their officials into the existing system of official courts.

The Small Claims Courts were instituted on the recommendation of the Hoexter Commission of Inquiry into the Structure and Functioning of the Courts.\textsuperscript{38} They were introduced to facilitate access to justice for lower-income litigants, and to deal with the psychological barriers caused by the formality of the Western court structure, the poverty of litigants and feelings of alienation.\textsuperscript{39} The fact that no legal representation is permitted, that costs are low, that no records are kept (but for the verdict, judgment or order)\textsuperscript{40} and that procedure and evidence are simplified and informal, again show marked similarity to indigenous dispute-resolution procedures. Section 14 (3) of the Act empowers the Courts to hear civil actions arising in indigenous law and to apply indigenous law "as may be proved".\textsuperscript{41} Their jurisdiction is very limited and dissolution of indigenous marriages, and actions for damages for seduction are amongst the matters excluded from their jurisdiction.

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\textsuperscript{36} See generally Chapter IV s 10 of Act 103 of 1991 for the rules concerning procedure and evidence in these Courts.

\textsuperscript{37} s 11 and s 12.

\textsuperscript{38} By the Small Claims Courts Act 61 of 1984.

\textsuperscript{39} Bennett \textit{Sourcebook} 87; see generally 87-90.

\textsuperscript{40} s 4.

\textsuperscript{41} S 14. Although s 14 (3) has not been expressly repealed by the Law of Evidence Amendment Act 45 of 1988, the wording of s 1(1) of that Act, namely "any court may take judicial notice of ... indigenous law" would seem to include the Small Claims Courts; see also Kerr "All Courts" 167 168.
Yet again, there are features typical of reform effected from above. The needs of the black community, which has had the worst possible experience of the justice system and its inaccessibility, were clearly not considered. Academic requirements for commissioners of these courts include proficiency in Western law only. This is also the case with regard to language requirements. Proceedings may be conducted in "either of the official languages" - which at the promulgation of the Act meant Afrikaans or English. The fact that the Small Claims Court Act gives the Court the discretion to conduct proceedings in either of the official languages (now probably any one of the eleven); that provision is made for the use of interpreters where evidence (not all the proceedings) is given in a language with which a party is not sufficiently conversant; and the fact that the new Interim Constitution determines that where "practicable, a person shall have the right to use and to be addressed in his or her dealings with any public administration at the national level of government in any official South African language of his or her choice" (my emphasis), all have the effect that court proceedings will most likely still be conducted in either English or Afrikaans.

Judgment in these Courts is final and there is no possibility of any appeal, but only of review by the Supreme Court under certain circumstances. Kerr is of the view that a presiding officer's lack of knowledge of the applicable law (including indigenous law) should constitute a gross irregularity with regard to proceedings which could warrant such review.

43 S 5.
44 See s 3 of Act 200 of 1993.
45 S 3 (3) of Act 200 of 1993.
46 S 45 and s 46.
47 Kerr "Small Claims Courts" 729-730.
48 In terms of s 46(c).
A separate civil-court structure for the adjudication of civil cases by magistrates was created by the Magistrates’ Courts Amendment Act. In terms of section 2(d) of this Act the minister may establish family divisions of the Civil Court (formerly the Magistrates’ Court) and in terms of subsection 2(k) she may establish Family Courts for such divisions. Black Divorce Courts are abolished by the Magistrates’ Courts Amendment Act. In the transitional period, Black Divorce Courts will be regarded as Family Courts and the areas of their jurisdiction as a family division. The rules applicable to Family Courts will be applicable to such Divorce Courts and the presidents of the Divorce Courts will be regarded as family magistrates. Family magistrates are required to have a knowledge of Western law only and no mention is made of indigenous law.

3 THE INTERNAL CONFLICT OF LAWS

3.a Introduction

The official recognition of indigenous law gave a different dimension to legal pluralism and the interaction between that law and Western law in South Africa. It thus created the need for rules to regulate conflicts in situations where different official legal systems were potentially applicable. Over the years internal conflict-of-laws rules have developed to determine which legal system is the most closely connected to the facts of a given case.

49 Act 120 of 1993.

50 In terms of s 73 the short title of the Magistrates’ Courts Act 32 of 1944 is substituted by the “Lower Courts Act, 1944”.

51 Section 10 of the Black Administration Amendment Act 9 of 1929 which established Black Divorce Courts will be repealed by s 74 of Act 120 of 1993 which, as already mentioned, is not yet in operation.

52 S 71 Act 120 of 1993.

53 See Part I for the development of legal pluralism in South Africa.
One question which arises is to what extent private international law overlaps with the norms which regulate the internal conflict of laws and to what extent it could be used to develop these norms. Private international law basically encompasses the rules related to external conflict of laws. It concerns the conflict between the laws of different States, whereas internal conflicts are conflicts between the different laws applicable in the same State. This distinction is important in that private international law focuses on territory, whilst the internal conflict-of-laws rules focus on legal culture. Yet, the disparity in emphasis is not all-important. The principles and techniques of private international law have in the past, consciously or unconsciously, to a limited degree directed the development of internal conflicts and may still usefully be employed, if this is done with caution.

3.b Theoretical Overview of the Internal Conflict of Laws

Rules to regulate the conflict of laws in situations of internal legal pluralism are important for indigenous law because conflict may arise, on the one hand, between the general law of the land and indigenous law, and, on the other hand, between two different indigenous law systems.

Visser refers to the rules applicable where there is a conflict between different systems of indigenous law as C-type norms; and to the rules pertaining to situations where common law and secondary systems of law are involved as D-type norms. He

54 See generally Sanders "Internal Conflict of Laws" 57-58.
55 Also referred to as rules pertaining to the situation where both primary and secondary systems are applicable or where the domestic common law and indigenous law are potentially applicable.
56 These are conflicts between different systems of law applicable to particular population groups. The law regulating such conflict situations may also be referred to as inter-gentile law or conflicts between domestic systems of indigenous laws.
57 See Visser Interne Aanwysingsreg 49-58. A-type norms (norms of private international law) are involved in situations where there is a foreign element, and B-type norms (inter regional law) in situations where legal systems are territorially applicable.
uses the notions of ethnicity and status-stratification to make this distinction.

Three additional conflict situations which involve indigenous law may be identified: Conflict between a foreign system of indigenous law and domestic system of indigenous law; domestic common law and foreign indigenous law; foreign common law and domestic indigenous law. These three situations do not fall within the realm of internal conflicts of law because they involve foreign law and will thus not be discussed. In this thesis the emphasis is on the interaction and thus also the conflict between domestic indigenous law and domestic Western law.

(i) **Section 1 of the Law of Evidence Amendment Act**

The application of indigenous law is currently regulated by the Black Administration Act, The Law of Evidence Amendment Act and the Constitution of the Republic of South Africa Act. Section 1 of the Law of Evidence Amendment Act determines:

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

(2) The provisions of subsection (1) shall not preclude any party from adducing evidence of the substance of a legal rule contemplated in that subsection which is in issue at the
In any suit or proceedings between blacks who do not belong to the same tribe, the court shall not in the absence of any agreement between them with regard to the particular system of indigenous law to be applied in such suit or proceedings, apply any system of indigenous law other than that which is in operation at the place where the defendant or respondent resides or has a business or is employed, or if two or more different systems are in operation in that place (not being within a tribal area), the court shall not apply any such system unless it is the law of the tribe (if any) to which the defendant or respondent belongs.

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

It seems surprising that the legislature grouped indigenous law together with foreign law, thus creating the impression that it should be treated as foreign law. However, from the words of the Law Commission's Working Paper on the review of the law of evidence, the intention seemed quite the contrary:

"[C]ustomary law is not foreign law in the same sense as, for example, French law is foreign law vis-à-vis South African law. To the Blacks it is incomprehensible and even humiliating that their law is regarded as foreign law in the Republic."

The rationale behind this grouping of indigenous law and foreign law in the same proposition is possibly merely the fact that for both certain guidelines are laid down for the choice of law in a situation of conflict of laws - albeit that these guidelines, as contained in section 1, do not have the same consequences for internal and external conflict rules.

Section 1(4) which defines indigenous law, includes in its definition the law of the former bantustans. For purposes of this Act then, the incorporation of these territories into the Republic will make no difference to the position of the internal conflict of laws.
This section did away with racial restrictions regarding the application of indigenous law. Kerr\textsuperscript{65} discusses some interesting cases in the law of contract and succession where racial restrictions would have had an effect on the application of indigenous law and points out the vast improvement the omission of such restrictions has brought with regard to the application of indigenous law and legal certainty.

Furthermore, section 1 omitted the proviso that indigenous law may be applied only in so far as it has not been repealed or modified by legislation. Whilst this omission has been generally welcomed in light of the fact that all law should in any case be read subject to prevailing legislation,\textsuperscript{66} it has also been criticised as an incomprehensible oversight which may cause problems in the application of the Natal Code of Zulu Law of 1987. It would now theoretically be possible to allege the validity of an indigenous law norm which contradicts the Code.\textsuperscript{67} However, Constitutional Principle XIII\textsuperscript{68} determines that indigenous law shall be recognised and applied subject to the fundamental rights contained in the Constitution and subject to specific legislation dealing with its application.

Section 1(2) is of interest in that it explicitly empowers a party to lead evidence with regard to indigenous law norms. Indigenous law has to be proved if it is not readily ascertainable. Proof of indigenous law is in accordance with the rules relating to the proof of custom.

Section 1(3) is similar to previous legislation which regulated inter-gentile law.\textsuperscript{69}

\textit{\textsuperscript{65} Kerr "All Courts" 170-171.}
\textit{\textsuperscript{66} Bennett Sourcebook 119.}
\textit{\textsuperscript{67} Olivier "Customary Law" 51 points out that local norms which are contrary to the Code may now be alleged by a party.}
\textit{\textsuperscript{68} Contained in Schedule 4 of the Constitution of the Republic of South Africa Act 200 of 1993 as amended.}
\textit{\textsuperscript{69} S 11(2) of the Black Administration Act and s 54A of the Magistrates' Courts Act.}
Indigenous law is personal in scope and a person's personal law applies wherever he may be.  

(ii) Judicial Notice of Indigenous Law

In the absence of explicit reference in section 1, it is assumed that the courts still have a discretion to apply indigenous law.  

There seems to be some difference of opinion amongst writers as to whether the courts now have a discretion to take judicial notice of indigenous law, or whether it is obligatory to take judicial notice of that law, once it has been established that it should be applied. Bennett and Olivier are of the opinion that judicial notice is at the discretion of the courts, whilst Kerr interprets this legislation differently. According to him, once indigenous law is indicated or designated as the applicable law by the statutory or non-statutory conflict-of-law rules, or once the court has exercised its discretion and decided to apply indigenous law, it is obliged to take judicial notice of that law if it is ascertainable readily and with sufficient certainty. Kerr argues that the "may" refers to a court's discretion whether or not to apply indigenous law and not to take judicial notice of it.

From the Law Commission's Working Paper and their Report it appears that it intended the courts to have a discretion to take judicial notice of indigenous law. The discussion of judicial notice starts with an observation which seems to indicate that the

70 Kerr "Magistrates' Courts" 530-534.
71 Bennett Sourcebook 120.
72 Bennett Sourcebook 119-120
73 Olivier "Customary Law" 51; Olivier "Application" 202-203.
74 Kerr "All Courts" 168; "Magistrates' Courts" 527-528; Kerr "Judicial Notice" 580-581.
75 According to Kerr "Magistrates' Courts" 538 the legislator should have determined that it lies within a court's discretion whether to apply indigenous law and that all courts shall take judicial notice of indigenous law.
word "may" was used for a specific reason:

"There are numerous facts or matters of which a court may take notice or of which a court shall take notice. This area of the law of evidence does not give rise to any problems worth mentioning ...". (my emphasis)

Moreover, the Commission continues,

"[O]nly the Commissioners' Courts could in the adjudication of civil actions between Blacks in which customary law is applicable take judicial notice of such law. With the abolition of Commissioners' Courts ... this competency has been transferred to the Magistrates' Courts". (my emphasis)

Section 54A(1) of the Magistrates' Courts Act[77] which conferred this competency on magistrates also used "may", in conferring a discretionary power in this respect. If the aim of the Commission had been to rectify the position that the Supreme Court could not take judicial notice of indigenous law, whilst "[c]ustomary law is in fact part of our law" and "few members of the judiciary ... do not have at least a basic knowledge of customary law [sic]",[78] it may be assumed that the same discretion which applied to Magistrates' Courts was conferred on the Supreme Court. The Commission further deals here only with judicial notice after it had been established that indigenous law is applicable. It should not be inferred that the "may" refers to the application of indigenous law. Therefore, one may conclude that the courts have a discretion to apply indigenous law and a discretion to take judicial notice of that law.[79]

It must to be borne in mind that in practice a court will not randomly refuse to take

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77 Act 32 of 1944.
79 A court does not have to supply reasons why it takes judicial notice of rule of indigenous law.
judicial notice of indigenous law. The examples that Kerr provides to illustrate the extraordinary results that may be obtained should courts have a discretion to take judicial notice, seem somewhat forced. Should a court decide not to take judicial notice of an indigenous-law rule that is readily ascertainable and sufficiently certain, it will be obliged to provide reasons for such a decision, because the discretion the court exercises is a judicial discretion and not an arbitrary one. Ideally it should not make a difference whether the courts are obliged or have a judicial discretion to take judicial notice, as long as the discretion is judicially exercised. However, it is only realistic to accept that the very proviso that indigenous law should be readily ascertainable and sufficiently certain provides the means to avoid the application of that law, in the same way as the application of the repugnancy proviso provides those means.

A difficult problem arises when the conflict-of-law rules designate indigenous law as the applicable legal system but the relevant indigenous-law rule cannot be ascertained readily and with sufficient certainty. In *Harmschfeger Corporation v Appleton* the court determined that in light of the presumption that there is no difference between South African law and foreign law, the onus lies upon any party who asserts that the law of a foreign country applies, to prove how it differs from our own law. Should a person therefore fail to prove that there is a difference, South African law would apply. This presumption developed to facilitate speedy administration of justice and to relieve a party of the burden routinely to prove foreign law. However, now that judicial notice may be taken of foreign (and indigenous) law, the rationale for the application of this

80 Kerr "Magistrates' Courts" 527-528.

81 If a court exercises a discretion arbitrarily, its decision could be upset on appeal; see Bennett *Sourcebook* 120, Olivier "Customary Law" 45. See also Olivier *Inheemse Reg* 62 and the case law he refers to, on the nature of the discretion exercised by the courts.

82 Kerr "Judicial Notice" 588-590.

83 1993 4 SA 479 (W) 486 C.

84 The fact that the legislature used indigenous law and foreign law in the same proposition indicates that it intended the same principles to apply to both: see Kerr "Judicial Notice" 579-580.
presumption has fallen away. In a case where the specific tribal law cannot be established with sufficient certainty, the general or main principles of the designated or chosen law, and not the South African common law, should be applied. In private international law similar situations may arise. Where an exceptional rule of foreign law is against the principles of public policy, the general principles of that law are applied by the courts (if they are not against public policy) and not the lex fori. The same principle should apply in a case where the specific tribal law is found to be opposed to public policy and natural justice. Should it be found that the main principles of indigenous law are also opposed to public policy, that law should be adapted in accordance with the jural postulates which underlie indigenous law, and Western law should not be applied in its stead.

However, with regard to indigenous law it may be difficult to determine what the relevant general principles are. It may be reasonably easy to determine such general principles in the law of succession, but there are other areas of indigenous law where tribal laws differ substantially and where general principles may be determined only if one has a thorough knowledge of indigenous law generally - which brings one back to the problem of insufficient indigenous-law education. This problem may be solved by making use of expert evidence. If the legislature had in the first place expressly provided that judicial notice could be taken by making use of expert witnesses, it would have removed not only the evidential burden of proof from the party concerned,

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85 It should be noted that in those cases in which South African common law was applied and not indigenous law, the courts had exercised its discretion and had not applied the presumption: see Kerr "Judicial Notice" 589-590.

86 Kerr "Judicial Notice" 590 illustrates this by example of the law of succession. Where the specific indigenous rule cannot be established, the general principles of indigenous law of succession should be followed, namely those of primogeniture and universal succession, and not the South African law of intestate succession which would divide an intestate estate amongst all the children of a deceased if there is no surviving spouse.

87 The general rule is that the lex fori applies where foreign law is the designated law but is against the principles of public policy: see Kahn-Freund 283.
but also the financial burden.  

The fact that the application of indigenous law is still a discretionary matter makes its application uncertain and frustrates its uniform application throughout the country. In the past it was this uncertainty and the conflicting views of the courts⁸⁹ that caused the Minister of Native Affairs to seek an interpretation of section 11(1) of the Black Administration Act.⁹⁰ In *Ex parte Minister of Native Affairs: In re Yako v Beyi*,⁹¹ the Appellate Division did not lay down rules for the choice of law, but only precipitated some connecting factors to be used in establishing the appropriate law that should be applied. In *Umovo v Umovo*⁹² the Appellate Division pronounced for a second time on the discretion to apply indigenous law, but no rules for the exercise of such a discretion were specified, it being laid down only that the courts have a judicial discretion...

The principles and techniques of private international law are useful in the process of internal choice of laws.⁹³ The most important principle relevant for the internal conflict of laws is that the expectations of the parties should be realised. Techniques which may be usefully employed are those of the classification of the cause of action and the application of connecting factors to determine the appropriate law. With regard to the classification of the cause of action, it should be remembered that the courts are

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⁸⁸ Olivier "Customary Law" 51; see also Kerr "Judicial Notice" 586-588 on the methods the court may employ to obtain knowledge of indigenous law.

⁸⁹ Bennett *Sourcebook* 120-133. The Cape courts were of the view that common law was primarily applicable and that indigenous law would be applicable only in exceptional circumstances. In Natal and the Transvaal the prevailing view was that indigenous law was primarily applicable in cases where blacks were involved.

⁹⁰ Act 38 of 1927.

⁹¹ 1948 1 SA 388 (A).

⁹² 1953 1 SA 195 (A).

⁹³ See generally Bennett *Application* 105-109.
allowed only to apply indigenous civil law. If one takes into consideration that the categories in indigenous law and Western law do not always overlap, the problem that crops up is which system of law to use to classify the cause of action. It appears that the courts have overcome the problem by considering the full environment of the case.

Once the cause of action has been classified, a court will determine which law is applicable after consideration of all the evidence and argument of the case. First specific legislation or choice-of-law rules should be applied. Specific statutory provision for the application of a certain system of law in specific circumstances has been made in matrimonial property law, the law of succession and land law. Specific choice-of-law rules exist also with regard to status, the law of things, delict and contract. If there are no specific choice-of-law rules, general choice-of-law norms contained in legislation recognising indigenous law and connecting factors will be considered to aid the court in its discretion whether or not to apply indigenous law. Once it has been established that indigenous law is the appropriate law, reference must be had to the Law of Evidence Amendment Act as explained above.

In private international law indications against the application of foreign law are: fraus legis; conflict with public order; explicit statutory provision against its application; and the principle of non-application of foreign criminal and tax law. Similar considerations are used in relation to indigenous law. Indigenous law may not be applied where it is

94 Also in private international law a court is not allowed to apply another country's criminal or tax laws. This principle may result in the parties' expectations not always being realised, especially as far as indigenous criminal law is concerned. The unofficial application of indigenous law by official Chiefs' Courts as well as by the Courts of Chiefs and Headmen and Community Courts bears witness to this.

95 See also Olivier Application 202.

96 Olivier "Customary Law" 46-47; Olivier "Application" 210-213.

97 With regard to the application of the repugnancy proviso and considerations of public policy specifically, see Part II.II.2.c.ii and Part II.IV.6.
against the principles of public policy and natural justice.

(iii) Connecting Factors

Over the years certain connecting factors have emerged in our positive law which may serve as guidelines to the courts when determining the appropriate law to be applied. The Law of Evidence Amendment Act omitted the statutory connecting factor, that indigenous law is applicable where questions of indigenous customs are involved. In the absence of any provision in this legislation, it is to be presumed that the connecting factors that applied previously are still applicable. Section 11(1) of the Black Administration Act and section 1 of the Law of Evidence Amendment Act are similar in many respects and case law with regard to the former may still have persuasive value or sometimes even binding authority for cases to be decided under the new Act.

In making their choice, the courts' overriding goal should be to satisfy the expectations of the parties. It is generally assumed that, otherwise than in the case of private international law, all possible connecting factors should be taken into account to determine the applicable law. However, it is suggested that the connecting factors which the courts have identified over the years should be seen as guidelines to

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98 The lobolo custom is expressly excluded from the scrutiny of the repugnancy proviso. See generally Olivier "Customary Law" 189, Olivier "Application" 41. Although s 1(1) of the Law of Evidence Amendment Act 45 of 1988 omitted the proviso that indigenous law is applicable only in so far as it has not been abolished or modified by legislation, Constitutional Principle XIII (contained in Schedule 4 of the Constitution of the Republic of South Africa Act 200 of 1993 as amended) determines that the application of indigenous law is subject to specific legislation dealing with it.

99 Bennett Sourcebook 124-133; see also Olivier Inheemse Reg 73-74, Olivier "Customary Law" 44-45.

100 See generally Bennett Sourcebook 120, Kerr "All Courts" 170, Olivier "Application" 198.

101 Bennett Sourcebook 124; Bennett Application 108; see also Sanders "Internal Conflict of Laws" 59-60.
determine one connecting factor, namely the cultural orientation of the parties. It is only natural that the parties would feel most at home with the legal system that is part of their cultural environment. Thus, by selecting the legal system which is connected to the facts by the cultural orientation of the parties, the expectations of the parties are also served.

Some of the connecting factors, such as the nature of the transaction, use of a particular form and the defendant's non-objection of the plaintiff's choice of law, appear to be but instances of implied agreement as to the applicable law between the parties. But then it should be remembered that agreement is only a reflection of the parties' expectation that the law should be applied with which they feel the most closely at home and which forms part of their cultural environment.

The connecting factors which may serve as guidelines to the courts when establishing the appropriate law to be applied are:

1. An agreement (express or implied) by the parties to be subject to a specific system of law.

2. The nature of prior transactions or of the legal act in question. The juristic act or transaction which gave rise to the claim may be an indication of the cultural orientation and indicate the applicable legal system, for example transactions associated with indigenous institutions such as lobolo or bogadi. Some courts have concluded that this could depose the court's discretion, but in the decision of *Umvovo v Umvovo* it was held that the legal system which provides a remedy is not necessarily the appropriate system to apply, and that

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102 See generally Bennett *Sourcebook* 116-118 and Bennett *Application* 103-109 on the role of culture in the internal choice of laws.

103 Sanders "Internal Conflict of Laws" 59-60.

104 1953 1 SA 195 (A) 201.
in certain circumstances justice may best be served by applying the legal system which gives no remedy.

3 Where the nature of the transaction cannot be connected to a specific indigenous or Western cultural orientation, the purpose and subject-matter of the transaction and geographical environment in which the transaction took place may be considered to determine the appropriate law. For example, in an action arising out of a loan of money it was held that the common law applied because cash was not traditionally known in indigenous law.

4 Where a transaction is known in both indigenous and Western law, the form of the transaction, such as the conclusion of a marriage in a church, may be an indication of the cultural orientation.

5 The overall lifestyle of the parties may indicate a particular cultural orientation.

6 Exemption from indigenous law should be taken into consideration in conjunction with other connecting factors. A discretion to grant exemption vests in the State President, yet few people have made use of this.

7 Generally a person who unsuccessfully makes use of one system of law will be prevented from bringing his claim under the other system at a later stage because the matter will be regarded as res judicata; a plaintiff will be estopped from objecting to a defendant making use of the same system of law that the plaintiff used in the first place and a defendant may not object to the plaintiff making use of the system which provided the defence on which he relied. In the same vein the same legal system must apply to the main claim and defences, to damages and to the cause of action, to locus standi in judicio and delictual or contractual capacity of parties.

In determining the law which is the most closely connected to the facts in the case of
internal conflicts, the emphasis is now on culture and no longer, as in the past, on race. There is a parallel between race and nationality as connecting factors and between domicile and culture as connecting factors. \(^ {105} \) Nationality and race are imposed on an individual and determined by the State, whereas domicile and culture are abstract concepts which have to be ascertained from various factors and which may be changed by the individual himself. Domicile is inclusive. Its purpose is to provide the foundation for free interaction between members of different communities settling in each other's territories. In contrast, nationality is exclusive. \(^ {106} \)

Therefore, in countries which adhere to the domicile principle (domicile as general connecting factor), public policy does not in practice play such an important role in private international law, \(^ {107} \) whilst in countries which adhere to the nationality principle \(^ {108} \) public policy plays a more significant role because the emphasis is on the citizen. \(^ {109} \) Likewise, in the internal conflict of laws, policy considerations, as presently finding expression in the official courts, favour the application of the general law of the land to the exclusion of indigenous law, the latter being regarded as but an aspect of another culture.

3.c Conclusion

The availability of specialised, competent courts is a prerequisite to the proper

\(^ {105} \) Bennett Application 108.

\(^ {106} \) See Bennett Application 108 n 335.

\(^ {107} \) This would appear to be advantageous to the possible application of non-Western foreign law which is underscored by different fundamental jural postulates.

\(^ {108} \) Mancini promoted the idea that a country's laws are made for the individual and not for a specific territory. Therefore, the cultural qualities of a community play an important part in making their laws: see Kahn-Freund 284.

\(^ {109} \) Kahn-Freund 284; see generally 280-285.
application of personal laws.\textsuperscript{110} In South Africa the very foundation for the solution of internal conflicts of personal laws is uncertain: the competency of our courts to apply and administer indigenous law. The problem lies in the lack of indigenous-law education of the people who administer indigenous law and the hesitancy to do something about this lack of knowledge.\textsuperscript{111} The problem is further exacerbated by the fact that Western law has always been regarded as the superior law and that indigenous law does not enjoy the same status as Western law.

The fact that there are so very few cases in the law reports on private international law may be an indication of the a reluctance on the part of judges to apply law other than that of the system with which they are most familiar.\textsuperscript{112} The same applies to the internal conflict of laws.

Whilst Bennett\textsuperscript{113} is of the opinion that indigenous law has developed its own choice-of-personal-law rules which fall within an indigenous jurisprudential matrix and thus differ from the characteristically Western rules of private international law, Visser\textsuperscript{114} maintains that there are no rules to regulate the conflict of laws in indigenous law. He regards the mechanisms to solve internal conflicts in indigenous law as "conflicts sensitivities" or "konfliksensitiwiteite". This emotional awareness of and reaction to conflicts cannot fulfill the role of the Western rules regulating conflicts because of the ongoing process of legal acculturation.

\textsuperscript{110} Bennett \textit{Sourcebook} 110; Olivier "Application" 197.

\textsuperscript{111} The SA Law Commission \textit{Evidence} Report 13 14 is of the erroneous opinion that most judicial officers have at least a basic knowledge of indigenous law. The problem of insufficient knowledge of indigenous law could be solved by providing a compulsory course in indigenous law at universities and in the mean time to provide in-service training for magistrates. Moreover, compulsory use of expert witnesses may bridge the gap whilst judicial officers at all levels are being trained in indigenous law.

\textsuperscript{112} Visser "Legal Education" 69.

\textsuperscript{113} Bennett \textit{Application} 106, explains that an alien who was integrated into the group became a part of that group and was thus subject to their law. Membership of the group was determined by allegiance to the ruler and not by birth.

\textsuperscript{114} Visser \textit{Interne Aanwysingsreg} 52-53.
Yet, although indigenous law is adaptable and is experiencing a continuing process of development, it is important to bear in mind that this process does not revoke the jural postulates underlying the system. Development and adaption occurs within the framework of these postulates and should not be seen as a shift in emphasis towards the (Western) law of the land.\textsuperscript{115} It may be true that for practical reasons it is necessary to work with concrete rules and even that such vague norms could only lead to uncertainty and casuistry. But these indigenous mechanisms for conflict resolution, whether they are legal rules or mere conflict sensitivities, should not be ignored. They should be taken into account and even direct the development of the concrete rules for the solution of conflicts. Only when these underlying values are accommodated in the internal-conflict rules and process will they will find acceptance in indigenous communities.

Finally, it seems that the rules regulating the conflict of Western and indigenous law, and the application of indigenous law generally, have not found acceptance within the indigenous community. As a result alternative dispute-resolution institutions emerged which evidence the lack of faith in the courts' handling of internal conflicts and their insufficient knowledge of indigenous law. In the following sections the focus will be on these alternative dispute-resolution structures and the interaction of unofficial, alternative law and State law.

4 UNOFFICIAL INDIGENOUS LAW

State regulation, which often resulted in distortion, and conflict with imposed State law underscored by fundamentally different values, could not suppress the natural development of indigenous law and its institutions. The unofficial application of indigenous law by both official and unofficial institutions bears witness both to the resilience of indigenous law and to its inherent ability to adapt to changing circumstances without losing its indigenous character.

\textsuperscript{115} Visser \textit{Interne Aanwysingsreg} 53 regards it as a "natuurlike verskuwing van die klem na die landsreg".
4.a.i Indigenous Law in the Court of the Ward Headman\textsuperscript{116}

The Courts of the Ward Headmen are traditional administrative and judicial tribunals which unofficially apply the living indigenous law in rural areas. These Courts are presently functioning successfully in rural areas and the State has up to now turned a blind eye to their judicial activities.

In civil cases, parties who cannot resolve their differences through their family councils, may approach the headmen of their wards. Complicated or serious cases are usually referred to the Chiefs' Courts. Both parties and their witnesses are present at hearings. Presiding officers, who are always assisted by their councils, first try to resolve disputes through mediation and only when unsuccessful do they actually adjudicate upon a case. Although ward headmen are not bound to follow chiefs' decisions, their decisions serve as valuable guidance. The Courts also adjudicate upon petty crimes but accused have a choice whether to have their cases tried by ward headmen or chiefs. Appeals lie to Chiefs' Courts and amounts to retrials.

4.a.ii Indigenous Law Unofficially Applied by Official Courts of Chiefs and Headmen

The Courts of Chiefs' and Headmen often act as unofficial tribunals when they adjudicate upon cases that fall outside the jurisdiction laid down by legislation and apply the living indigenous law. The administration of criminal justice by these Courts may serve as an example. Their criminal jurisdiction is severely restricted by legislation and they are empowered to adjudicate upon a very limited number of common law, statutory and indigenous-law crimes. However, in reality and owing to the non-specialised nature of indigenous law, these Courts in actual fact adjudicate upon

\textsuperscript{116} See generally Van Niekerk "Procedure" 132 133 134, Myburgh & Prinsloo 15 112-115, Prinsloo \textit{Publiekreg} 64 113-115 240.
crimes which fall outside their jurisdiction.\textsuperscript{117} Whilst crimes such as rape, robbery, certain forms of assault, receiving stolen property, fraud, extortion and defeating the ends of justice are excluded from the jurisdiction of the Chiefs' Courts, the civil disputes arising from these crimes fall within their jurisdiction. Chiefs often adjudicate upon civil and criminal cases flowing from the same set of facts simultaneously, notwithstanding legislative enjoinder that criminal and civil cases be separated.\textsuperscript{118} Their lack of jurisdiction to try these offences is in this way side-stepped. In such cases, what seems to be an increase in courts fees in a civil case, is then punishment imposed for the related crime.

There are other interesting examples where the living indigenous law is still unofficially applied by the chiefs. In indigenous law the effect of poison or even medicine is regarded as magical. Poisoning may thus lead to an accused being charged with the offences of assault and practicing black magic. Whilst hearing the assault charge which falls within their jurisdiction, chiefs seldom refrain from trying an accused also for practicing black magic merely because the Black Administration Act happens to exclude it from the their jurisdiction. The same applies to theft by false pretences (which is within their jurisdiction) and fraud (which is not). While these two crimes are technically distinguished in Western law, they are not so separated in indigenous law. Arson and malicious damage to property are similar examples where the chiefs over-step their jurisdiction and apply the living indigenous law. In \textit{Dladla}\textsuperscript{119} it was found that chiefs have no jurisdiction to try a person charged with arson. However, in indigenous law arson is considered to be a species of malicious damage to property, which is not excluded from their jurisdiction. Had Dladla been charged with malicious damage of property instead of arson the case would in all probability not have reached the higher court.

\textsuperscript{117} See generally Van Niekerk Comparative Study 57-59.
\textsuperscript{118} S12 and s20 of the Black Administration Act 38 of 1927.
\textsuperscript{119} 1965 1 PH R 1 (N)
4.b People’s Law

Fitzpatrick\textsuperscript{120} indicates that informal ordering may occur in response to “fiscal and legitimacy crises ... afflicting countries of advanced capitalism ... because it is cheaper or, ... because it is a means of engendering some popular participation and thus serving to make up the deficit in legitimation”. State involvement in unofficial laws and institutions, or informal ordering, is but a means of containing "potentially disruptive elements".

In South Africa people’s law developed in reaction to the lack of legitimacy of the official legal order of the State.\textsuperscript{121} Class contradictions, the inefficiency of the existing justice system, a lack of legal resources and economic factors all played a role in the emergence of popular justice. The State’s intervention in or its sanctioning of people’s law and institutions had a profound influence on its development.

The application of living law by unofficial legal institutions is a world-wide phenomenon.\textsuperscript{122} But all unofficial practices do not constitute unofficial law. It is only those practices which have the ability to influence the cultural background to the official law and have a direct or indirect influence on the effectiveness of the official law which are relevant for the development of the general legal system. Therefore, only the unofficial laws and institutions which have undermined, opposed, modified or supplemented this country’s official law or which have the inherent ability to do so, will be considered.\textsuperscript{123}

\begin{itemize}
\item \textsuperscript{120} Fitzpatrick “Marxism” 47; see also Nina & Stavrou 4-5.
\item \textsuperscript{121} See Part II.I.1 and Part II.I.4 below where the concept of legitimacy is discussed in more detail.
\item \textsuperscript{122} Eg in India, Japan, Indonesia and Alaska, to name but a few. See Allott & Woodman (eds) \textit{People’s Law and State Law. The Bellagio Papers}, a collection of papers on the application of living law and unofficial legal institutions.
\item \textsuperscript{123} The State was eventually forced to take cognisance of the unofficial tribunals administrating living law and even tried to legalise them by the institution of the Short Process Courts.
\end{itemize}
In South African legal history roughly three eras in the development of unofficial dispute resolution may be distinguished, the period before the state of emergency in 1985; the period from 1985 to 1989 and the period after 1989, the era of reform.

4.b.i The Period Before 1985

Unofficial dispute resolution has been the norm in black metropolitan areas for as long as these areas have existed. Official legal institutions have been regarded to be of secondary importance, seemingly because of their inability to satisfy the community's sense of justice. This was the position not only in urban areas. In rural areas the very first Magistrates' Courts were widely dispersed over large areas. Because of a lack of policemen or troops, they were not able to enforce the foreign official law imposed on the indigenous people and to curb the influence of the unofficial traditional courts. In British Kaffraria, magistrates as well as chiefs and headmen continued to apply indigenous law despite the Cape government's policy of non-recognition of that law. At first, from the annexation of the territory in 1847, it was administered under martial law, but when martial law was suspended in 1859 and the territory fell under colonial laws, the administrators of justice continued to apply indigenous law unofficially.

Urban communities developed a new and unique social ordering which provided fertile ground for the development of a system of justice rooted in traditional Africa but adapted to the needs of urban life. Informal structures for the administration of justice came in a variety of forms. The earliest known unofficial urban institution with dispute-settlement functions, was the Uitvlugt Committee which was formed in 1901.

124 Hund & Kotu-Rammopo 205; Burman "Street Committees" 151-153; Burman & Schärf 693 706; Schärf "Memorandum" 2; Schärf "People's Courts" 8.

125 Brookes 181 184; see generally Part I.III.2.a.

126 The only comprehensive study of the development of unofficial dispute-settlement structures in urban areas, which spans the 20th century, was done by Burman and Schärf on the townships of the Cape Town area. Examples of unofficial structures which operated in the very early period are thus confined to this area of the country.
in the first Cape Town township, Uitvlugt. This unofficial court was modelled on the traditional courts of the Transkei and Ciskei and dealt with civil grievances and petty crimes with the tacit consent of the local government. In 1927, in response to the forced removals of residents from Uitvlugt, the Vigilance Committee was formed. In line with the non-specialised character of indigenous law, the latter (mainly administrative) body also conducted unofficial courts. By the 1950's informal courts, which seem to have existed even prior to that time, were reportedly run by the Cape African Congress in most Western Cape townships. In the single-sex hostels for male migrant workers of the Langa township, unofficial courts came to the fore in the early 1950's. These dispute-settlement structures were based upon the strict paternalistic rule of elders. Unfortunately little is known of the procedure they followed and the law they applied. Nevertheless, there is evidence that their activities, in both dispute resolution and informal policing, were in fact tolerated by the State.

(i) **Civic Structures in the Western-Cape**

The 1960's and 1970's saw the emergence of squatter committees and street committees which acted as unofficial courts, but also had other functions besides

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127 Burman & Schärf 697; Schärf "People's Courts" 8.

128 This unofficial structure was created after the Uitvlugt Committee was crushed and an attempt was made by the government to institute an official township Superintendent's Advisory Council with six members elected by the residents of the Ndabeni township. This was a powerless, government-controlled body with merely advisory functions: see Burman & Schärf 697- 698, Schärf "People's Courts" 8-9.

129 Schärf "People's Courts" 8-9.

130 Burman & Schärf 698.

131 A branch of the African National Congress.

132 Schärf "People's Courts" 15.

133 "Civic structures" denote the informal police force and courts operating in the townships. These consisted of marshals, yard, block and street committees who were responsible for civic duties directed at the general well-being of the community, as well as informal dispute settlement. See generally Schärf "People's Courts" 45-50.
judicial functions. They applied living law which could be described as an adapted, urbanised indigenous law. This law and its procedure had features of a non-specialised legal system. Civil and criminal cases which originated in the same facts were dealt with simultaneously, procedure was simple, non-technical and conciliatory in nature and there was no legal representation. Serious criminal cases were referred to the police and family matters often referred to the family council. Field research indicates that, as a rule, very few of these institutions had connections with Community Councils. They had a system of appeal to the executive committees. Executive committees heard these cases ab initio as a court of first instance. In some instances these unofficial courts worked in close association with social workers. They were run by adult males who were elected by adults.

The law applied by these courts has been described as a reflection of the "patriarchal gerontocracy of African culture". Informants were of the opinion that traditionally

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134 It is in line with indigenous law that administrative bodies such as the street committees also had legal functions. There seems to be some confusion on the exact meaning of the term "street committees" and different authors use it to denote different institutions. See generally Burman "Street Committees" 151-166. In this thesis the operation of unofficial dispute-settlement institutions is discussed generally and these institutions are termed "people's courts".

135 Schärf "People's Courts" 10; see also generally Burman & Schärf 706-718.

136 Schärf "People's Courts" 10; Schärf "People's Courts in Transitions" 169 maintains that no distinction is drawn between civil and criminal law - a misconception, possibly flowing from the fact that in indigenous law criminal and civil cases are dealt with in the same set of proceedings due to its non-specialised character. However, this does not mean that no distinction is drawn in indigenous law between civil and criminal law: see Van Niekerk Comparative Study 24-29.

137 Unfortunately there is no research available on the family councils which are often referred to and are obviously in operation in the urban areas.

138 Burman "Street Committees" 161-162. Some street committees in the older, established areas were indeed associated with the Community Councils which were regarded as a final court of appeal. However, all connections were finally severed when the political conflict intensified and a state of emergency was declared in 1985; see Burman & Schärf 716-719.

139 Eg, serious sentences such as eviction, had to be reviewed by the civics before execution. Executive committees had the same functions as the street committees and also tended to the daily affairs of the township. The executive committees were sometimes also confusingly referred to as "civics".

140 Schärf "People's Courts" 11; see also Burman & Schärf 711.
women were regarded as having an inferior position in the community and were accordingly excluded from court proceedings. Their opinion or position was of no relevance, even in custody cases.\textsuperscript{141} However, this is a distorted reflection of pre-colonial indigenous law. The husband’s right of moderate chastisement and the fact that “the husband’s word is the word in the family”\textsuperscript{142} are indeed in line with indigenous ethics.\textsuperscript{143} But, whilst moderate chastisement is regarded as a lawful and commendable means of maintaining discipline in the indigenous family, excessive corporal punishment constitutes criminal behaviour, analogous to assault in Western law. In indigenous law women are certainly forbidden to enter the kraal area where court sessions are held, not because of their inferior position in the community but because of their monthly ritual impurity. However, they have an honoured position within the group and an important role to play in certain preliminary extra-judicial proceedings. For instance, amongst many tribes, the women of a seduced girl’s group immediately seize a beast of the culprit’s group. This beast is slaughtered to provide satisfaction for the violation of their honour. The same proceedings are followed in case of bodily injury.\textsuperscript{144} Any patrimonial claim for damages\textsuperscript{145} follows by way of ordinary court proceedings at a later stage.\textsuperscript{146} Further, a woman has an important share in the property of her house and has to be consulted before it is dealt with in any way, also by the male head of the household. She even has the right to demand protection from the group against her husband should his conduct amount to squandering of the family property. Esteem for women in indigenous law is also

\begin{footnotesize}
\begin{enumerate}
\item Burman “Street Committees” 156-157; Schärf “People’s Courts” 11. It seems that there were so-called women’s committees in operation. Although some of their functions were similar to those of the street committees, they were more involved in extra-judicial mediation. Unfortunately there is very little information available on them: see Burman & Schärf 709-712.
\item Schärf “People’s Courts” 11.
\item Myburgh Papers 81; see also Myburgh “Discipline” 32-34.
\item Myburgh Papers 18-23.
\item This claim is based on the violation of guardianship which, in indigenous law, is regarded as a patrimonial right.
\item Myburgh Papers 33.
\end{enumerate}
\end{footnotesize}
evidenced by the fact that the great wife of the group is often consulted by the male head of the group where the interests of the group are at stake.  

The indigenous-law position regarding the custody of children may explain the street committees’ attitude of excluding the mother from any proceedings in this regard. In indigenous law plenary guardianship is regarded as a patrimonial right which is shared by the group. The right of guardianship vests in the group which has guardianship over the mother, unless the child is transferred to another group for other reasons. Thus, a child is a member of the group to which it is born. An unmarried mother and her children belong to the mother’s group by virtue of that group’s plenary guardianship over the mother. Children born to a married woman fall under the guardianship of her husband’s group by virtue of the marital guardianship over the mother. That is probably the reason why the unofficial courts excluded the mother from the proceedings.

Another interesting example of where these courts applied substantive indigenous law, was where a party refused to comply with the order of the court. In such a case the culprit could be forced to pay double the original fine, sometimes even in instalments. In indigenous law compliance with a court order is obtained by threat of corporal punishment for non-compliance or attachment by the messengers of the court. In the last-mentioned instance the fine would be doubled. The extra beast(s) thus obtained by way of fine, would be slaughtered for the court itself, because the conduct of the culprit constitutes contempt of that court. Mangangatlaa is an indigenous form of punishment for contempt of court by the unwarranted demand on the court’s attention and is, amongst others, imposed for repeated misconduct.

Eviction was another form of securing compliance with the judgments of street

147 Myburgh Papers 80-81 110.

148 Myburgh Papers 54 87; see also Part I.II.4.b.

149 Myburgh "Punishment" 44 53 54; Myburgh "Contempt of Court" 72.
committees, not only in squatter areas, but also in regular townships, such as Guguletu and Nyanga. Eviction was regarded as a very serious punishment because the waiting period for housing in official black urban areas could be twelve years or more. In indigenous law banishment is generally a serious punishment. It is imposed, amongst others, for disobeying the ruler's order or for repeated theft.

(ii) The Makgotla in Mamelodi and Soweto

The unofficial dispute-resolution institution which gained prominence in the Pretoria-Witwatersrand area in the latter half of the 1970's, was generally known as people's courts or makgotla. The first publication of a comprehensive field study done on the makgotla of Mamelodi, near Pretoria, appeared in 1983. As indicated by the researchers the terms "makgotla" and "people's courts" are generally very broadly used and designate more than just court-like institutions. However, only those informal structures which were indeed responsible for the administration of justice are investigated here.

The Ward Four Lekgotla of Mamelodi was linked to the Community Council and was described as a "parental model of justice", dealing with both petty crimes and family related disputes. Although the chairman of this lekgotla was a Community Councillor, there is no evidence that he was instituted in terms of the Black Administration Act. Other makgotla in Mamelodi were associated with the homeland representatives and were thus tribally oriented.

Certain characteristic features of their procedure which are symbiotic with indigenous law may be highlighted. The makgotla had other functions besides their judicial

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150 "People's courts" generally connoted unofficial dispute-settling structures until it adopted a more specific and political meaning around 1985: see Hund & Kotu-Rammopo 180, Schärf "People's Courts" 6.

151 See Hund & Kotu-Rammopo; see also Ndaki.

152 Hund & Kotu-Rammopo 188.
functions, but they were mainly concerned with family-law matters and the enforcement of traditional values. An inquisitorial process was adopted to elicit evidence. They were run by responsible adults and emulated community justice. Thus, characteristic of non-specialised legal orders, the emphasis was on reconciliation and harmony of the collectivity rather than on the abstract, formal technicalities of Western law. Little if any distinction was drawn between law and morality. Justice was directed at the individual and was thus substantive. The goal of these unofficial courts appeared to have been directed towards a restoration of the equilibrium in the community rather than the observation of specific legal rules; the emphasis was on the individuals involved in the case and their relationship with each other. The presiding officers attempted to reach this goal by implementing a holistic view of the relationship between the litigants, a view that goes beyond the narrow, technical Western appraisal of legally relevant facts with an accompanying emphasis on rules. Although it is impossible to isolate a comprehensive systematic body of legal rules, it does seem that the living law applied by these courts resembled indigenous law more than it did Western law.\footnote{153}

The Mamelodi courts associated with the homelands and Community Councils fulfilled a useful role and were amongst others supported by a section of the urban community that still identified with tribal authority. The more established older urban community who supported these makgotla may by analogy with the pre-colonial indigenous community, be described, in the words of Comaroff and Roberts\footnote{154} as

\[\text{"a hierarchy of progressively more inclusive co[-]residential and administrative groupings... Units at each level have agnatic cores - as well as other kin and unrelated members - and well-defined authority roles predicated on agnatic ranking principles. [T]he ward is...the most significant unit of organization...[with] a recognized dispute-settlement agency, which operates along similar lines to the chief's kgotla. Indeed, it is described indigenously as a lower-order homologue of the chieftdom as a whole, and its headmanship is regarded as a microcosm of the apical office."}\n
\footnote{153 Hund & Kotu-Rammopo 186-188.}
\footnote{154 See Comaroff & Roberts 26-27.}
Part l.IV.4 Post-colonial South Africa Before 1994

The findings of Ndaki\textsuperscript{155} in an early case study of a lekgotla operating in Soweto, indicated a similar position there. He highlights the following features of the process followed by this court: reconciliation of feuding parties, immediate compensation, swift relief, the hearing of the criminal and civil case in one set of proceedings and the absence of time-consuming technicalities. It should be borne in mind that people of various ethnic groups were served by this lekgotla. Therefore, there was generally no question of specific substantive tribal laws applied by the court. Yet the law that was applied was underscored by indigenous legal postulates. In contrast, Seekings\textsuperscript{156} very brief, general description of makgotla operating in Soweto during the period 1969-1974 presents a different picture. According to him the courts dealt mostly with juvenile delinquency (including crimes such as robbery, rape assault, murder and theft by youths under the age of 18) and family disputes and fell under the leadership of a woman. They became increasingly coercion-based, violent, arbitrary and barbaric and lost the support of the community.

With the decline in tribalism as well as for political reasons (they were associated with the so-called bantustans or had a close association with the Community Councils) the makgotla lost credibility.\textsuperscript{157} Community values of the youth conflicted with those of the more responsible adults. Growing individualism and a protest against the status society supporting these makgotla resulted in the emergence of a new type of makgotla linked to youth organisations. Information on them is incomplete and it is difficult to establish the type of law, if any, applied by them. Although Hund and Kotu-Rammopo\textsuperscript{158} describe the form of authority of one of these organisations as "closer to traditional forms of chiefly or autocratic control", judging from the procedure elicited in their research, it seems that it was far removed from indigenous law or even

\textsuperscript{155} Ndaki 183.

\textsuperscript{156} Seekings "People's Courts" 121-123.

\textsuperscript{157} Hund & Kotu-Rammopo 188-191 199-200; see also Labuschagne & Swanepoel unpublished report (1978).

\textsuperscript{158} Hund & Kotu-Rammopo 200.
Western law and procedure. It is clear that they opposed everything that the gemeinschaft model of justice stands for. Yet, it is difficult to discern from the available information any of the features of the gesellschaft model of justice typical. They followed a strict inquisitorial procedure and their punishment was harsh. The law that evolved from them could rather be characterised as repressive law. Many of these courts in fact deteriorated into criminal gangs.\textsuperscript{159} It is notable that one of the reasons why they lost support in the community, was that they disregarded the advice of the adults and sat in judgment over adults; a serious breach of indigenous community values.\textsuperscript{160}

The adapted indigenous dispute-settlement structures which originated in the metropolitan areas may be seen as an attempt at indirect rule by the urban communities. This often occurred with the tacit consent of the authorities. The Crossroads Executive Committee, for example, claimed to have received tacit agreement by the police to see to the ordering of the Crossroads squatter area. They successfully ran unofficial courts during the period from 1979-1984. These courts were manned by headmen who were in control of different areas. They were also assisted by informal township police, a concept foreign to indigenous law.\textsuperscript{161} Other squatter areas also successfully ran such informal courts. It appears that they continued in practice even during the state of emergency and despite the rise of the politically affiliated people's courts.\textsuperscript{162}

Over the years, the State continuously tried to exercise control over indigenous communities and their alternative institutions through the establishment of various State-controlled councils. Whereas the Chiefs' Courts could, to an extent, be

\begin{itemize}
  \item \textsuperscript{159} See Hund & Kotu-Rammopo 201-202 204 206.
  \item \textsuperscript{160} See generally Allison 414-415, Moses 67. This was also one of the reasons why the Nyanga East Youth Brigade finally lost legitimacy in the latter part of 1985.
  \item \textsuperscript{161} In indigenous society there is no formal police force.
  \item \textsuperscript{162} Schärf "People's Courts" 19-21.
\end{itemize}
manipulated by the State, the unofficial administrative and legal institutions which originated in the urban areas from the earliest times, proved impossible to dislocate and the bodies which were instituted as agents of control lacked credibility. In 1902 the first Advisory Board consisting of township residents, was instituted in the Uitvlugt township. In 1926 provision was made for the election of the members of Advisory Boards by the inhabitants of the different townships. In 1927 in terms of the Black Administration Act,\(^{163}\) indigenous law and institutions were formally recognised. The Courts of Chiefs and Headmen were instituted as the lowest tier in the hierarchy of State courts and were administratively and judicially controlled by white officials. Commissioners' Courts too were controlled by white officials.\(^ {164}\) In 1961 Urban Bantu Councils were introduced as "an urban parallel to the rural chiefdom/authority structure".\(^ {165}\) In terms of the Bantu Urban Councils Act\(^ {166}\) the minister could confer judicial powers of a tribal leader upon a resident of such an urban area. Both the Advisory Boards and the Urban Bantu Councils were abolished by the Community Councils Act\(^ {167}\) which in turn established the Community Councils. These councils were elected by members of the relevant communities, but by a very poor poll. Their powers and duties, which included administrative duties as well as the maintenance of law and order, were conferred upon them by the minister of the then Department of Co-operation and Plural Development. Needless to say, the councils were seen as instruments in the hand of the apartheid regime and had little credibility in the eyes of the community. Their upgrading to Town Councils,\(^ {168}\) did little to improve their credibility.\(^ {169}\) In 1980\(^ {170}\) the Black Administration Act was amended and the minister, 

\(^{163}\) Act 38 of 1927.  
\(^{164}\) See Hund & Kotu-Rammopo 182-183.  
\(^{165}\) Burman & Schärf 699 741.  
\(^{166}\) S 5 Act 79 of 1961.  
\(^{167}\) Act 125 of 1977.  
\(^{168}\) In terms of the Black Local Authorities Act 102 of 1982.  
in consultation with the Community Council, could then confer upon any black urban resident the same judicial powers as those conferred upon a chief or headman in terms of the same act.\textsuperscript{171} It is not certain whether such courts have indeed been instituted in terms of the Act,\textsuperscript{172} but the decline in popularity of the people's courts associated with the Community Councils evidences the State's inability to create a court structure outside the formal court structure with lasting credibility and popular support.\textsuperscript{173} The promulgation of the Black Local Authorities Act of 1982\textsuperscript{174} was yet another attempt to control black urban areas and neutralise the challenge posed by unofficial dispute-settlement institutions. This Act upgraded Community Councils to Town Councils and made provision for their inclusion of township and squatter leaders into the formal system of local government as official Town Councillors of the black urban areas.\textsuperscript{175} When the black communities challenged this legislation and started demanding their rights as full citizens, their politically neutral informal courts were transferred to politically orientated bodies.

It was the gradual increase in the momentum of the struggle against the apartheid regime which changed the early people's courts into institutions with a political goal and gave the general term "people's courts" a more specific political meaning. It should be borne in mind that the courts discussed above were the historical ante-

\begin{itemize}
\item \textsuperscript{170} Act 94 of 1980.
\item \textsuperscript{171} These powers were similar, yet more extensive than those conferred by the Urban Bantu Councils Act.
\item \textsuperscript{172} Motshekga "Alternative Legal Institutions" 39, Hund "Formal Justice" 205 and Seekings "People's Courts" 120-122 are of the opinion that officers had been officially conferred with judicial powers; for a contrary view see Burman & Schärf 700.
\item \textsuperscript{173} See also Schärf "People's Courts" 5-6 16-21.
\item \textsuperscript{174} Act 102 of 1982.
\item \textsuperscript{175} See eg Zwane 1989 3 SA 253 (W) 265-270 for an exposition of the history of the Alexandra Town Council. This Town Council was supported by the majority of the community until 1985. Opposition eventually led to its dissolution in 1986 when the majority of the councillors was forced to leave the township, or to resign and the remaining councillors could no longer form a quorum.
\end{itemize}
cedents of the courts that came to the fore after 1985 and therefore. Accordingly, common features could be distinguished in all these courts.

4.b.ii The Period After 1985

People's courts made their appearance in early 1985 and were forced underground within a year of their inception. By the middle of 1986 there were at least one people's court in operation in every black township in South Africa. These courts originated in metropolitan areas and most of them were politically aligned. This did not mean that they adjudicated only upon political cases, but that their sentences were politically directed and that activists used the courts as a forum to spread a political gospel. Thus, the adherents to the Freedom Charter and the Black Consciousness Movement competed for control of these courts. Nevertheless, some street committees continued in practice without political affiliation despite the 1985-1986 conflict. The proliferation of people's courts in the 1980's may be attributed both to the failure of the formal court structure to administer justice and to the political aim of a certain section of the black community to render the State institutions inoperative by creating alternative institutions.

The popularly known "people's courts" were informal institutions for the administration of justice which were ideally perceived to be a prefiguration or foreshadowing of a post-apartheid adjudicative infrastructure. Their history, composition, procedure and goals varied from one area to the next. However, there were certain common reasons

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176 In terms of the Emergency Regulations Proclamation 109 of 1986.
177 Schärf "People's Courts" 25.
178 See Burman & Schärf 727-730 on the political conflict between these two ideological tendencies.
179 See eg Zwane 292-296, Burman & Schärf 706-718.
180 See generally Mayekiso 1988 4 SA 738 (W), Zwane, Grant & Schwikkard 308, Allison 410.
for their existence. The rising crime rate and political protest during the political upheaval which reached a peak in the period 1985 to 1986 could not be dealt with satisfactorily by the State police and its judicial institutions. These institutions came to be regarded as illegitimate by the majority of the urban inhabitants. State courts were regarded as instruments in the hands of the apartheid regime, enforcing apartheid laws. Also access to justice became increasingly difficult and unsatisfactory. People's courts were instituted as alternative structures to substitute State institutions. Township dwellers who ignored consumer and rent boycotts and stay-aways from work had to be dealt with by unofficial institutions because the State did not regard such behaviour as criminal. People's courts were regarded as a political arena to further the cause of the struggle against apartheid not only through dispute settlement but also by way of speeches on the morality of a new post-apartheid society.

Procedure and evidence in the people's courts were similar to that in the makgotla. Cases of assault, theft, robbery, housebreaking, disrespectful behaviour, maintenance, conflict flowing from tribalism, witchcraft and accusation of witchcraft, fighting in the yards, posturing as a comrade, refusal to co-operate in the freedom struggle and collaborating with the police were heard by the people's courts. Cases of rape and

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181 Schärf "People's Courts" 23-31; Schärf "People's Courts in Transitions" 169-170; Moses 58 59 65 68-69 75; Grant & Schwikkard 306-309.
182 Eg Court procedure was conducted in an unfamiliar language; interpreters who had to be relied on were often inaccurate and unreliable in their interpretation; legal representation became too costly; unfamiliar highly technical procedure was followed; foreign Western law was applied; and the "winner-takes-all" philosophy of that law was foreign to indigenous procedures.
183 However, it should be noted that the cases heard by the people's courts were not politically related: see Schärf "People's Courts" 28.
184 See Zwane 292-296 where the formation and goals of yard, block and street committees in Alexandra township are discussed. In this case the State could not prove that these committees were formed as organs of people's power to take over the administration of the township. It was concluded that they were indeed formed to "encourage unity, comradeship and co-operation within yards, and to solve problems arising between residents". (295D); see also the charges brought against the accused in Mayekiso 739A-E.
185 See the discussion of the unofficial institutions above.
murder again were generally referred to the police.\textsuperscript{186} Family matters, such as those relating to lobolo and in some instances witchcraft, were usually referred to the family council.\textsuperscript{187} Civil and criminal cases flowing from the same set of facts were heard simultaneously.\textsuperscript{188} It is interesting to note that, in conflict with the position in indigenous law, some of these courts were indeed courts of record.\textsuperscript{189}

Unlike the informal structures which operated prior to 1985, the people's courts became increasingly controlled by youths.\textsuperscript{190} Membership of these courts was restricted to males and females held an inferior position in the township society. Hearings generally took place in public and procedure was non-technical and simple. Parties were given the opportunity to state their case and call witnesses. Hearsay was not allowed, unless corroborated. There is no mention of legal representation in these courts. All those present had the right to question parties. Judgment and sentence were determined through a process of voting by those present. Where there was no system of appeal, dissatisfaction with the proceedings, judgment or sentence was regarded as contempt of court and resulted in an increase of the sentence.\textsuperscript{191}

Sentences took the form of community service, corporal punishment, restitution, compensation and sometimes so-called modelling. Modelling meant that the culprit had to march through the township with a placard describing his misconduct. Punishment was aimed at a restoration of the equilibrium in the community and more importantly, at educating the person in the goals of, and winning him over for the struggle against apartheid. Punishment with a sjambok was summary and also

\begin{footnotesize}
\begin{enumerate}
\item However, some courts reportedly tried rape cases: see Zwane 301 302 303-304, Moses 60.
\item Zwane 309; Moses 60; see also Nina & Stavrou 9.
\item See Van Niekerk \textit{Comparative Study} 24-29.
\item Eg the Nyanga East Youth Brigade and the Southern Cape courts.
\item Zwane 303 306.
\item Schäff "People's Courts" 26; Moses 62. Such increase in sentence reminds one the punishment for contempt of court in indigenous law: see the discussion of mangangatlaa in 3.b.i above.
\end{enumerate}
\end{footnotesize}
administered to females. Corporal punishment was administered by several members of the court in order to stress the fact that the misconduct was an injury to the community as a whole and not merely to an individual. Some of the people's courts maintained a fair level of community justice and continued in existence with the full support of the community until they were suppressed by the State.

In the non-punitive phase of their existence, the police tacitly approved the operation of people's courts as informal dispute-settlement structures and even referred some cases to them. Certain courts, for instance those which were linked to civic organisations, retained popular support and never deteriorated into a punitive phase. Nevertheless, the escalation in political conflict caused an increase in violence in the streets, rigorous measures by the State police to contain the violence, detention of the more sophisticated, responsible leadership and in undisciplined youths taking over political structures and people's courts. This led to a change in the ethics of these courts. The emphasis shifted from education to punishment. This was attributable also

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192 Zwane 308; Sjambokking is also a popular traditional form of punishment. It is usually executed without delay by members of the court and administered to any healthy person, except pregnant women: see Myburgh "Punishment" 50 58-59.

193 Burman & Schärf 725.

194 Schärf "People's Courts" 26 28.

195 The youths are commonly referred to as marginalised youths and form part of all urban communities in the country. They were uneducated, had no work and no family or organisational structure. They often formed street gangs or acted as comrades - in conflict with one another. Their only frame of reference was a society characterised by violence - violence by the State structures and violence within their own communities. Their model of justice was the exclusively punitive, confrontational, state of emergency summary justice where time advocated against reconciliating procedures. On the one hand, the comrades viewed themselves as activists in the liberation struggle. They regarded themselves as untouchable in the political arena and ignored all forms of authority, both State and domestic. Their contemptuous attitude towards domestic authority brought them in conflict with the adult section of the community and seems to explain why they did not turn to the community model of justice of the unofficial tribunals which operated prior to the 1985-1987 period. On the other hand, the street gangs were not political gangs and operated outside the State system of justice and outside the unofficial township system of justice. Their only goal was to enrich themselves. Their "acquisitive opportunism included theft, robbery, selling illicit intoxicants, housebreaking, assault and rape". They worked with the police and provided information on the comrades. See generally Schärf "People's Courts" 35-40.
to the fact that the responsible leadership could no longer assist in the education of the deviants who were supposed to be incorporated into the political organisations supporting the people's courts. Relationships between the people's courts and civic organisations degenerated and the courts entered a phase of meting out unrestricted and severe punishment. Procedure became persecutorial and disintegrated into a process of harsh interrogation where parties were not given any or sufficient opportunity to state their case.  

The community did not subject itself to their jurisdiction voluntarily, but out of fear. These features caused the institution to become a "horrendous monster that is coterminous with necklacing". Community support declined and people started taking their grievances to the State structures again. New people's courts, also now called "kangaroo courts" were set up by youths who acted without the mandate of the community. These courts should be clearly distinguished from the people's courts which were organs of people's power, which were run by disciplined, organised youth in collaboration with older people, and which operated with the mandate of the community and with the support of its collective strength.

Death sentences have always been a sensitive issue in considering the legitimacy of people's courts. Over the years these courts have been widely criticised for being involved in necklace killings. These accusations have, as widely, been disclaimed by supporters of the courts. Violence and thus also necklace killings, contradict the general spirit of education, reconciliation and restoration of the equilibrium within

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196 See also Zwane 315 316.
197 Schärf "Memorandum" 8.
198 See Moses 55-56.
199 Necklacing is the burning of a person by placing a tyre, filled with petrol, around his or her neck and setting it alight. As far as the State was concerned people's courts and other organs of people's power were responsible for these murders.
200 Seekings "People's Courts" 133 relates a case where a summary necklacing was stopped by the intervention of community leaders who urged those involved to refer the matter to the proper People's Court in stead. See also Schärf "People's Courts" 29-30, Schärf & Ngokoto 360-363, Van Niekerk "People's Courts" 298-299, Motshekga "Alternative Legal Institutions" 48-51, Moses 68 81 89.
the community, ideally perceived to be features of the system of justice prefigured for a post-apartheid era. Although it is true that excessive punishments have been ordered and administered by these courts and although some of them have in fact come close to passing a death sentence, they were usually discouraged in doing so by the political organisations supporting them. Courts that could either directly or indirectly be linked to such killings were shut down by the community itself. Motshekga classifies the violence experienced in South Africa in three categories: structural violence which emanated from the implementation of the policy of apartheid; retaliatory violence as part of the armed struggle against apartheid; and self-help. Self-help, in this sense, is described as structural violence resulting from despair and need for self-preservation. Necklacing is classified under this third category. These brutal acts, which are usually perpetrated by an aggravated crowd, have also been described as a consequence of mass anger.

Field research has been done on people's courts since their inception in 1985 and is still ongoing. Interesting examples of the operation of such courts will now be discussed.

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201 An example is the case where a court was persuaded to change the death sentence of the rapist of an eight year old girl to corporal punishment of 400 lashes.

202 Motshekga "Alternative Legal Institutions" 50-51.

203 It is the result of aggression directed at weakness, deceit, disloyalty and disharmony within the oppressed community itself. It is viewed as summary action by the outraged community to obtain satisfaction for injustice against the community. It is a release of the structural, social tension created by decades of political frustration: see Van Niekerk "People's Courts" 298-299. It is interesting to note that traitors were also summarily executed, without trial, in indigenous law and that the family home of the traitor was burnt down. Such action was regarded as public satisfaction for the outraged community. Thieves of public resources were burnt alive.

204 Field research has mainly been conducted by Schärf, Burman and Moses. Schärf has been investigating informal dispute settlement and policing since 1976.
Part IV.4 Post-colonial South Africa Before 1994

(i) The Eastern Cape

The people's courts of the New Brighton and Soweto townships in the Eastern Cape\textsuperscript{205} were political structures. Their initial success was attributed to their close co-operation with the street and area committees of those townships.\textsuperscript{206} During their operation a dramatic drop in the crime rate was reported. When these committees become dissolved through the detention of their members, the youths took over the leadership and the courts. Severity of sentences increased and some court officials were suspended because of their undisciplined behaviour. The people's courts in these areas disappeared by the end of 1986.

(ii) The Western Cape

Schärf\textsuperscript{207} broadly classifies the Western Cape courts according to the punishment meted out by them. Examples of the least punitive of these structures were the street committees and the Nyanga East youth brigade\textsuperscript{208} in their initial phase. None of these courts was politically affiliated and they worked in close association with each other. Whilst some of the judicial functions of the street committees were taken over by the people's courts, matters relating to the family and adults were usually referred by the people's courts to the street committees who were run by adult males. Unresolved matters were also referred to the street committees. The goal of the street committees and the youth brigade was to administer collective justice by a caring community. The jurisdiction of the Nyanga East youth brigade was limited to youths. Punishment was limited to occasional lashing, sometimes with and sometimes without the consent of the parents, and mostly with a view to restitution and incorporating the culprit into the

\textsuperscript{205} See Moses 57-64.
\textsuperscript{206} The extensive network of people's courts which were formed in Mamelodi also fell under the leadership of the Mamelodi Civic Association; Moses 57.
\textsuperscript{207} Schärf "Memorandum" 3; Schärf & Ngcokoto generally; see also Moses 64-68; Burman "Street Committees" 162-164; Zwane 301 302.
\textsuperscript{208} See generally Burman and Schärf 723-734, Schärf "People's Courts in Transitions" 171-175.
community. This last-mentioned goal was effected by allowing the culprit to become a member of the youth brigade and re-educating him.

When the Nyanga East youth brigade entered a second and more punitive phase, it lost a considerable amount of community support. The reason for its new phase was the very fact that the brigade incorporated offenders into its ranks, while not having adequate facilities properly to re-educate them. The democratic voting process through which judgment and sentence were supposed to be reached existed only in name. Furthermore, during this period the conflict between the adherents to the Freedom Charter and the Black Consciousness Movement also increased and contributed to this loss of support.

The third phase was highly punitive and was characterised by a struggle for control of the courts by different political factions. As a result the courts become very unpopular. However, the fact that they were instrumental in enforcing the consumer-boycott, as well as the fact that they tried so-called "bogus-comrades" for furthering their own criminal activities in the name of the struggle, did lead to their regaining some support in the community. Nevertheless, this increase in popularity was countered by the fact that they started hearing adult-related cases. This was regarded as a serious breach of traditional values. It is an interesting and surprising phenomenon that this assumption of authority over adults, and not the severe punishment meted out by the courts, led to the final legitimacy crisis experienced by the youth brigade courts. Field research done by Burman and Schärf\(^{209}\) indicates that the rites of passage from boyhood to manhood are still strictly upheld by the majority of males in the Cape Town area. Males between the ages of eighteen and twenty five are still initiated and circumcised and "they are usually considered men only once they are married".\(^{210}\) Yet, authority patterns shifted during this time and the youths started

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209 Burman & Schärf 730.

210 In indigenous law the status of males is indeed enhanced by marriage. Once a man is married, he represents his family in domestic affairs. He may then become the head of the agnatic group and represent the group in litigation or the conclusion of juristic acts. In Natal a man becomes
representing adult political interests in the streets. When they moved beyond their mandate - the streets - and tried to assume authority in the formulation of ideas and democratic decision making, they came in direct conflict with the community whose emphasis was still firmly on status. This was especially so in the squatter areas where a conservative and patriarchal social organisation was firmly ensconced.

The people's court which came into existence in the KTC squatter area\textsuperscript{211} in the Western Cape was a youth court initially supported by the community and working in close association with street committees. Support for this court also started waning when it tried adult-related cases. A conflict between the court and the Community Councillor of the area led to his necklace death as well as four other killings by the same method. The KTC court was dissolved following these killings, although in fact it had never been established that the killings took place on the courts' instruction.

The people's courts of the Bongulethu (Oudtshoorn) and Kwanoncqubu (Mossel Bay)\textsuperscript{212} townships were both politically aligned. They were created in response to the rising crime rate and the break down of government structures in the areas. There was a youth court as well as an adult court in Kwanoncqubu township. The former dealt only with juvenile offenders. Appeals lay to the adult court which dealt with all adult related matters and the highest body of appeal was the executive committee of their civic organisation. It consisted of seven members representing parents, youths and women.

Bongulethu's civic organisation was headed by the Bongulethu Civic Association which also represented parent, women's and youth organisations. This association was concerned with the general social and political welfare of the township. Its executive

\textsuperscript{a} major upon marriage. See generally Myburgh \textit{Papers} 81.

\textsuperscript{211} Schärf & Ngcokoto 357 360-363; Burman & Schärf 701-703 708-709 713-715 717 720-721; Moses 68.

\textsuperscript{212} Moses 68-75.
committee served as a court of appeal for all people's courts operating in the area. The court next in the hierarchy of people's courts also served as court of appeal for lower courts, but was instituted specifically as a dispute-settlement structure by the Civic Association. Four people served on this court, a chairman, vice-chairman, secretary and treasurer. Four other people represented parent, youth and women's organisations, but they were not court officials. In line with indigenous law, the youths did not participate in cases relating to adults. Street committees formed part of the lowest tier in the hierarchy of people's courts in this area. These courts also had other functions beyond settling minor disputes. They were presided over by youths, and women were excluded from their ranks. The reason for this seems to be the fact that the women's own organisations dealt with their specific problems. These courts were subject to the authority of adult courts, but adults did not supervise their proceedings. Their proceedings, judgment and punishment were summary and often took place on the spot of the crime. Marshals, drawn from the ranks of street committees, ensured that offenders who ignored the court's written notice appear before the court.

Although procedure and evidence of the Bongulethu courts were similar to that generally followed by people's courts, there were some differences. Except for the youth courts, all courts were held indoors. Furthermore, court proceedings were not open to the public as a whole, because all sections of the community were represented through their organisations. These courts stopped functioning, due to detention of their leadership.

(iii) The Karoo

In the Karoo, field research was conducted on the people's courts of Beaufort West and Graaff Reinett. The courts in these areas were created for the same reasons

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213 The youth were represented by two, one for those under the age of 23 and one for those between the ages of 23 and 30 years.

214 Moses 75-78.
that courts in the other areas emerged. In Beaufort West the youth courts did not adjudicate upon cases that were perceived to be of a sensitive nature, namely cases pertaining to family and adult matters. These were heard by adult courts. Adult courts served as courts of appeal for the youth courts. The presence of those who had to appear before the youth courts was secured by making use of marshals. All those present were considered to constitute a jury. The chairman of the court, who made the introductory political speech and co-ordinated the proceedings, served for a limited period only. The courts came to an end through a lack of support of the broader community and the detention of their members.

In Graaff Reinett these courts were established when street committees started hearing minor disputes. Appeals from the street committees lay to the zone courts and from there to the civic association. Unlike the civic association, the lower courts were basically non-political. Punishment was initially limited to a warning or, if it was the third time a culprit had been found guilty, a sentence of community service or restitution was imposed. Again the courts entertained strong community support until its leadership was detained. They were dissolved in 1986.

(iv) Gauteng

The breakdown of State justice structures in the area, the rising crime rate, the increasing momentum of the struggle, and more specifically an incident in which several people were killed in 1985, prompted the youth of Mamelodi near Pretoria, to create alternative legal institutions.\textsuperscript{215} The courts they established fell under the auspices of the Mamelodi Civic Association which represented youths, adults, women, labourers and professionals such as teachers. Initially the courts adjudicated upon adult-related cases, but this was soon met with the disapproval of the community. As a result, adults became involved in the courts. Adult and juvenile cases, general matters and consumer boycott cases were dealt with by different divisions of the

\textsuperscript{215} Motshekga "Alternative Legal Institutions" 44-47; Moses 78-82.
people's courts. An adjudicator could be either male or female - a surprising deviation from the general tendency in other people's courts in the country. The prosecutor's function included a political introductory speech, leading evidence and facilitating mediation. Judgment and sentence were democratically decided upon by all present. Sentences were in line with those generally imposed by this type of court. As was the case in most urban areas, there was a strict hierarchy in the court structure and an opportunity for appeal from lower to higher courts. Judgment and sentence of lower courts could also be reviewed by the higher courts. These courts stopped functioning during the state of emergency.

Alexandra is one of the few townships in Gauteng in which extensive field research has been done on popular justice and the development of institutions of alternative dispute resolution. Alexandra was founded in 1912 as a freehold location for blacks and so-called coloureds and today has an estimated population of 350,000 residents. Years of apartheid have left a heritage of insufficient housing, a lack of basic hygienic, school, community and recreational facilities, and virtually no other infrastructure in the township. The resultant poverty and overcrowding have lead to social problems that could be overcome only by a spirit of co-operation in the community. These circumstances also gave rise to an active spirit of resistance and struggle, so characteristic of black townships created under the apartheid regime. Tribalism became a major problem in this township where up to fifteen families of different tribes live in one yard under squalid conditions. During the 1980's, civic structures in the form of yard, block, street and camp committees were established. They were responsible for the general social well-being of the community, to encourage unity, comradeship and co-operation in the community, and also to solve disputes between residents.

The first People's court in Alexandra was created by a woman, Sarah Mthembu, who

216 See generally Nina Popular Justice, Nina (Re)making Justice, Seekings "People's Courts", Monyela, Zwane, Mayekiso.
started settling minor disputes in her house. Development of the people's courts followed the familiar pattern of such courts in other townships. Courts were set up by youths and fell into disrepute when they started adjudicating upon cases involving adults and administering corporal punishment upon them. Moreover, corruption and violation of human rights caused these courts to lose the support of the community. When the people's courts ceased operating either for this reason, or because of government intervention, a hiatus was created in policing and dispute resolution and a drastic rise in the crime rate was experienced.

4.c.iii The Period of Reform

(i) Reform from Within

In the late 1980's a process of restructuring the people's courts emerged in many townships. This process went hand-in-hand with the renaming of the courts in an attempt to rid them of the stigma of violence which attached to them through the abuse of the revolutionary concept of people's power by the marginalised youth, when the responsible leadership was detained. Generally they came to be called "community courts". Developments in Alexandra may serve as an example.

In the latter half of the 1980's the Alexandra Civic Organisation was formed to

217 The circumstances which gave rise to the formation of people's courts in Alexandra in 1986 are discussed in Zwane and the political goals of these courts are set out in Mayekiso; see also generally Nina Popular Justice, Nina (Re)making Justice, Zwane 268H-293D-F, Schärf "People's Courts" 47-50.

218 In Kagiso the youth courts used adults to hear adult related cases: see Seekings "People's Courts" 130.

219 Schärf "People's Courts" 31-35.

220 However, it seems that some of the restructured community courts today still function in an atmosphere of intolerance and violence, a result of years of State repression: see Motshekga "People's Courts" 39 42.
reorganise civic structures as institutions of social control and support. The civics comprise, at the lowest level, the yard which is the smallest social unit in the township. The yard committee is also the first tier at which community disputes may be resolved. Unresolved disputes may from there progress to the level of the block committee and thence to the street committee. The traditional institution of family council still plays an important role in this township. It is a private council in which the community has no say and a family matter will be resolved by the various committees only once it is clearly established that it cannot be resolved by the family council. In a survey done by Nina and Stavrou in 1993 it was established that the family council also plays an important role in the administration of criminal justice in various other South African townships.

The new community courts associated with the civics, differ from those that operated during the period 1985 to 1988 in that they are not party-politically aligned and in that subjection to their jurisdiction is voluntary. Marshals are responsible for patrolling the area, for general social services such as collecting money for refuse removal, and for securing the presence of deviants before the yard committees. An advice office was established in Alexandra in 1990. A community-trained registrar assesses problems brought to the advice office and then refers the parties to the appropriate institutions for the dispute to be resolved.

The Joe Modise Camp is an interesting example of success achieved in community dispute resolution. It is one of the fourteen areas into which Alexandra is divided and forms an administrative unit of the civic organisation, representing 12 000 - 15 000 township-dwellers, living in four avenues. Although, generally speaking,

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221 Schärf, "People's Courts" 47-50.
222 See Zwane, 292-296 on the formation and goals of civics in Alexandra.
223 See generally Nina & Stavrou.
224 Schärf, "Sipati" 45-49.
225 Nina, (Re)making Justice 8-10; Monyela.
people have become apprehensive of getting involved in the civics in Alexandra, because of the escalation of violence in 1991, this is not the position in the Joe Modise Camp which appears to be well structured at grass-roots level and to be enjoying the support of the community. The activities of its courts have led to a drop in the crime rate in the area. This unit is also hierarchically organised from the lowest yard committee to the camp committee which is the highest level of dispute resolution in the area. Between 12 and 20 mediators are elected by the community. Mediators are generally untrained and rely on common sense to resolve disputes. Men only are elected as mediators. This is contrary to the position in other areas in Alexandra which seem to be gender sensitive and where females play an active role in all spheres of social ordering. At least three mediators are present at each hearing. Hearings take place in public, on Tuesday evenings and Sunday mornings. An aggrieved party may approach either a yard representative on the camp committee, or a mediator. The mediator dispose of the problem immediately, or may refer the case to a regular Tuesday or Sunday court session. In case of a serious problem the parties often first approach the advice office, where a statement is taken, a date for the hearing established and messengers dispatched to advise all parties involved, of that date. The venue is usually the yard where the dispute arose. Procedure is aimed at community participation and the rehabilitation of offenders.226

It is interesting to note that the Alexandra community interrelates with the State police on their own initiative when they feel this is necessary. Community police in the form of anti-crime committees (elected by the community) as well as unofficial courts are actively and successfully functioning in many townships in South Africa, often with the full co-operation and blessing of the State police.227 Seekings points out that the State's acceptance of informal justice developed as a slow process, varying from region to region and that this acceptance is closely connected to individual police

226 Offenders are often involved in dispute resolution as a form of rehabilitation.

227 See generally Seekings "Revival" 190-193; see also Ferndale & Langa.
officers, magistrates, attorneys-general and judges. In the port Elizabeth and Cape Town areas police have proved to be unusually tolerant of institutions of informal justice. The State's increasing acceptance of unofficial courts culminated in the promulgation of the Short Process and Mediation in certain Civil Cases Act which came into operation in August of 1992.

(ii) Reform with the Assistance of Non-State Institutions

Various non-State organisations have initiated programs to facilitate access to justice and develop popular justice in black rural and urban areas.

Under the auspices of the Centre for Applied Legal Studies at the University of the Witwatersrand, a Community Dispute Resolution Resource Committee was brought into existence to pilot a project for the formation of community dispute-resolution centres in co-operation with existing civic structures in urban areas. At its initial stage the project was discussed with the then Minister of Police, and was given the blessing of the State. When the formation of community centres was first contemplated, certain needs for a new democratic legal dispensation were considered: a change in the content of the law, greater accessibility of courts, research into the effect of conflict

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228 Eg. whilst denounced by Kannemeyer J of the Eastern Cape, Kriegler J described the operation of people's courts as a self-help by people who have been "deserted by the law": see Seekings "Revival" 193.

229 The Cape Town police tacitly support Gugulethu's People's Court and in the Eastern Cape police reportedly welcomed the operation of these unofficial institutions: see Seekings "Revival" 192-193.

230 Act 103 of 1991. See the discussion of this Act and the criticism levelled against it in Part I.4.2.b above.

231 Little has been written on the community dispute-resolution centres. I have relied on Nina Popular Justice and Nina (Re)making Justice, Seekings "Revival", an unpublished progress report of the Community Dispute Resolution Resource Committee, an editorial in 1991 (3) Rights LHR 43, unpublished papers read by Nina and Motspe (Alexandra Justice Centre Co-ordinator) at a "Community Courts Conference - An Eastern Cape Perspective" Port Elizabeth 13 14 May 1993, Glaeser 96-100.

232 Seekings "Revival" 196, see generally 196-198.
on relations within the community, involvement of the community in establishment of laws and legal institutions through the political process, as well as the administration of justice, the establishment of institutions which deserve and command the respect and support of the community and which are readily available and affordable, and which follow procedures to satisfy conflicting parties. The goal of the Community Dispute Resolution Resource Committee is to assist in the development of new and the adaption of existing dispute-resolution institutions; in the education and training of personnel involved in the resolution of disputes; in the co-ordination of research initiatives and professional development programs in community dispute resolution; and in maintaining contact with State institutions assigned with the administration of justice. Once a justice centre is established in a community, the Committee withdraws and assists only if requested. The idea is thus to assist in establishing dispute-resolution centres within the community, manned by personnel from the community and not to superimpose a structure from the outside.

The first such centre opened in Alexandra in September 1991. The Alexandra Justice Centre was manned by mediators and administrators from the Alexandra community who were trained by the Community Dispute Resolution Resource Committee. The Committee worked in close association with the Alexandra Civic Organisation in establishing this Centre. The Centre enjoys reasonable community support. Cases mediated related to family, neighbourhood and marketplace disputes. Former people's courts "judges" are among the mediators who work at the Justice Centre.\(^\text{233}\)

Procedures followed in the Alexandra Justice Centre have features of the inquisitorial procedure prevalent in indigenous African law. As explained before, Western concepts and principles of mediation and arbitration are very similar to the general principles of

\(^{233}\) Seekings "Revival" 196-197 briefly mentions similar projects for the regulation of informal justice in black townships in South Africa but it seems that progress is slow. In Guguletu in the Western Cape, the community preferred that the street committees remain the dispute-resolution institutions. They wanted the lawyers' associations to limit their activities to the training of personnel (amongst others in mediation skills) and to the evaluation of proceedings. Unfortunately there is little information available on the success or otherwise of this program. See Schär "People's Courts" 10-11.
indigenous procedural law and law of evidence. And these features may well be the reason why the Centre has accomplished some success. However, there are certain points of criticism which may be levelled against it. An American model of mediation was basically superimposed upon an African community. This model does not provide for collective participatory justice, and public proceedings, both of which are features inherent in indigenous African dispute resolution. The Centre functions parallel to existing structures of community dispute resolution and is in the final analysis not compatible with these institutions. It is difficult to explain the initial support the Alexandra Civic Organisation gave to this project, but it is clear that, in the two years of its existence, the Justice Centre has not realised its goal of working in close co-operation with existing civic structures towards the creation of an indigenous African model of dispute resolution. Nina suggests that some measure of political awareness should be retained in order to diminish the inequalities created by apartheid, and that the ideology-free framework maintained by the Justice Centre is not desirable.

Tiruchelvam points out that in countries such as Tanzania, India and Burma popular tribunals "of indigenous inspiration" emerged in societies that were committed to new social and economic orders and where the existing regime was being replaced by a process of reform or revolution. He further describes these unofficial institutions as "post colonial reactions to an imposed British court structure". They were considered an extension of a new legal ideology and a rejection of the existing legal system. In this country the community courts (as well as their predecessors, the people's courts) enjoy considerable support. One reason may be the fact that they are indeed still politicised and "represent the extension of the new 'ideology' to the legal

234 Cf the intake officer and the advice committee (only the last-mentioned enjoys credibility in the community); see generally Nina Popular Justice 21-30.


236 Tiruchelvam 264, see generally 263-280.
and specially the judicial sphere". This will conceivably remain the position for the foreseeable future.

Other non-government organisations which have accomplished success in facilitating access to justice and developing popular justice, especially in rural areas, are the Legal Education Action Project which was brought into existence under the auspices of the University of Cape Town, and the Community Law Centre affiliated with the University of Natal. Their activities entail, inter alia, the training of para-legals (also within an indigenous-law framework) who assist the community in solving legal and social welfare problems through referral, counselling, advice giving, education on their legal and human rights and networking with other organisations. Community advice centres have been established in rural areas, villages and townships. These centres are equivalent to the advice offices operating in the townships but do provide additional social services. The Community Law Centre has established para-legal committees to oversee the establishment and administration of para-legal offices in the various rural communities, manned by para-legals who reside in the areas.

5 CONCLUSION

In 1992 Nina and Stavrou conducted research into perceptions of justice and the interaction between State and popular justice. Although the research was carried out in only two areas which are clearly not representative of the whole of South Africa, some interesting information came to the fore on perceptions of justice, the role of the State judicial system and unofficial systems of judicial ordering.

It appears from their report that certain indigenous values have been adapted to the needs of the urban community. This may be seen as an indication that indigenous law is not the rigid system of customary law which it is often perceived to be but that it is indeed adaptable to the prevailing circumstances. In this regard the following may be

237 Tiruchelvam 278.
noted.

The communities investigated regarded imprisonment, which is unknown in indigenous law, as the most appropriate punishment for the majority of the crimes about which they were interviewed. Of particular interest are responses to questions about the different forms of domestic violence. Some people regarded marital rape as a crime and felt that it should be dealt with by the police, and that the appropriate sentence should be imprisonment, fines or community work; others were of the opinion that it should be dealt with by the family, friends, or social workers. Only 3% of interviewees were against any interference whatsoever. It is significant that the majority of women interviewed were more in favour of intervention by social workers or the police and that the men preferred intervention of relatives or friends. These responses may be interpreted as an indication that women do not find the proper support from their families in the townships and for that reason preferred the intervention of outsiders. It may further be an indication that the pre-colonial indigenous law has been distorted to the extent that marital rape is thought to be sanctioned by it.

It appeared further that family or friends and thereafter, social workers, were regarded as the proper institutions to interfere in cases of wife beating. Community elders, legal-resources centres, the church, police, civics and comrades were chosen by a small number of those interviewed. Only a very small percentage of the respondents was of the opinion that there should be no interference in cases of wife beating. It may be inferred that the pre-colonial indigenous-law position (moderate chastisement of wives and children is admissible in indigenous law) is not being exploited or distorted in this regard and that the family is more willing to support women than in the case of

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238 Most of which are serious crimes such as murder, rape and assault.

239 However, in indigenous law marital rape is seen in a serious light. It is regarded by some as assault, and others believe that such conduct is visited by the automatic supernatural sanctions that follow on the violation of taboo. Myburgh "Rape" 84.

240 About 40% of the women regarded the family or friends as the appropriate institution to deal with such cases while 47% preferred social workers. Only 13% regarded wife beating as a case for the police.
marital rape.

The majority of males and females interviewed felt that child rape should be dealt with by the police but that child beating could be dealt with in the family. Generally, two-thirds of the respondents were of the opinion that the community should not interfere in family disputes and that either the family or unbiased outside institutions, such as social workers and the police, should deal with it.

Certain indigenous values still seem to play an important role in the two urban communities under investigation. Whilst the majority of the informants were of the opinion that the police should deal with serious crimes, they felt that witchcraft should be dealt with by the community and that domestic violence should rather be reported to the family or social workers. A small percentage of the informants indicated that most of the listed crimes should be reported to the family. This should not necessarily be interpreted as an indication that the crimes were not regarded in a serious light, or that the respondents were of the opinion that the family should adjudicate upon the crimes. It may be that the family council is still considered by some to fulfill its traditional role and that it is considered that all injustices should first be reported to the family council whence it should be referred to the proper institution to be dealt with after consideration by that council.

It is interesting that 72% of the informants was of the opinion that State courts symbolise justice and that 60% was of the opinion that the civics symbolise justice. Respondents wanted the community to be involved in the administration of justice, but on a regulated basis as members of a jury, as community court judges, or as members of community mediation structures. However, they felt that community participation should not be unlimited and that certain matters should fall outside the

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241 Thus, more or less 90% of the informants were of the opinion that non-State structures symbolise justice.
capacity or "jurisdiction" of the community.\textsuperscript{242}

Sachs\textsuperscript{243} attributes the success of community courts, which have been in operation in Mozambique for more than a decade, to the fact that they function in line with the African concept of participatory justice; the fact that they are democratic and have features of ancient, traditional and well-known principles of the administration of justice; but that the law they apply is not exclusively traditional and that distinct non-African features such as women's participation and youth participation may be observed. Moreover, presiding officers do not necessarily come from traditionally powerful families and the courts are sensitive to the practical and direct physical needs of the urbanised community they serve.

Finally, the creation of a culture of community participation in dispute resolution, witnessed by the resolution of disputes in and by the community and by the creation of forums for dispute resolution in which the community may participate collectively and openly, should not be regarded as merely the legacy of the people's courts, but also as a reaffirmation and perpetuation of the spirit of communitarianism and collectivity underlying indigenous African law and social ordering. Whilst certain features of the proceedings of people's or community court proceedings point to an almost Western-type of mediation, rather than adjudication,\textsuperscript{244} these features are also characteristic of African adjudication and underscore the importance of the indigenous values underlying the community dispute-resolution process.

People's courts that resemble the pre-colonial institutions in structure and purpose and that are not linked to specific political movements, are today still in operation. These courts are witness to the fact that while for the vast majority of the urban population

\begin{footnotes}
\item[242] Nina & Stavrou 17; the detailed tables are set out on 19-44.
\item[243] See generally Sachs "Changing"; Sachs "Community Courts".
\item[244] This may be the reason why researchers generally call presiding officers "mediators" and not "judges".
\end{footnotes}
the notion of tribalism is abating, the break with traditional practices is not so clear cut in domestic relations. Many domestic customs are not incompatible with the conditions of urban life and urban dwellers as a rule still regulate their domestic relations according to customary norms and values.245

In his analysis of political and social developments in the township of Luanshya in the 1950's, Epstein246 documented that despite the movement away from tribalism, urban blacks continued to order their behaviour in accordance with indigenous norms and values, especially with regard to inter-personal and domestic relations. Due to a wage economy, urban administration and groupings, and interaction with Westerners, new sets of relations developed which cut across tribal lines and brought about new interests in the political sphere. Yet he concluded that

"[a]lthough 'tribalism' is an irrelevant category in these new sets of relations, it does not thereby cease to operate within them ....'[T]ribalism' tends to be carried over into, and to operate within, all these sets of relations in which the urban African is involved".247

Some twenty-five years later, Hund and Kotu-Rammopo248 wrote that

"[a]lthough for the vast majority of urban dwellers the concept of tribalism is on the decline the break with traditional practices is less radical in domestic relations than in the sphere of 'class'

245 Burman & Schärf 737 emphasise the important role of the people's courts in promoting indigenous values by maintaining the supportive network of the extended family.

246 See generally Epstein 224-240.

247 Epstein 240. The influence of Christianity and its condemnation of polygyny, labour migration, the concomitant development towards urbanisation, and the Government's policy of discouraging migrant labourers to bring their families to newly developed urban areas in order to preserve the rural economy, are regarded as factors contributing to the disintegration of the extended family: see Sachs "Family" 40-42, Sachs "Changing" 105; see also Bennett Sourcebook 144-167. The Ivory Coast, where legislation was passed with the express purpose of destroying the extended family and promoting individualism "because the family was believed to be parasites discouraging individual initiative" provides an extreme example where Western values were superimposed upon Africa values.

248 Hund & Kotu-Rammopo 189; see also 190-191.
relations. Many residents of Mamelodi still regulate much of their social behaviour in the sphere of domestic relations in terms of customary norms and values. The reason for this is that many domestic customs, if somewhat difficult to comply with, are often not incompatible with the conditions of urban life."

Nevertheless, the move away from pre-colonial indigenous-law institutions does not necessarily mean a radical change in the jural postulates underlying that law. Although political, economic and social circumstances may have forced a change in the family set-up, it is not necessarily true that the need for the indigenous way of family organisation has also disappeared. Indigenous law is indeed a most adaptable legal system and the need for the traditional or rather familiar organisation of the family and family relations is witnessed by the informal dispute-resolution institutions which are in operation in urban areas. Although there is a movement towards individualism, this is a post-communitarian individualism. It may be that Africa, after centuries of solidarity is passing through an individualistic stage before it reaches a new communitarian synthesis.  

249 See also Maurier 12.
1 INTRODUCTION

The issue of the legitimacy of the South African legal system is closely connected to the existence and complex interaction in this country of official law and unofficial law or living law generally, and more specifically, of the dominant Western legal system and the servient indigenous legal systems which are accorded limited recognition. ¹

¹ Jewish and Islamic personal laws, are not officially recognised or applied as legal systems. Indigenous and religious legal systems are often in direct conflict with the official western common law, especially in the field of family relations and succession where the tenacity of intuitive law is best observed. Fitzpatrick "Marxism" 47 observes a direct connection between legal plurality and a legitimacy crisis, but sees the legitimacy crisis as giving rise to legal plurality. Legal plurality emerges as a result of, or in response to monetary and legitimacy crises which often afflict countries of advanced capitalism. Informal ordering then emerges because it is cheaper or because it is a means to create popular participation, thus "serving to make up the deficit in legitimation".
The essence of the legitimacy crisis of the present South African legal system lies in the historical superimposition of a foreign legal system with its concomitant Western jural postulates, upon those of Africa.\(^2\) Whilst it has shown itself to be workable in certain countries,\(^3\) legal pluralism as a colonial phenomenon has been abused in others where the transposed law was dominant, implemented as an agent of change and so-called development by replacing or adapting indigenous legal systems, and employed as a political tool to subjugate whole communities.\(^4\)

It seems that in South Africa, where the normal interaction of living law with State law has for many years been repressed, the issue of the legitimacy of the State legal order may be reduced to an investigation of the moral validity of Roman-Dutch law (influenced by English law) as the common law. From a positivistic point of view, any question pertaining to morality in law and legal orders should be rejected as unscientific, for legal positivism denies the viability of any form of metaphysics. Thus any approach which relies on moral standards in evaluating legal norms and legal systems should be rejected.\(^5\)

It is an uncritical compliance with this scientific approach to our legal system which instilled in many jurists an inability to see legal rules in their social context and which

\(^2\) The concept of legitimacy is discussed in more detail in paragraph 4 below. It should be borne in mind that legitimacy may be viewed from different angles and that apartheid, for example, had an important role to play in the legitimacy crisis of the South African legal system: see HSRC 166-167.

\(^3\) The imposition of a foreign legal system which emanated from a country with a culture wholly different to that of the servient community, is a world-wide phenomenon. Apart from African indigenous populations, those of Papua New Guinea, Africa, America, Australia, Japan, India, Indonesia, Turkey and Alaska are further examples of such servient communities.

\(^4\) See generally Van Niekerk "New Developments" 19-20. In colonial times there was a tendency to use law and legal rationality to order those social structures perceived by the colonialist as "dangerously exotic and bizarre": see Fitzpatrick "Law Plurality" 161 who also describes it as an attempt by the European bourgeoisie to eliminate "the root of diversity".

\(^5\) Davis "Realists" 388. The epistemology of legal positivism has been dismissed by Corder & Davis 2 in the following terms: "[1][1] by 'scientific' is meant some kind of value-freedom or a separation of things political, then law can never attain such a status."
gave rise to inadequate attention being paid to the philosophical foundation of other legal institutions and the social reality within which they function.⁶

Over the years, the pursuit of legal positivism created a legal order primarily suited to the needs of that section of the community whose traditions and way of life may be classified as Western and capitalist.⁷ Moreover, analytical positivism proved inadequate to explain law and social ordering and to direct legal development in Africa.⁸

In the South African context one is then confronted with the question whether this country's legal system has the inherent capability to qualify as a legitimate legal system in the eyes of the majority of the population, now that it is being purged of the unjust and racist legislation which has crippled it and now that it can operate independently of the illegitimate State authority from which such legislation originated.

History teaches that it is, above all, the scientific framework and methodology of Roman law which proved decisive in its reception, not only in Western Europe where the practical rules of Roman law were received, but also in eastern European countries where a scientific reception of Roman law took place although the rules of Roman law were never received.⁹ Is the scientific framework of Roman-Dutch law capable of accommodating indigenous law and institutions? While attempting to answer this question, it should be borne in mind that the Roman-Dutch methodology and conceptual framework remain foreign to indigenous Africa and, more importantly, that the South African legal system remains endorsed by a basically ethnocentric Western jurisprudence which ignores the jural postulates and value systems which form the

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6 Corder & Davis 2.
7 Corder & Davis 3.
8 Ogwurike 137 observes that "there is no end which justifies law [in Africa], except a social end".
9 Zajtay & Hosten 181-183.
basis of indigenous laws. The notion that the ideas of Western jurisprudence are universally applicable and that non-Western jurisprudential ideas and modes of thought are to be relegated to the field of sociology and anthropology needs to be reconsidered. In order to accomplish this, Western cultural axioms need to be transcended and an indigenous African perspective employed.

Before one attempts to analyse the legitimacy of any legal system in a heterogeneous society, it is essential to distinguish between different types of law applicable in such societies. In this chapter a theoretical explanation will be given of how and where the different laws which are potentially applicable in the pluralistic South African situation fit into the general scheme of this country’s legal order.

The popular, Western, and typically positivistic perception of modern law is that law is necessarily monist, that it consists of those norms that are created and sanctioned by official State organs in accordance with a basic rule of recognition or grundnorm. It thus negates the co-existence of a variety of unofficial legal systems (in Africa notably those applicable in indigenous cultures) within a single community. It accords

10 Dhlamini "Future" 12; Chiba "Conclusion" 356; Trubek 16.

11 Monism being the doctrine that only one ultimate principle or being exists; the theory that denies the existence of a duality of mind or matter. It is interesting to note that although legal monism prevails in modern Western societies, these societies are characterised by normative pluralism in that a variety of autonomous social norms exist and are to an extent recognised. In contrast, in primitive societies normative monism in a broad sense prevail. Initially law and positive morality, specifically religion, were so closely related that they formed a single coherent system of norms which regulated the lives of members of the community: S Ehrlich 225 226; see also Fitzpatrick "Marxism" 52: who notes that "[m]edieval law was integral to a moral order and traditional community ...". This is also evidenced in traditional indigenous African communities noted for their characteristically non-specialised cultures, characterised by lack of separation, differentiation, classification, delimitation, definition or individualisation with regard, for instance, to time, activity, functions, interest, duties, knowledge, conceptions: see Myburgh Papers 2ff. This lack of specialisation in indigenous societies has been misunderstood by some anthropologists and lawyers alike and interpreted as evidencing a lack of law in these societies. But then they either conceptualised law so narrowly that it could not be applied in these societies, or equated it with custom: see generally Pospisil Anthropology 11ff, Van Niekerk Comparative Study 13-16.

12 Davis "Realists" 38ff; see also S Ehrlich 226, Allott and Woodman 7, Allott "Popular Law-making" 33, Podgörecki "Intuitive Law" 72, Hund "Formal Justice" 212.
It accords unofficial laws a culturally inferior status to that of the official State law, and often labels it as not being law, nor being civilised, sophisticated, centralised, national, systematised or authorised. Moreover, juridical monism theoretically has the effect that normative systems, other than the State system, may officially be dislocated and even absorbed by the State system.

From a sociological point of view one can distinguish different types of law. Most inquiries into a variety of legal or other normative systems which apply in a single society, commence with the Austrian jurist Eugen Ehrlich's view on living law and norms for decision. According to him living law is the law that dominates life itself, even though it has not been posited in legal propositions. Living law may be distinguished from the law which is enforced in the courts and other tribunals. Authoritative sources of living law are modern legal documents; direct observation of life, of commerce, of customs and usages, and of all associations.

13 Chiba Legal Pluralism 51.

14 S Ehrlich 227. The current position of indigenous law and unofficial laws in South Africa bears witness to this phenomenon. But, it must be remembered that although systems of living law may be officially interfered with or even abolished, they usually continue to be applied and consequently develop unofficially.

15 See inter alia S Ehrlich, Nelken, Podgórecki "Intuitive Law", Friedman, Chiba Legal Pluralism, Timasheff, Rich. Although Ehrlich's notions of living law and norms for decision are regarded by some as the most developed view of the school of thought which emphasises the prominence or even predominance of intuitive law (See Fitzpatrick "Marxism" 46, Fitzpatrick "Law Plurality" 161), those notions have also been criticised. Rottleuthner is of the opinion that it "appears rather arbitrary for legal sociology to begin with Ehrlich" and that one may as well go back another century and regard Montesquieu as the founder of legal sociology. Nevertheless, he indicates (at 19 23) that it is important that Ehrlich's research was stimulated by his every-day experience of the application of folk laws under the surface of the official Austrian law in Bukowina. Ehrlich's distinction of various types of law, or his incorporation of living law in his definition of law also elicited criticism from Hans Kelsen with his monistic view of law and thus resulted in a setback for legal sociology in Germany: see Rottleuthner 28 especially n 83.

16 Associations which the law has recognised, those which it has overlooked and passed by, and even those of which it has disapproved: see E Ehrlich 493; see also Nelken 161, Podgórecki "Intuitive Law" 71, Ogwurike 10 129-131, S Ehrlich 226, Timasheff 52-53, Rich 151. People's law as discussed in Part I.V.4 may be classified as social law within this definition.
Norms for decision are legal rules found in positive law, legal codes and statutes. Although the norms for decision are those norms that are enforced in the courts (official law), it is the living law which provides the very foundation of the legal order. But, the norms for decision are not invariably based on the living law. Whilst traditional jurisprudence altogether denies the existence of living law and takes account only of laws and norms of judicial decisions, Ehrlich promoted a jurisprudence which would take cognisance of the living law in order to bring the application of official law closer to social reality.

Although Eugen Ehrlich regarded the legal document, such as a will or a contract, as the primary source of living law, he determined that it is the customs, usages, and institutions from which the unwritten living law originate which are in conflict with the State legal order. These are more relevant in an investigation of a specific system of living law.

Ehrlich's concepts of "living law" and "norms for decision" are often equated with Pound's concepts of "law in action" and "law in books". This is so because both

17 See generally Ehlich 486ff, Lloyd 522ff.
18 Rottleuthner 6-7.
19 Ehlich 495.
20 See Kidder 42-44 on the tension between the living law (or customs) and what terms the "written law".
21 The ascertainment of living law remains one of the most vexing problems facing a researcher in the field of legal anthropology. Judicial decisions of unofficial folk institutions are important sources of the living indigenous law, which must be distinguished from the black letter indigenous law which is applied by official courts and reduced to writing in the standard works on indigenous law. Nevertheless, it should be kept in mind that "only a tiny bit of real life is brought before the courts and other tribunals; and much is excluded from litigation either on principle, or as a matter of fact. Moreover the legal relation which is being litigated shows distorted features which are quite different from, and foreign to, the same relation when it is in repose": Ehlich 495.
22 See eg Chiba Legal Pluralism 132.
employ the notions of a living law and a dead letter law.\textsuperscript{23} However, Ehrlich's concern was with the social determination or function of law, that is, the social basis of law, whereas Pound was more concerned with the effect of law upon society. Law is seen as a method of social control and is thus viewed in terms of its purpose.\textsuperscript{24} Pound's law in books as well as his law in action refer to the activities of law makers and law enforcers. Law in books are the real rules and norms applicable to those subject to the law and the law in action are those obligatory norms that are in fact enforced. His concern was with the harmonisation of law in books and law in action, since discrepancies between the two are indicative of the fact that the law is not attuned to the needs and aspirations of society.

Whilst Pound was committed to the unsatisfied social needs which were made evident by social circumstances, Ehrlich's commitment was rather to the existing normative orders which could not be ignored.\textsuperscript{25} Ehrlich's norms for decision control judicial behaviour\textsuperscript{26} and include both law in books and actual patterns of decision by legislative and judicial bodies which emerge and are applied only when a matter comes before a court. Official State mechanisms for social control are regarded as complementary to living mechanisms for social control. It is only when the latter proves inadequate that official mechanisms are employed. The living law consists of those norms that prevail under normal circumstances and which originate from the normal interaction between individuals in a variety of circumstances.\textsuperscript{27} Living law is not necessarily in competition with norms for decision.

However, in an investigation into the legitimacy of an official legal order and the role of a particular system of living law, notably in this thesis indigenous law, the ideas of

\textsuperscript{23} See Nelken 168ff.
\textsuperscript{24} See Lloyd 522 525, Nelken 164-167.
\textsuperscript{25} Nelken 169.
\textsuperscript{26} See also Rich 151.
\textsuperscript{27} See also Rich 151 159.
both Ehrlich and Pound are applicable. Pound’s notions about law in action remain particularly relevant in the field of legal-anthropological research into indigenous legal systems, with regard to the various faces of indigenous law in this country, as well as the application and abuse of indigenous laws by official institutions. Ehrlich’s view on living law, in turn, is of relevance with regard to the existence and application of unofficial indigenous laws by unofficial institutions, its non-recognition by the State authorities as well as the effect living law might have on the State law.

In drawing a distinction between living law and State law some important questions spring to mind. What would happen if different systems of living law should be in conflict? What will be the outcome of the interaction of different systems of living law? How does one explain the original effectiveness of State law and the effect on living law which State law indeed sometimes seems to have?

The first two questions have a bearing on the internal conflict of laws, and the goals which should be set in an internal-conflict management. It should be borne in mind that the numerous South African publications which deal with this topic, tend to concentrate on the conflict between different official laws, that is the conflict between indigenous laws which are recognised by the State and applied in the general courts of the land inter se and between indigenous laws and the Western common law. These works are not concerned with the true living law. Unofficial, living law is being ignored because the State has the ultimate authority to recognise or ignore systems of living law. In South Africa the State legal order does not take cognisance of conflict between, and interaction of systems of living law, or of the effect of living law on the effectiveness of the official law.

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28 See generally Hund "New Legal Anthropology", Hund "Roles of Theory", Sanders "Comparative Law" on the conflict between the rule-directed and trouble-case method of investigation into indigenous laws.

29 Fitzpatrick "Marxism" 46.

30 See the discussion on the conflict of personal laws in Part I.IV.3 above.
Living law may be regarded as a sine qua non for State law. It forms the basis of State law and the effectiveness of State law depends on its being in harmony with living law. Official legal propositions or legal institutions divorced from their presuppositions (living law), have no information to convey. It may thus be said that legal normative systems cannot function in a normative vacuum. And that is one of the most important reasons for the legitimacy crisis of the official State legal system in South Africa.

The original effectiveness of official law may be explained with reference to the most common, diffuse unofficial jural postulate which underlies indigenous law in Japanese society and which also underlies law in South African indigenous societies. It is called the identity postulate or the amoeba-like way of thinking because of the similarity to the amoeba's capacity for flexible movement whilst retaining its individuality. This postulate induces people to adjust culturally to changing circumstances in order to preserve their own identity. Consequently, one finds that living indigenous law is flexible and has the ability to permeate different levels of the structure of State law whilst retaining its own identity. It may be sanctioned by, or even incorporated into official law; or it may function unofficially. It is perhaps more appropriate to regard the resilience of indigenous law as one's point of departure, rather than the so-called effectiveness of official law.

The resilience of indigenous law in South Africa is best illustrated by the living people's law which was applied by people's courts, even after it had been officially rejected and

31 Fitzpatrick "Marxism" 46; Fitzpatrick "Law Plurality" 161.
32 E Ehrlich 475.
33 S Ehrlich 232.
34 See Part II.II and II.III below for a detailed discussion of jural postulates.
35 Chiba "Unofficial Postulates" 59 and Chiba "Three-level Structure" 355-358. This feature should clearly be distinguished from legal acculturation, where the identity of one legal system is sacrificed in favour of another. In indigenous law this postulate is referred to as the identity postulate. See Part II.II.3.b.(iii).
banned by the official law, as well as the living law which is unofficially applied in the State Courts of Chiefs and Headmen. The resilience of indigenous law in Kgatla society is ascribed to its centralised State organisation; its well defined body of norms; and in accordance with the jural postulate described above, the Kgatla chief's ability to adapt those norms to changing circumstances so as to keep them attractive to the population.

In an investigation into the implementation of State law through living law, in this instance North Sumatran indigenous law, Slaats and Portier come to the conclusion that the apparent effectiveness of State constitutional law is dependent on and determined by the operation of indigenous institutions and procedures. They indicate that where a village chief was chosen in accordance with Western procedures, his rule was not acknowledged nor accepted by the community. This was because his position lacked the indigenous basis of authority which is "empowered and at the same time restricted by, the intricate fabric of multi-layered tripartite relationships".

2 OFFICIAL LAW

From a positivistic point of view, various types of law may be distinguished with reference to a hierarchy of power structures. Law is closely related to social power, and every power structure has a corresponding set of legal rules which it recognises and supports. Accordingly a distinction may be drawn between State law, being legal rules of the highest and most powerful power structure, and social law, both of which

36 See generally Part I.IV.4.

37 Von Benda-Beckmann 167.

38 Slaats & Portier 153-154 171.

39 Slaats & Portier 171.

40 Timasheff 302. Timasheff's view that the purpose of law should be the maintenance of societal equilibrium is consonant with the indigenous idea of the purpose of law.
fall under official law.\textsuperscript{41}

The Russian-Polish philosopher Petrazycki, who has been described as the father of the sociology of law,\textsuperscript{42} distinguishes between four appearances of law which go beyond the conception of law as a normative phenomenon endorsed by the State. These are: positive law, intuitive or living law, official law and unofficial law. Within his definition of law, positive law is law which is, for instance, derived from statutes, custom, contract and judicial practices,\textsuperscript{43} whilst intuitive law obliges without reference to any authority.\textsuperscript{44} Official law is supported and sanctioned by the State, whilst unofficial law operates independently of the State. Official and unofficial law need not necessarily be in conflict with each other, although this is usually the case in heterogeneous societies where values are divided and explicit formal prescripts of the official, positive law regulate the society.\textsuperscript{45}

Positive official law may be referred to as State law. Positive law and official law almost always coincide. An example is the law applied by the courts and upheld by the State.\textsuperscript{46}

Positive unofficial law is positive law applied by an unofficial dispute-settling body.\textsuperscript{47}

\textsuperscript{41} Cf Pound's view of law in action and law in books, which both form part of official or State law.

\textsuperscript{42} Podgórecki \textit{Law and Society} 212.

\textsuperscript{43} This would include both Pound's law in books and law in action and coincides with E Ehrlich's norms for decision. Petrazycki also regards the effectiveness of positive official law to be dependent on intuitive or living law.

\textsuperscript{44} If authority is here interpreted as State or official authority, intuitive law coincides with living law.

\textsuperscript{45} See Ogwureke 144ff, Podgórecki \textit{Law and Society} 219-221.

\textsuperscript{46} Cf Pound's view that official law (law in books) does not necessarily coincide with positive law (law in action). But then it should be kept in mind that positive law in Petrazycki's definition encompasses more than law laid down in judicial decisions.

\textsuperscript{47} Positive unofficial law seems to coincide with what Timasheff classifies as autonomous law, and according to him autonomous law is official law.
In the South African context one thinks of two examples of positive unofficial law. Alternative institutions for dispute resolution in townships sometimes apply official or positive indigenous law as well as the common law. The Courts of Ward Headmen also apply official indigenous law in addition to the unofficial law they apply. The fact that unofficial institutions such as community courts sometimes apply State law does not have any effect on the development of that law or its validity because these unofficial institutions are altogether disregard by the State legal order. The inference that may be drawn is that State law which is applied by unofficial institutions is indeed living law.

Intuitive official law is intuitive law applied by official institutions. An example here is the application of indigenous criminal law by the Courts of Chiefs and Headmen. Living indigenous law applied by these official institutions does not thereby acquire the status of official law. However, should the Appellate Division extend the application of existing norms of indigenous law because perceptions have changed as to the propriety of applying the rule, thereby bringing it in accordance with the living law, living law may become official law. All four instances in which policy considerations may be employed to adapt existing State law may serve as examples of intuitive official law.

Intuitive, unofficial law is the spontaneous people's law applied by unofficial people's institutions.  

2.a State Law

From a positivistic point of view, State law forms the upper tier of official law and

48 See Part II.IV.6.
49 See generally Part II.IV.4.
50 See generally Timasheff 302-308.
emanates from, or is supported and authorised by the active power centre\(^{51}\) of the highest authority or social power structure, namely the State. Law emanating from other, lower social structures, is termed social law and forms the lower tier of official law. Social law is subordinate to State law. It is applicable only in so far as it is recognised by the State which circumscribes and limits its application.\(^{52}\) State law is the law directly created by the State or directly authorised or supported by it. It may emanate from various levels of power structures in the State, depending on the complexity of the form of that State.\(^{53}\) This conception of State law may be contrasted with Ehrlich's sociology of law which endorses the salience or even the supremacy of social law. Thus State law is regarded as a derivative, which results from a double institutionalisation of norms; State law emanates from intuitive law which is re-institutionalised at another level.\(^{54}\)

Chiba,\(^{55}\) in his research on legal pluralism and indigenous law in Asia attempts to identify the structural position and function of the indigenous legal systems in various Asian countries in terms of the official or State law. The methodology of his analysis and observation of law as an aspect of a society's culture is based on two hypotheses: The three-level structure of law and the interaction of indigenous and received law.\(^{56}\) The first hypothesis is that law encompasses three structural levels namely official law, unofficial law and jural postulates. Official law is the law sanctioned

\(^{51}\) The power centre is a small group within the larger social group which is endowed with power and from which patterns of conduct is imposed on the larger and passive periphery: see Timasheff 13-14

\(^{52}\) In accordance with the Kelsenian-grundnorm or the Hartian rule of recognition.

\(^{53}\) This conception of State law accords with the predominant positivistic South African perception of law. According to Sugarman 162 one must not lose sight of the dynamic character of legal pluralism and the original effectiveness of State law, as well as its ability to yield to informal communal ordering and extend in a supervisory way over social ordering.

\(^{54}\) Bohannan "Realms" 47-48; see also Fitzpatrick "Marxism" 46.

\(^{55}\) Chiba *Legal Pluralism* 131-140; Chiba "Introduction" 4-9; Chiba "Unofficial Postulates" 61.

\(^{56}\) In this chapter the emphasis is on the three-level structure of law.
by a legitimate authority. It usually coincides with State law, but does not necessarily exclude other forms of law authorised and supported by the legitimate sanctioning authority. The distinction between official and unofficial law seems fairly universal.

Chiba subsequently developed his hypotheses into a scheme comprising three dichotomies, namely official versus unofficial law; legal rules (the formalised verbal expression of a particular legal regulation to designate specific patterns of behaviour) versus legal postulates (particular values or ideas specifically connected with a particular legal system which they justify and guide); and indigenous law (law which originates in the native culture of a people) versus transplanted law (law transplanted from another culture or other cultures, either by a voluntary reception or by imposition).

The difference in jural postulates underlying the various legal systems in South Africa is central to the legitimacy crisis of the State law and plays a cardinal role in the interaction between indigenous law and the Western component of the South African law. Therefore, it will be discussed in a separate chapter.

2.b Social Law

Social law is law which originates from social groups or power structures other than the State and which is indirectly recognised and supported by the State. All official law other than State law is first sanctioned by a sanctioning body of its own and then officially recognised and sanctioned by the highest and legitimate legal order.

57 It is interesting that Chiba accentuates the legitimacy of the institution which has the authority to sanction the legal rule.

58 Chiba "Identity Postulate" 39-40.

59 See Part II.II and Part II.III.

60 Chiba Legal Pluralism 131-140; Chiba "Introduction" 4-9.
Social law may be described a quasi-legal forms of regimentation which are embedded in the State or the official legal systems. These are the laws of groups or communities operating outside the regular systems of courts and State law. It is not limited to primitive or indigenous law and may take on different forms. It may broadly be referred to as non-State law. A distinction may be drawn between social law emanating from political normative systems, from the normative systems of non-political organisations and from the normative systems of families.

2.b.i Autonomous Law

Autonomous law is a form of social law which is derived from various sources. First, it may originate from one-sided declarations by individuals who are regarded as an active power centre within a specific social group and may or may not be coupled with private sanctions (for example, rules for visitors laid down by the owner of a private gallery; or rules for employees laid down by a factory). These rules are indirectly supported by the State to the extent that the State may under certain circumstances enforce them.

Secondly, autonomous law may emanate from agreements or conventions. This will be the position, for instance, where the rules created by the social interaction between partners are supported or authorised by the State. If such rules are not be supported by the State, they will not be a source of autonomous law, for then they do not truly reflect the collective agreement between the large social groups involved.

Thirdly, rules of behaviour established by the collective activity of social groups,

61 Allott & Woodman "Introduction" 1.
62 See Podgórecki "Intuitive Law" 72.
63 S Ehrlich 234-241.
64 Timasheff 308-310 312; S Ehrlich 238-241.
enforced by the group and by the State, create autonomous law. Examples of this type of collective action include that of guilds, private schools, or churches.\textsuperscript{65}

\section*{2.b.ii Customary Law}

Customary law comprises both indigenous law and other similar laws of communities which operate outside the formal State and court systems. It is social law which is created by positive morality and ethics. It originates from continuous observance of usages and is not imposed from above. Customary law is the normative self-regulation of a semi-autonomous social field.\textsuperscript{66} Fuller describes it,\textsuperscript{67} by comparison with language, as a "language of interaction"\textsuperscript{68} which emanates from human interaction and finds direct expression in the conduct of men toward one another. Customary law\textsuperscript{69} is essential in understanding State law. Although customary law encompasses more than mere primitive law, on close scrutiny of the varying social contexts presented by modern society, one would find parallels of almost all phenomena that are thought to be exclusively characteristic of primitive law.\textsuperscript{70}

Customary law may be recognised and enforced by the State without it ever having been legislated. Whereas customary law which has been incorporated in legislation

\begin{itemize}
  \item \textsuperscript{65} Sugarman 216-217 describes autonomous law as emanating from "semi-autonomous realms with powers that in some respects resembles [sic] those of the state". These semi-autonomous realms are, for example, village communities, guilds, churches, corporations, local courts, trusts and arbitration. Fitzpatrick 158 refers to it in similar vein and stresses the mutual influence of legal systems and their associated social systems.
  \item \textsuperscript{66} See Allott & Woodman "Introduction" 2, Podgórecki "Intuitive Law" 72, Timasheff 310-314.
  \item \textsuperscript{67} Whether it is official or unofficial customary law.
  \item \textsuperscript{68} Fuller 2.
  \item \textsuperscript{69} Fuller 1-3 5.
  \item \textsuperscript{70} Fuller's customary law seems to comprise not merely customary law in the narrow sense of the word as it is usually understood, but virtually social law generally as set out above. Therefore, his "language of interaction" refers to primitive law, customary law and autonomous law.
  \item \textsuperscript{71} Fuller 33.
\end{itemize}
and applied by State courts (which rigidly follow a precedent system) validly exists independent of the support of the social group from which it originated; true customary law is adaptable and responsive to the changing values of its corresponding social group and will lose its validity once the loss of support by the related social group is proved.

In countries which rigidly adhere to the precedent system, the development and adaption of customary law may be stultified through its application by the courts, even though it has not been taken up in legislation. Indeed, this happened to indigenous law in South Africa. Through a lack of knowledge of indigenous law and through the application of the repugnancy clause, an adulterated indigenous law, not in line with social reality, developed through judicial precedent. This law is also not consistent with the jural postulates which underlie indigenous law.

Custom plays an all-important role in indigenous societies. Popular practice in these societies buttress, sustain and sanction law, albeit through a complicated process in which that which is done becomes that which ought to be done in order to keep up with changing value systems.

There is close connection between custom and the values that underly a community's normative system. Ideally custom should influence the development and creation of State law:

"[I]t goes hand in hand with positive law, creeps into jurisprudence and modifies it. Then the day comes when the theory of modifications is formulated and positive law opens a new chapter."  

72 As, eg, in the Zulu Code.

73 Allott "Popular Law-making" 33; The application of adat law in the State courts of Indonesia has, eg, led to a different type of law, an adat law with a Western structure which can be distinguished from the adat law which is applied in the folk sphere and which has an indigenous structure: see Koesnoe 104.

74 Excerpt taken from Timasheff 312.
However, in reality State law and customs are as a rule not in step with each other. It usually takes longer for law to be brought in step with changing societal values, than it takes customs. Nevertheless, it should be remembered that the courts should be able to keep law in line with changing values by employing considerations of public policy and that custom and unofficial customary laws should serve as indication of changing societal values which form the foundation of considerations of public policy.

3 UNOFFICIAL OR LIVING LAW

Unofficial laws are the bodies of rules and modes of settlement which are at best tolerated and at worst prohibited by the State. These laws apply both in undeveloped and in highly developed or sophisticated legal orders. In terms of the positivistic epistemology, unofficial law should be dismissed as consisting of non-legal norms, it not being derived from a basic Kelsenian grundnorm, or from Hart’s ultimate rule of recognition or Austin’s sovereign.

Chiba’s unofficial laws, which are not sanctioned by the legitimate highest authority and yet sanctioned by the community which supports it, form the second tier in his three-level structure of law. The sanctioning of unofficial law by the community concerned may be of a conventional, formal and conscious structured nature, or may show itself in unconscious behavioural patterns of that community. However, all social practices do not constitute unofficial law in the sense referred to here. Unofficial law comprises those laws which have the ability to influence official law and the postulates which underscore it. Unofficial law directly or indirectly influences the effectiveness

75 See Kidder 42-43.
76 See Part II.IV.6.
77 Allott & Woodman "Introduction" 2.
78 Chiba "Introduction" 6; Chiba Legal Pluralism 139.
79 It may undermine, oppose, modify or supplement official law.
of official law because it reflects more closely the values of that section of the community which adheres to it.80

The most important example of unofficial law in South Africa is the law administered by the Courts of the Ward Headmen and the people’s or community courts. Other unofficial law in the indigenous context, is the law administered by the official Courts of Chiefs and Headmen which have a very limited jurisdiction and in fact apply unofficial indigenous law in those cases where they act outside their official jurisdiction.81

The unofficial law which forms the basis for the discussion of jural postulates is pre-colonial indigenous law. It is also referred to as such. This law is regarded as the true indigenous law from which the underlying jural postulates are extricated. However, this does not mean that indigenous law is static. On the contrary, it is an adaptable legal system which has developed over the years, sometimes in accordance with its underlying postulates, sometimes in accordance with Western postulates. In the latter case the result was inevitably a distorted law, far removed from the true values which form the basic axioms of indigenous legal reasoning.

4 CONCLUSION

One should not be blind to the strengths of State law and the weakness of people’s law. All forms of law functioning in a single community have their limitations and none has advantages which are so overpowering that they would be justified to grant it a monopoly or a position of hegemony.82

80 One should perhaps rather define it as the law with the inherent ability to supplement, oppose and influence the official law.

81 See Part I.IV.4 for a discussion of unofficial law in South Africa.

82 Sack 3.
Different laws have different functions to fulfill, functions for which they are best suited. "Other laws" need not of necessity be in conflict with State law; they may complement State law and direct the development of State law in harmony with basic values underlying non-State legal and social systems. It is not only the negation of the role of living law, but also ignorance of grass-roots values and an unwillingness to keep official law in step with such values, which sustains the illegitimacy of the South African legal system.

Legitimacy of a legal order should not be viewed solely in terms of the legitimacy of the authority from which law emanates, or solely in terms of the legitimacy of the legal system itself. Legitimacy concerns not only the content of the legal norms, but also their origin and application; it concerns norms, process and values. For example, should the values which underpin the official legal system be consonant with the values to which the majority of the community subscribes, the official legal system may nevertheless still be regarded as illegitimate because it originated through illegitimate means (such as through the historical imposition of a foreign legal order upon an existing legal order) and because the official power structure from which the law emanates is illegitimate. The source of illegitimacy will probably be removed once the illegitimate State power which imposed the legal order and from which the law emanated, is replaced by a legitimate State power.

The idea of value consensus is fundamental to most discussions of legitimacy: Smith

83 Van der Westhuizen "Opmerkings" 3.

84 Values are also reflected in norms and process. D'Entrèves 698 observes that "in countries where there are wide ideological discrepancies, radical contrasts of interests, and little or no agreement on basic values, the issue of legitimacy is bound to be put, as it were, within brackets, or explained away by paying lip-service to the principle of popular sovereignty as a kind of deus ex machina".

85 In South Africa this source of legitimacy has now been removed, but the basic values which underscore indigenous law and western law remain inherently different and sometimes even in conflict.
and Weisstub\textsuperscript{86} point out that the concepts of consensus (sought through the political process), and rationality (embodied in the science of legal precept) are both fundamental to legitimacy. D'Entrèves\textsuperscript{87} regards the body of accepted beliefs and values, which induce men to obedience and to the acceptance of the exercise of power as "just and proper" in a given society, as the basis of legitimacy. He regards legitimation as "the appraisal of action in terms of shared or common values in the context of the involvement of the action in the social system". Van der Westhuizen\textsuperscript{88} gives what he modestly regards as an over-simplified definition of a legitimate legal order, namely a legal order accepted as law by the majority of the population to which it applies; and obeyed not merely because of fear or threat of force, but because the nature and content of the system as a whole is consistent with the community's sense of morality and justice and as such accepted and trusted by the majority of the community, even if they do not agree with certain aspects or individual norms of the system. In the same vein Cotterrell\textsuperscript{89} views a legitimate legal system as a "consistent and comprehensive rational system of regulation which the community believes to promote the most fundamental values of justice and order. And Hund and Kotu-Rammopo\textsuperscript{90} see the legitimacy of a legal order as being determined by the beliefs and perceptions of the community.

All these definitions share an emphasis on the acceptance of certain fundamental values by the majority of the population. These values pertain to authority, justice, order and morality. As will be indicated below, there exists a conflict between the Western and indigenous perceptions of basic values.\textsuperscript{91} In its essence this conflict is

\begin{itemize}
  \item \textsuperscript{86} Smith & Weisstub 397.
  \item \textsuperscript{87} D'Entrèves 688.
  \item \textsuperscript{88} Van der Westhuizen "Opmerkings" 3.
  \item \textsuperscript{89} Cotterrell 84-87.
  \item \textsuperscript{90} Hund & Kotu-Rammopo 197.
  \item \textsuperscript{91} See Part II.II and II.III for a general discussion of jural postulates.
\end{itemize}
a fundamental conflict between the jural postulates which underscore Western law and indigenous law. Moreover, the very foundations of the jural postulates underlying Western and indigenous law are different and give rise to an essential difference in the so-called invariable characteristics of the different legal systems. In a situation of legal pluralism, this difference in the fundamental values gives rise to a continuing legitimacy crisis of the official legal system, even though there may be a legitimate political order in power.

In the following chapters some jural postulates which underly indigenous and Western law, as well as the foundations of these postulates will be discussed. The postulates which will be discussed do not constitute an exhaustive list, but were merely selected to illustrate the different value systems which underscore indigenous and Western legal orders. Reference will also be made to some examples to illustrate the effect those different values have on approaches to law and legal institutions. Attitudes towards witchcraft and marriage, for example, illustrate a very real disparity in perceptions of morality. Diverse notions of equality affect conceptions of justice. Religious orientations and perceptions of natural law, human rights and the rule of law also are important concepts which have to be assessed in this regard. Finally, the effect of the new political dispensation on perceptions of the official legal system, and the effect of the Bill of Rights, which is phrased in an exclusively Western idiom, will also be commented on.
CHAPTER II

JURAL POSTULATES

1 Introduction

2 Jural Postulates in Western Law
   2.a General
   2.b Diffuse Postulates
   2.c Specific Postulates
      2.c.i Constitutional Law
      2.c.ii Private Law
      2.c.iii Criminal Law
      2.c.iv The Interpretation of Statutes
      2.c.v Procedural Law

3 Jural Postulates in Indigenous Law
   3.a General
      3.b.i Diffuse Postulates
         (i) Harmony of the Collectivity
         (ii) Superhuman Forces are Superior to Man
         (iii) The Identity Postulate
      3.b.ii Specific Postulates
         (i) Status Order
         (ii) Family Idea
         (iii) The Hamlet Spirit
         (iv) Common-kin Principle
         (v) Esteem for the Ruler

4 Summary

1 INTRODUCTION

According to Pound jural postulates embrace the fundamental purposes of law and
constitute starting points for legal reasoning.¹ In his treatise on the law of primitive man, Hoebel² describes them as self-evident truths, based on societal values of what is desirable and what is undesirable. Jural postulates are the basic axioms underlying law. Studies of these axioms focus on values and should ultimately accord with studies of religion, cosmography, and morals in a particular society.³ They form an integral part of the structure of law and a conflict between such jural postulates are often reflected in a political struggle.⁴

Chiba⁵ presents jural postulates as the third structural tier of law - the other two being official law and unofficial law. According to him jural postulates, or fundamental conditions, are the value systems or value principles which are specifically connected to and underly both official and unofficial law, and which justify and orientate all law. These postulates may and should to an extent coincide in official and unofficial laws in a given country, but are not necessarily consonant in all cases, especially if the close relationship between law and culture is taken into account. Jural postulates are also not immutable in that they may change in order to improve their supported legal system. These fundamental underlying principles direct legal development. They are dynamic and could adjust in accordance with the changing values, needs and

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¹ See Pound 112. On the one hand Lloyd 748-749 criticises his view that jural postulates are, as it were, pre-legal because they regard these postulates as being derived from existing law. On the other hand criticism has been levelled against the very expression jural postulate. According to Sawer 148 it suggests that these postulates are wide generalisations of legal principles from which the courts can deduce specific legal rules. He is of the opinion that since these postulates rather constitute widely held assumptions pertaining to social demands which the law should enforce, they should rather be termed social postulates. However, it should be borne in mind that law and its underlying postulates are but an aspect of a community's culture and that as such they should reflect a society's value systems.

² Hoebel 13.

³ Bohannan *Anthropology* 288; see also 287.

⁴ Hoebel 17. Wille 13-19 refers to jural postulates as "laws other than national law" which influences the development and application of national law.

⁵ Chiba "Introduction" 6-7; Chiba *Legal Pluralism* 87 138-140 178.
aspirations of the community. Although they may in fact conflict with one another, they should present a compromise of the diverse values in a community, if that community is to be socially integrated. However, in South Africa, which is characterised by cultural diversity, it is not so easy to obtain such a value consensus for the very reason that values are culturally acquired.

Jural postulates are fundamentally applicable, which means:

(i) that without being incorporated in specific legal norms, they are, or should ideally be respected, sometimes intuitively, in all judicial and administrative decisions as well as in legislation; and

(ii) that they underly specific legal norms and form the basis of interpretation of such norms and that their application can be suspended only where specific legal norms make provision for such a suspension. In South African context this is usually so in the case of legislation.

The principles of natural law, justice and equity constitute jural postulates in Western jurisprudence and are as such accepted and sanctioned by the State authority. Sacred truths and precepts constitute jural postulates in religious laws. Social and cultural precepts concerned with the clan unity, bilineal descent and seniority are jural postulates.

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6 Pound 112-113 116-118 133-134; see also Lloyd 528-531.

7 One should bear in mind that whilst Pound is of the opinion that law embodies the consciousness of a community as a whole, he also views society as a homogeneous, static and cohesive entity with "shared values and traditions and a common cognition of reality": see Lloyd 529; see also Seidman Jural Postulates 16.

8 Hoebel 13-17; Pound 133-134; see also Lloyd 529ff, Ogwurike 134. It is here that Pound's view of the function of law as the balancing of conflicting and competing interests in a community is best illustrated. The importance of public policy in internal conflict management in South Africa also illustrates the role of jural postulates in the balancing of different interests. See Part I.IV.3.c.

9 Seidman Jural Postulates 16.

10 Du Plessis Juridiese Relevansie 797 821-822.

11 According to Hoebel sacred truths and precepts constitute jural postulates also in primitive laws.
postulates in indigenous law.

These basic axioms may be usefully employed to determine the legitimacy of a legal system and the role and place of unofficial laws in a situation of legal pluralism. In a positivistic dispensation, postulates which compete or conflict with the postulates accepted by the official State authority are, as a rule, rejected as being irrelevant to law, and are relegated to the field of anthropology. But it should be borne in mind that at least some integration of the legal postulates underlying all laws (official and unofficial) is required if the people of a country are to maintain their national identity. One of the reasons why the legitimacy of the present South African legal order is disputed, is the fact that it completely and consistently ignores not only the operation and applicability of unofficial law, but also the underlying value systems attached to the unofficial laws in the country. Although official law may be so dominant that its rejection of unofficial law is perceived to be justified, it is usually unofficial law which threatens the whole structure and effectiveness of the official legal system.

Generally two ideal types of jural postulates may be distinguished, namely, specific jural postulates and diffuse jural postulates. The former are postulates with specific relevance to specific legal rules. The latter are general postulates which support specific postulates as well as law and social norms in general.

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12 See also Chiba "Conclusion" 387-388.
13 See Chiba "Introduction" 7, Chiba *Legal Pluralism* 139-140.
14 However, rejection of unofficial laws rarely results in its "annihilation": see Chiba "Conclusion" 388.
15 This was practically experienced in South Africa when the people's courts kept functioning underground after it had been banned by the authorities. (See generally Part I.IV.4. above). It follows that there should be a recognition of the existence of the jural postulates of unofficial law.
16 Chiba *Legal Pluralism* 94-95; Chiba "Three-level Structure" 351-355; Chiba "Unofficial Postulates" 64.
2 JURAL POSTULATES IN WESTERN LAW

2.a General

The jural postulates discussed in this chapter do not form an exhaustive list, but are used to illustrate the difference between the values which underlie Western and indigenous law. These postulates form the important framework within which the interaction of Western and indigenous law should be seen. In the discussion of the Western jural postulates reference will be made to their possible application in, or their relevance to indigenous law.

Du Plessis\textsuperscript{17} regards jural postulates (wesenlik gelykheidsnorme) in Western law, as "kanale waarlangs verdere optredes ... in 'n hele aantal ... konkrete situasies verrig kan word, die legale uitgangspunt synde dat hierdie grondnorme (qua kanale) eerbiedig sal word". These fundamental precepts are created and positivised on the strength of the existential equality of relations. In South Africa jural postulates are historically founded in the Graeco-Romano and Christian-Judaic traditions.\textsuperscript{18}

2.b Diffuse Postulates

To preserve order and to do justice are not only regarded as basic axioms which support specific jural postulates in Western law as well as law and social norms in

\textsuperscript{17} Du Plessis \textit{Relevansie} 820ff. Du Plessis' grondnorme or jural postulates described above should be distinguished from Kelsen's grundnorm: Du Plessis \textit{Relevansie} 796. Van der Merwe 109-110 describes the grundnorm as the "transcendental-logical condition" or presupposition which forms the reason for the objective validity of legal norms. It does not form the basis of legal reasoning, or the basic value system underlying law and does therefore not determine the content of legal norms. The grundnorm only prescribes the manner in which a legal norm should be created and is for its existence dependent on its effectiveness by and large.

\textsuperscript{18} See Du Plessis \textit{Relevansie} 821, Du Plessis "Geregtigheid" 546.
general, but are often regarded as the main objectives of law. These values may be regarded as legitimating values which provide justification for the existence of a legal order. Demands for the consideration of particular other values do not threaten the legitimacy of a legal system, as long as those who demand such consideration recognise the fundamental superiority of the basic values of justice and order underlying the legal system. The legitimacy of a legal system is threatened when the values demanded are considered to be more important than the values underlying the legal system and/or where the legal system cannot accommodate the values demanded and the values upon which the legal system is based in a rational and consistent manner, to maintain the systematic character of the law on which legal domination depends.

Although justice and order do not always coincide and a proper balance between them should be maintained, they may for purposes of a comparison between Western and indigenous jural postulates, be seen as an integrated whole. Likewise, fairness, reasonableness, generality, equality and certainty may be regarded either as separate specific postulates, or as postulates of justice and part of this integrated system of values which forms the starting point for legal reasoning in Western law. Wille adds to these postulates of justice that law should be in accordance with public opinion, a postulate which emphasises the important role of public policy in legal development and reform.

19 Hahlo & Kahn Legal System 25 26; see also Van der Westhuizen "Opmerkings" 5 on the close relationship between justice and the maintenance of order and stability. It seems that also Du Plessis regards justice as an important diffuse postulate. He (Du Plessis Relevansie 827) makes the following statement: Hierdie geregtigheidsvorme is tewens nie grondnorme an sich nie maar leidingsfunksies (of rigtende prinsipes) vir die handelinge van staatsowerheid en -burgers in hulle konkrete doen van geregtigheid (wedersyds teenoor mekaar) langs die weg van die instellings (waaronder inter alia grondnorme).

20 Cotterrell 87 88. Chiba Legal Pluralism 140 also remarks that a minimum integration of the unofficial and official jural postulates is required in order to maintain the legitimacy of the State law.

21 Or, according to Hahlo & Kahn Legal System 31-35, as criteria with which law must comply in order to be just; see also Willie 13-16.

22 Willie 15-16.
Over the years various theories on the concept of justice have been developed. The primacy of the individual and the concept of equality has played an important role in most of these theories and it is in this sense that the dichotomy between Western and indigenous jural postulates reveals itself most explicitly.23

Aristotle's concept of justice is often used as a framework for examining different conceptions of justice.24 He emphasised the connection between justice and equality and distinguished between distributive and corrective justice.25 Distributive justice is concerned with the fair distribution of benefits and burdens and involves the relationship between the society and individuals. It comprises the principle that equals should be treated equally and unequals unequally (which principle presupposes a fundamental right to equality).26 Corrective justice is directed at the restoration of the equilibrium by redressing unfair distribution. The former entails political or social justice, whilst the latter comprises justice administered by the courts.

The pre-eminence of the individual and the concept of individual rights originated in the writings of Locke and Kant and in the documents and Constitutions of the American and French revolutions. These notions have since dominated legal philosophy in the west.27 It comes as no surprise that prevailing modern liberal concepts of justice focus on the maximisation of individual liberty subject to the limitations which are necessary to protect such liberty. It is also not surprising that the

23 It should be borne in mind that although the primacy of the individual and absolute individual freedom dominate modern liberal jurisprudence, Neo-Marxist and Critical-Legal-Studies theorists have criticised the mainstream liberal theories: see Lloyd 857-861 935-941. Within the South African context the conflict between liberal and communitarian approaches to human rights are of relevance: see Du Plessis & Corder 33-39.

24 Lloyd 456-357.

25 Van der Westhuizen "Opmerkings" 5; Van der Vyver "Regter" 8-11.

26 The concept of equality in justice is also incorporated in the Ulpian concept of justice evinced in the Corpus Iuris Civilis: lustitia est constans et perpetua voluntas ius suum cuique tribuens. Justice is the constant and unceasing will to give everyone his due (D 1 1 10; see also Inst 1 1 pr). See Genn 194-195, Clark 61-64.

27 See Lloyd 379-381.
specific postulates which underscore Western law (some of which are discussed below) are often just that: limitations on individual liberty in balancing conflicting interests (the principle that equal liberty should obtain) and in the protection of liberty itself.

Yet it should be remembered that equality and liberty are both, separately entrenched in the Interim Constitution and that this may lead to practical tension and conflict between the two concepts. Liberal equality entails the dominance of freedom, whilst socialist equality allows for fewer limitations of equality by individual freedom. This tension comes to the fore especially in the law of contract. It is solved by either limiting individual freedom in the interest of material equality (thus obtaining socialist equality), or by limiting material equality for the sake of liberty (thus obtaining liberal equality).

For purpose of comparison with the indigenous concept of law and indigenous jural postulates, the theory of justice of the modern Western liberal philosopher, John Rawls is used as example.

In his assessment of the role of justice in a society, Rawls makes a distinction between the concept of justice and conceptions of justice. The concept of justice is seen as an objective phenomenon which entails the maintenance of a balance between competing claims. This concept encompasses a set of principles which assigns rights and duties and which defines the appropriate division of social advantages and distribution of burdens which is necessary for social co-operation. In contrast, conceptions of justice are subjective interpretations of the role of the principles of justice in a particular situation.

28 See Hawthorne 3-5.

29 See generally the discussion of Hawthorne 12-23 on the tension between equality and freedom of contract.

30 See generally Rawls 3-22.
The principles of justice are derived from a hypothetical ideal original position of equality in which free and rational people agree on the principles which should organise society.\textsuperscript{31} The principles are:\textsuperscript{32}

"First: each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty of others.
Second: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all."

The basic liberties of the first principle are political liberty (to vote and to be eligible for public office), freedom of speech and assembly, liberty of conscience and thought, freedom of the person and the right to personal property and freedom of arbitrary arrest in accordance with the rule of law. These liberties are fundamental rights which all people have.

Once equal liberty is attained, equal opportunities must be given to persons of similar skills, ability and motivation. Also contained in the second principle of justice is the difference principle which requires that inequalities must be arranged to the greatest benefit of the least advantaged.\textsuperscript{33}

Rawls points out that for a theory of justice to be useful, it must be general, universally applicable, publicly known, able to impose an ordering on competing claims, and that it must have finality.\textsuperscript{34} Proceeding from the premise that his is a universally applicable

\textsuperscript{31} It is their reason which induces individualistic, egocentric individuals to realise the necessity of social control to restrain excessive greed and maintain order in a society. Agreement is the rational way to establish such social control.

\textsuperscript{32} Rawls 60; see generally Rawls 60-67, Heyns \textit{Difference Principle} 29-31.

\textsuperscript{33} See Heyns \textit{Difference Principle} 30-34, Lloyd 356-367.

\textsuperscript{34} Rawls 130-136; Genn 202.
theory, indigenous laws would have to be assessed within the framework of justice as an objective set of principles which govern the assignment of rights and duties and regulate the distribution of social and economic disadvantages. It may indeed even appear that the ideals of justice as we understand them in a Western sense are to an extent realised in indigenous law. But in his theory, in typically Western liberal fashion the individual is awarded a central role and individual freedom takes priority over the greater good shared by the community.35

Rawls36 makes provision for the possibility that individuals in the same community may have different conceptions of justice: they may have different views on the content of the principles which should govern their association with each other. Yet, he is of the opinion that individuals or groups of individuals who have different conceptions of justice, should still agree on the basic need for a set of principles to assign basic rights and duties and should agree that "institutions are just when no arbitrary distinctions are made between persons in the assigning of basic rights and duties and when the rules determine a proper balance between competing claims to the advantages of social life" (my emphasis).37 Thus, he foresees the possibility that individuals or groups of individuals may differ on the basic concept of justice only to the extent to which their notions of "arbitrary distinctions and proper balance" may differ.

Indigenous laws are underscored by wholly different jural postulates. Indigenous starting points for legal reasoning are different and this makes the conceptions of law and justice in an indigenous context very different to the Western conceptions. Not only in the general conceptions of justice put forward by Rawls, but also in the concept of justice does the individual take primacy over the common good and is

35 Liberal justice asserts the primacy of the individual and his inalienable human rights and stresses mechanisms to check and balance State rule.

36 Rawls 5-6.

37 Rawls 5.
equality assigned a central role. This is not consonant with the most important diffuse postulate of indigenous law, namely harmony of the collectivity in which the collective good takes primacy over individual claims. Judged then by Western standards of justice (whether these are the standards exposed by Rawls or those posed by any other Western philosopher), many indigenous laws will be found to be unjust and should consequently be reformed or abolished. By the same token, if judged within the framework of indigenous jural postulates, Western law may be regarded as falling short of the standards of justice of indigenous jurisprudence.

The postulates of justice and order determine the content of public policy in a community. Legal development should reflect these societal values. However, these values do not only vary in different societies but also at different times. Consequently, the content of legal ideology may vary and thus burden legal institutions charged with the administration of justice, even in homogeneous societies which are socially integrated.

It is also interesting to take note of conceptions of justice of Pospisil, a legal anthropologist. He identifies three paradigms of justice of law, which he distinguishes from justice of facts. The first is substantive justice which is concerned with the

38 Rawls 504-512; see also Van der Westhuizen "Opmerkings" 5, Van der Vyver "Regter" 8-12, Du Plessis Relevansie 820ff.

39 But, as explained above, the collectivity cannot be seen as an entity separate from its component members. Therefore, it is also not quite correct to speak of the absolute primacy of the collectivity over the individual good. Indeed, indigenous law has other mechanisms to protect the dignity of the individual.

40 See generally Part II.IV.6 on the role of public policy in legal development.

41 Cotterrell 87 88. Although he acknowledges the changeable nature of values or conceptions of justice and order, he does not discuss a heterogeneous society and consequently does not reflect upon the idea that there may be conflicting conceptions of the values of justice and order within the same society. This is the case in South Africa and this is the very reason why the legitimacy of the legal system as a whole is still questioned, despite the fact that a legitimate government is in power. See also Basson & Viljoen 227 228 on the role of societal values in the formation of law.

42 Pospisil Anthropology 240ff.
content of individual precepts or norms;\textsuperscript{43} the second is justice in adjudication which underscores impartiality in and so-called humane application of law; and the third is procedural justice. The last two are concerned with the processes: how legal rules are applied. The first one is concerned with the study of norms. Although the fundamental values of justice are not merely procedural elements of law but also reflect social values, they have generally been centered on procedural aspects of law.\textsuperscript{44}

Indeed, in a society where there is legal pluralism, it is in the practical administration of justice that the conflict between Western and indigenous value systems is most apparent. Aguda\textsuperscript{45} makes the following remark in an assessment of the judiciary in a developing third-world country:

"Here the judiciary has a task, and a very difficult one, of re-thinking and adapting the concept of justice and fair hearing to which they have become accustomed during their learning under the common law so that the concept will be acceptable to the generality of the people they are called upon to serve."

The existence of unofficial legal institutions provides a fine example of the dichotomy that prevails in the Western and indigenous values regarding procedural justice. The functioning of these institutions should not merely be ascribed to political differences and the prevalence of unjust and racial legislation, but also to the different perceptions of the concept of justice. In contrast, the application of unofficial indigenous law by the official Chief's Courts may serve as an illustration of the difference in perceptions of substantive justice prevailing in actual legal norms. Marriage, and other family relations, the law relating to land and criminal law are but a few examples of where this conflict

\textsuperscript{43} As indicated above the premiss of this thesis is that the individual legal norms of Roman-Dutch law, stripped of inequitable legislation, are basically just. Therefore, the content of individual precepts will not be considered in this thesis and no further attention will be paid to substantive justice.

\textsuperscript{44} Cotterrell 85-87 equates order with the subjection of all social and natural phenomena to rational control and justice with fairness, which does not necessarily imply equality.

\textsuperscript{45} Aguda 162.
of value systems comes to the fore.

The introduction of the repugnancy clauses throughout Africa during the colonial period in particular illustrates this conflict in Western and indigenous values. Justice has acquired a very specific meaning in colonial Africa with the introduction of repugnancy clauses in legislation. The criteria which were (and are) used to determine the repugnancy of indigenous law reflect the Western jural postulates that underlie that law. These criteria are justice, morality, equity, good conscience, order, humanity, public policy or natural justice. Whilst the use of a repugnancy clause today has been abandoned by most African countries, it still forms part of the legislation of South Africa and of other countries belonging to the South African Law Association. In fact, the repugnancy clause has been entrenched in the new Interim Constitution.

2.c Specific Postulates

There are various specific postulates which underscore Western law. Some examples may be referred to to illustrate the differences (and sometimes apparent similarities) between the specific jural postulates in Western and those in indigenous law. It should be borne in mind that all the specific postulates in Western law are supported by the principles of justice embodied in the concept of individual freedom elucidated above. This is the very reason why specific postulates are often referred to as postulates of justice.

46 See also Part I.IV.2.a.
47 See Bennett Sourcebook 130-131.
48 These are Lesotho, Botswana and Swaziland. The term was developed by Schreiner J in Annah Lokudzinga Mathenjwa 1970-1976 SLR 25 29H.
Specific jural postulates are often embodied in a written code. An example is the American Constitution in which certain, mostly public-law, postulates are entrenched. These postulates have been regarded as expressions of human rights.

The new South African Constitution entrenches many jural postulates as basic human rights in its Bill of Rights and in the Constitutional Principles. Other postulates of the Western component of South African Constitutional law are embodied in and underlie the common law principles. The jural postulates underlying the common-law principles of constitutional law are, inter alia, the rule of law and the liberty of subjects.

The rule of law encompasses the principle that the law is above the government of the day. Dicey was the first jurist to establish a coherent doctrine of rule of law in the nineteenth century. This doctrine includes three basic principles, namely the absolute supremacy of law as opposed to arbitrary power; equality before the law; and the principle that a constitution should be the result of the ordinary law of the land and that effective legal remedies for the protection of human rights should be provided by the courts. This implies that laws must be clear, pre-pronounced, general in application and impartially enforced by independent courts according to fair procedures.

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50 Du Plessis *Relevansie* 820-821.
51 See Part II.IV, Bennett "Equality Clause" 130.
52 The Interim Constitution is discussed in Part II.IV above.
53 Du Plessis *Relevansie* 822.
54 Hahlo & Kahn *Constitution* 133-146.
56 Wille 14-15 regards these qualities that a rule of law must possess as postulates of justice, thus illustrating the working of justice as a diffuse postulate which underscores the specific postulate of the rule of law.
The International Commission of Jurists perceives the rule of law as a dynamic supra-national concept which comprises the following principles:\(^{57}\) respect by the government for basic human rights; equality before the law; legal certainty; a minimum standard of justice in the exercise of judicial and quasi-judicial functions; the limitation of governmental powers democratic form of government and separation of powers; and an independent and properly qualified judiciary and an independent and properly qualified legal profession. This particular perception of the rule of law has also been referred to as the principle of legality.\(^{58}\)

There are various and controversial interpretations of the rule of law, but the overriding view seems to be that its purpose is the protection of basic human rights. Indeed, Sanders\(^{59}\) describes it as a

"politico-legal code for governmental conduct which is best suited to securing to the individual the highest possible enjoyment of those public claims of which - due regard being had to competing individual interests the necessities of government, and available national resources - may be regarded as fundamental".

Despite the criticism leveled against it, the notion of the rule of law still forms an integral part of modern constitutionalism.\(^{60}\)

This very cryptic description of the rule of law will suffice for a comparison with indigenous or African legality. According to Sanders,\(^{61}\) African legality comprises the politico-legal precept that behaviour of governors and the governed should be in

\(^{57}\) See Sanders "Natural Law" 73, Sanders "Rule of Law" 303.

\(^{58}\) Boule 40.

\(^{59}\) Sanders "Natural Law" 73.

\(^{60}\) See Boule 40-41, Basson & Viljoen 231-235.

\(^{61}\) See generally Sanders "Natural Law" 72-75.
accompany with the values of African social solidarity.\textsuperscript{62} He points out that the principle of African legality is reconcilable with Western legality as embodied in the rule of law. Although some of the principles of the rule of law as expounded by the International Commission of Jurists or Dicey seem foreign to traditional indigenous law,\textsuperscript{63} the value of human dignity which the rule of law aims to protect is not foreign to African legality which is as conscientiously committed to the dignity of man. The rule of law gives primacy to the individual and the protection of individual rights, but emphasis is on humanism and care for "the person in society"; and indigenous legality concerns communalism, but is underscored by humanism.

It is true that whilst indigenous law accentuates communalism, it does not ignore the individual, the person. Julius Nyerere\textsuperscript{64} once said that in African society

\begin{quote}
"[n]obody starved, either of food or of human dignity" and, elsewhere,\textsuperscript{65} that "[i]n our traditional African society we were individuals within a community. We took care of the community, and the community took care of us."
\end{quote}

Kenneth Kaunda\textsuperscript{66} too emphasised the importance of the individual in indigenous society:

\begin{itemize}
\item \textsuperscript{62} This is consistent with the diffuse postulate of indigenous law, harmony of the collectivity. Sanders "Natural Law" 73 points out that although present-day situations in Africa show a radical digression from the principle of African legality this does not detract from the basic value of the principle which should still be regarded as a mission in itself.
\item \textsuperscript{63} The concepts which seem foreign to indigenous law are: individual human rights (see Part II.IV); separation of powers (in indigenous law the ruler has the highest judicial powers, legislative and executive functions: see Part I.II.4.a and Part II.IV); and a separate legal profession (formal legal representation is foreign to indigenous law: see Part I.II.4.a). Also some of Dicey's principles seem foreign to indigenous law: The ruler in indigenous law falls outside the realm of private law: see Part I.IV.4.a; conceptions of equality in indigenous law and Western law differ: see Part II.IV.; the very basis of Western and indigenous constitutional law differ: see Part I.II.4.a.
\item \textsuperscript{64} Nyerere 163.
\item \textsuperscript{65} Nyerere 166.
\item \textsuperscript{66} Kaunda 25.
\end{itemize}
"I am deeply concerned that this high valuation of Man and respect for human dignity which is a legacy of our tradition should not be lost in the new Africa."

It may be that African legality and the rule of law are both aimed at the protection of human dignity. But the concept of humanism in indigenous communities, underscored as it is by the postulate of harmony of the collectivity, cannot be likened to the Western concept in which the individual is never really regarded as a person in society. In indigenous law the concept has to be assessed with reference to traditional social structures in which the individual is in the first instance regarded as a component of a larger whole and in which the community or group cannot be separated from its individual components.

The fact remains that although the individual is given primacy in Western jurisprudence, protection of individual interests is in the final analysis devoid of humanism - even humanism in the Western sense. Protection is through a dispassionate legal system and indifferent legal procedures which stand detached from the individual whose interests they endeavour to safeguard. And in this sense African legality and the rule of law are not reconcilable.

Diamond has observed that,

"[p]rocedure is the individual's last line of defense in contemporary civilization, wherein all other associations to which he may belong have become subordinate to the state. The elaboration of procedure then, is a unique, if fragile, feature of more fully evolved states, in compensation, so to speak, for the radical isolation of the individual." (my emphasis).

Nevertheless, some principles of the rule of law (or custom) are applicable in indigenous society. Thus there is respect for indigenous dispute-resolution institutions;

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67 African humanism and the concept of "ubuntu" are discussed in more detail in Part II.III.2.

68 See also Nyerere 166.

69 Diamond "Rule of Law" 222.
the making of laws is subject to public debate and concurrence of the ruler's council; and the ruler cannot act despotically.\textsuperscript{70} However, the reason why these principles are upheld is that the ruler has a sacred position in the community. This must be seen in conjunction with the fact that there is no separation of powers and that in indigenous societies the ruler is at the apex of judicial, legislative and executive power in society.

It explains on the one hand the respect for judicial and political institutions. On the other hand the ruler, who is regarded as the vital link between the community on earth and the spiritual world cannot through his tyranny sever the ties with the people, thus disturbing the equilibrium in the collectivity as well as the equilibrium with the deceased ancestors.\textsuperscript{71}

2.c.ii Private Law

The jural postulates underlying private law may broadly be described as principles of equity.\textsuperscript{72} Equity, in this sense, should not be equated with institutional equity, as known in English law - that is, equity as a system which is distinct from and often opposed to common law. Equitable legal principles are principles which are wide enough to accommodate various situations in different circumstances and are based on conceptions of ideal justice.\textsuperscript{73} Being based on conceptions of ideal justice these principles are directed at the balancing of competing interests by delimiting individual freedom.

(i) The first principle of equity, or specific jural postulate is that nobody should be

\textsuperscript{70} See, eg, Heyns \textit{Civil Disobedience} 609-614 on the role of rebellion as a check on the tyranny of the ruler in indigenous society.

\textsuperscript{71} See generally Part II.II.3.b.i(i) and (ii) and 3.b.ii(v); see also Ayittey x:xvi 72 179 264.

\textsuperscript{72} See Du Plessis \textit{Relevansie} 832-833, Wille 16-19.

\textsuperscript{73} Wille 16. He explains that although the principles of equity and of natural law are both based on the conception of ideal justice, principles of equity are formulated by man and are not, like the principles of natural justice, instinctively known to all mankind.
unduly enriched at the cost of another.\textsuperscript{74}

Myburgh\textsuperscript{75} gives some examples in which the concept of undue enrichment in indigenous law comes to the fore. He explains them as cases where the property of one group has been used for the benefit of another group. This happens in the case of isondlo (maintenance)\textsuperscript{76} and the management of the affairs of the group where the ngaka treats a patient without the consent of her group.\textsuperscript{77} These examples provide some difficulty and may perhaps rather be explained by analogy with the Western concept of negotiorum gestio.\textsuperscript{78} Whelpton\textsuperscript{79} too is of the opinion that the examples provided by Myburgh in fact do not pertain to enrichment even though, according to him, the concept does exist in indigenous law. In fact, amongst the Bakwena of Hebron, a person who pays money to another under the wrong impression that it is due has a remedy to reclaim it.

It is tempting to say then, that this specific postulate of Western law also underscores indigenous private law. However, it remains difficult to explain indigenous institutions by analogy with Western institutions and concepts because indigenous law is shaped by postulates wholly different from those that underly Western law. Moreover, one always runs the risk of distorting the indigenous institution in order to force it into the Western compartment.

\textsuperscript{74} In D 50 17 206 and D 12 6 14 it has been stated that iure naturae aequum est neminem cum alterius detrimento et iniuria fieri lucuptiorum.

\textsuperscript{75} Myburgh Papers 92.

\textsuperscript{76} Eg, where a child stays with, and is supported by her mother’s group, whilst in fact her father’s group has the plenary guardianship over her and has the duty to support her. It should be borne in mind that in indigenous law guardianship falls within the group’s patrimony.

\textsuperscript{77} Myburgh Papers 113; see also Nathan “Consent and Management” 27.

\textsuperscript{78} For an exposition of the difference between undue enrichment and negotiorum gestio see Van Zyl, \textit{Negotiorum Gestio} 85-110, Wille 642-643.

\textsuperscript{79} Whelpton \textit{Inheemse Kontraktereg} 78-79.
In indigenous law enrichment does not come to bear on individuals of the same constituent group. Members of a group share their rights and duties and basic commodities. Being subsistence communities, individuals will use only what is necessary for their livelihood and no more: this is congruent with African legality. What is produced is evenly distributed in accordance with individual needs. Accordingly, in indigenous law the concept centers on one group's enrichment at the expense of another group. There is no limitation on individual liberty, but on group liberty. And therefore the concept of enrichment focuses on the group and not the individual as in Western society.

(ii) The second postulate underlying Western private law is that nobody should profit from his own bad faith or unlawful actions. This principle underlies the law relating to contract, property, delict and representation. Examples are the principles ex turpi causa non oritur actio or (in pari delicto) and contra suum factum venire, the latter giving rise to the doctrine of estoppel by representation. This postulate limits the principle of freedom of contract and the all-embracing importance of the subjective will of the parties in the law of contract. In fact, the modern contract doctrine is based on the principles of consensualism, freedom of contract and pacta sunt servandas. These three principles should be seen as an integrated whole. The postulate of pacta sunt servanda implies that contractual promises must under all circumstances be honoured and further underscores the principle of consensualism. Parties are free to contract and to determine the content of their transactions. But these values are not absolute

80 See Nyerere 162-171 for an interesting discussion of African socialism.
81 See also Van der Merwe Contract 230-234, Wille 431-435, Zimmermann Obligations 697-715.
82 See Zimmermann Obligations 865-866 for a brief synopsis of the approach of the South African courts to this rule.
83 Van Aswegen "Contract" 457.
84 See generally Zimmermann Obligations 576-577.
values. As indicated above, individual freedom may be limited in the interest of material equality (thus obtaining socialist equality) as well as in public interest. Thus, the courts do not strictly adhere to this principle that nobody should benefit from his own bad faith and exceptions are in fact made where public policy demands it.

It should be remembered that public policy is often used interchangeably with public interest. It is necessary to establish exactly what is meant by these terms. Public policy comprises the underlying value systems of a community. These values could entail that under certain circumstances the welfare of the community as a whole should take primacy over the individual good. But, these values are determined by the postulates of justice. As such public policy in Western law still reflects the primacy of individual freedom. Public policy determines what is in the interest of the public as a whole. Public interest posits a more difficult problem in that it conveys the idea that it could be in public interest only that the communal good be served as opposed to the individual good. However, it may sometimes be in public interest that the individual good takes primacy over the communal good of the society: that would be determined by public policy, by the societal value system. In the law of contract there is a definite movement to the limitation of individual freedom in the interest of the community as a whole.

Thus, public policy may determine that contracts to injure the State or public service, or contracts to defeat or obstruct the administration of justice, or contracts that interfere with the free exercise of individual rights are against the interest of the public. Public policy may also demand that under certain circumstances an individual who is guilty of illegal conduct, may still make use of an enrichment action, in which case

85 Hawthorne 12-24.
86 Zimmermann Obligations 865-866; Wille 636.
87 See Hawthorne 19-21.
individual freedom takes primacy over communal good. This is also in line with the idea that the postulates which underlie private law are principles of equity in that they make the widest possible provision for the accommodation of different situations in different circumstances.

In the indigenous law of contract, unlawful transactions are not allowed and parties may be punished for committing a crime when entering into an unlawful transaction. Whelpton mentions various examples of such contracts amongst the Bakwena, such as a contract to limit the jurisdiction of the courts or a contract to commit a crime. The reason advanced by the informants why a court's jurisdiction may not be limited was that a kraal is built around the ruler, lentswe la kgosi le agelwa lesaka. This is an interesting example of the special position of the ruler in indigenous law, also as vital link between the community and the spiritual world.

Another example in indigenous law of an unlawful contract is a contract which is against the boni mores. The panel pointed out that the reason why such contracts are regarded as unenforceable, is that they are detrimental to the public welfare. This illustrates the postulate of harmony of the collectivity. A contract not to pay bogadi (marriage goods) in a civil-law marriage is regarded as being against the boni mores. It should be stressed again that public policy determines the boni mores and that public policy is but a reflection of the underlying community values - in indigenous society underlining societal welfare and the superiority of the superhuman; in Western society individual freedom and equality. Transfer of marriage goods is incidental, that is, an inevitable accompaniment, to marriage and not a requirement for the conclusion

88 Zimmerman Obligations 865-866.
89 Prinsloo & Vorster "Elements" 8-9; Prinsloo "Exchange" 29-30; Whelpton Inheemse Kontraktereg 93-100.
90 Whelpton Inheemse Kontraktereg 93-100.
91 See Part II.II.3.b.ii(v).
of a valid marriage.\textsuperscript{92} The transfer of marriage goods does not validate the marriage. It is sufficient if the family groups of the prospective husband and wife have reached consensus on its transfer.\textsuperscript{93} In indigenous law the delivery of marriage goods may be regarded as the necessary means to restore the equilibrium in the community which has been (or will be) disturbed by the transfer of the limited authority\textsuperscript{94} of the women to her husband's group.\textsuperscript{95}

Amongst most Tswana, marriage goods were formerly not returned when the wife died

\textsuperscript{92} The obligation to pay marriage-goods does not prescribe (cp the Tswana maxim molato ga o bôle, a debt does not decay): see Church "Betrothal" 88-89, Church "Lobolo" 28. That is the reason why a claim for marriage-goods will not be taken to court. If it is taken to court the claimants will have to pay mangangatlaa (cheek shriners) for wasting the court's time by demanding its unwarranted attention. This is similar to the Western contempt of court: see Church \textit{Marriage} 41-42.

\textsuperscript{93} Church \textit{Marriage} 48-51 discusses an interesting case in which a woman, who had lived as a man's wife for some years, but who had never been married to him because their families would not consent to the marriage, applied to the chief's court for a divorce. The court found that because the man's family had ultimately accepted the woman, and because the man regarded her as his wife, that she was indeed his wife. The court made an order for the division of the property acquired by the couple during their union. Church points out that it should not be concluded that mere acceptance of the woman by the man's family constituted a marriage, because it does not accord with the indigenous law principle that rights can only be transferred with the consent of both the transferor and the transferee. In this case, although the man's group had eventually agreed to the transfer of marital guardianship over the woman, her family had never consented. Although the court made no reference to the position of the children, it appeared from the facts that the woman's family laid claim to them, which should be seen as an indication that there had never been a valid marriage. If there had been a valid marriage the husband's group would have had plenary guardianship over the children. It seems then that in this instance account was taken of circumstances that were not covered by the legal rule in order to obtain a result that would be in accordance with the underlying jural postulate that harmonious relations between members of a community should be maintained. Or could this be an instance where the court decided that no-one should profit from his own bad faith?

\textsuperscript{94} The marital authority which is transferred entails her reproductive capacity, sexual privileges and services in caring for the household: see Church "Lobolo" 28.

\textsuperscript{95} Church "Lobolo" 29; on 33 the author refers to the "stabilizing effect of the transfer of marriage-goods". She subsequently seems to change her opinion when she states that the delivery of bogadi before marriage must be seen as performance in terms of a real contract. Such performance then makes the agreement to give the woman in marriage obligatory: see Church \textit{Marriage} 37, Church "Betrothal" 91. However, these two views are not contradictory. The transfer of marriage-goods has various functions in indigenous law. See for example Labuschagne "Lobolo" 545-550. It may be contended that the stabilising effect is indeed very important and in line with the postulate of harmony of the collectivity and the postulate that superhuman forces are superior to man.
without children or when she was barren. A substitute was sent to take her place, or bear children for her. Even in the highly unlikely case that a substitute could not be found, the marriage goods were not returned. This was also the position in case of divorce which was formerly uncommon in indigenous law. Although it has nowadays, possibly due to Western influence, become more common to get divorced, marriage goods are as a rule not returnable. Church attributes the lack of a general rule that marriage goods should be returned to the fact that divorce was uncommon in traditional law. One may also attribute this to the fact that the underlying purpose with the transfer of marriage goods is to restore the disturbed equilibrium in the group and that it must not be seen as a quid pro quo for the transfer of the women.

The exchange of gifts upon betrothal may likewise in terms of Western-contract doctrine be described as performance in terms of a real contract which renders the agreement between the groups binding. But in indigenous law it can be explained differently. Within the non-specialised indigenous culture abstract consensus has to be transformed to a concrete experience and this happens through the exchange of gifts reflected in the Tswana maxim "lentswe la maabane ga le thlabe kgomo" or "yesterday's word does not slaughter an ox".

There is even more to the exchange of betrothal gifts and marriage goods in indigenous law. The purpose of such exchange is not only to restore the equilibrium, it also forms part of an extended marriage process in which two kin groups are linked together and the delicate relationship between the two groups strengthened. A contract not to pay marriage goods (and possibly also one not to exchange betrothal

96 In former times divorce was not known amongst most of the Tswana and although the machinery for the dissolution of a marriage did exist amongst many communities, divorce was a rare occurrence. The importance to uphold the continuity of a marriage must also be seen in the context of the principle that the harmony of the collectivity must be maintained: not only the harmony within the group to which the woman was transferred, but also the harmony between the two family groups: see Preston-Whyte 193-194.

97 Church "Betrothal" 96; Church Marriage 40-43; see also Preston-Whyte 193-194.

98 Church Marriage 26.
goods) is therefore unlawful because it threatens the relationships within the woman's group, the relationship between the two groups of the prospective husband and wife, and the relationship between the living and the deceased ancestors.

Other examples of unlawful contracts in indigenous law are contracts in connection with land. These are for instance contracts for the exchange of a field or of a residential site for livestock or movable things, and contracts for the selling or letting of a field. Land is not regarded as a negotiable commodity in indigenous law. It belongs to the community as a whole and its use is controlled by tribal authorities. The unlawfulness of such contracts should be seen against the background of the sacred position of land within indigenous communities and the diffuse postulate that superhuman forces are superior to man.99

(iii) Another postulate which underscores the Western component of private law is that "an error in a transaction cannot prevail over the truth" which gives rise to the assumption that "the intention of persons override their language or description". Zimmermann100 describes consensus as the "core concept of the modern law of contract". Consensus refers to a balance between the subjective attitude of the parties and their objective declarations; a balance between legal certainty (the giving effect to objective indications of the will of the parties) and equity (the giving effect to the true will of the parties).

Indigenous law, by analogy with the Western concept (and in line with its non-specialised character), knows only real contracts. Liability ensues only where one party has in fact partially or totally fulfilled his obligation.101 Although a mere agreement (nuda pacta) cannot be enforced in indigenous law, consensus, or the

99 See part II.11.3.b.i(ii); see also Prinsloo "Exchange" 29-30, Nyerere 166 167; Nyerere 53-58 on land and communal ownership.
100 Zimmermann Obligations 563; see also generally 563-565.
101 Prinsloo & Vorster "Elements" 6-7 10-11; Whelpton inheemse Kontraktereg 81-83.
subjective meeting of the minds plays an important role in their law of contract. In indigenous law consensus is reached by an extended process of deliberation between the contracting parties and between the parties and members of their respective families. In Tswana law this process is described as "go tshitsinya", which literally means "to introduce". Contracting parties must actually be present physically when consensus is reached; it cannot be reached telephonically or by mail or even by the nod of a head in the presence of the other party. Further, the object of the contract must be physically pointed out. Because the whole process of reaching consensus and concluding a contract is concretised, it is much easier to determine the real will of the parties. In fact, a panel of experts for the Tswana was nonplussed when the idea was put to them that one contracting party could make a mistake about the identity of the other party or about the identity of the object of the contract.

Pound also put forward some jural postulates which underscore private law. Although these postulates do not constitute an exhaustive list, being based on individual claims, they are useful indicators of the differences between the postulates intrinsic in Western law and those in indigenous law which are put forward by writers such as Hoebel, Chiba and Myburgh. These postulates concern possession, property, legal transactions and relating relations and, what he terms "wrongs" in Western society. The first four postulates have been referred to as generalisations pertaining to the concepts of right and justice presupposed by so-called civilisation. The prevalence of individual liberty and equality in fact comes to the fore in an analysis of

102 Traditionally parties to a contract consisted of groups. However, individual property (eg clothes, ornaments, animals) has become increasingly recognised and individuals are nowadays allowed to conclude contracts with regard to such property: see Prinsloo & Vorster "Parties" 21-22.

103 See Whelpton Inheemse Kontraktereg 81-83.

104 Whelpton Inheemse Kontraktereg 85.

105 Pound 115 points out that from time to time it becomes necessary to formulate new postulates for newly asserted claims in modern societies. However, for a comparison with indigenous law the first five postulates will be taken as examples.

these postulates. Pound's main specific jural postulates are the following:

1. In civilized society men must be able to assume that others will commit no intentional aggressions upon them.
2. In civilized society men must be able to assume that they may control for beneficial purposes what they have discovered and appropriated to their own use, what they have created by their own labor, and what they have acquired under the existing social and economic order.
3. In civilized society men must be able to assume that those with whom they deal in the general intercourse of society will act in good faith and hence
   (a) will make good reasonable expectations which their promises or other conduct reasonably create;
   (b) will carry out their undertakings according to the expectations which the moral sentiment of the community attaches thereto;
   (c) will restore specifically or by equivalent what comes to them by mistake or unanticipated or not fully intended situation whereby they receive at another's expense what they could not reasonably have expected to receive under the circumstances.
4. In civilized society men must be able to assume that those who are engaged in some course of conduct will act with due care not to cast an unreasonable risk of injury upon others.
5. In civilized society men must be able to assume that those who maintain things likely to get out of hand or to escape and do damage will restrain them or keep them within their proper bounds."

Although the postulates put forward by Pound in some instances seem to apply in indigenous law, there are others which clearly do not correspond with those in indigenous law.

The first two postulates may be regarded as ancient demands on security of property and the person. These postulates focus on the Western legal notion of personal

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107 Pound 113-115.
108 Sawer 147-148.
liberty and equality and the right to personal property. The protection of human
dignity in indigenous societies has been discussed at some length above. An
interesting phenomenon of indigenous law, which conflicts with Pound’s first postulate,
is that of self-help to obtain private satisfaction for a delict or public satisfaction for a
crime. Intentional aggression in the form of feud-action may be committed with
impunity, against a person or against his property in order to obtain satisfaction for the
infringement of personal injury. This could be construed as a means to restore the
unsettled equilibrium in the group and to restore relations with the ancestors.

Today the phenomenon of self-help still occurs amongst many indigenous people.
Amongst the Swazi of the former bantustan KaNgwane, adulterers caught in the act
and witches or sorcerer may still be killed summarily. An adulterer or thief caught
red-handed may also be marked by thrashing him on his back. The idea is to leave

109 It is assumed that Pound did not have such a narrow interpretation in mind so as to exclude
intentional aggression in self-defence or in necessity, but that he focussed rather on a much
broader concept of human dignity and personal freedom.

110 See Gluckman “African Traditional Law” 29-40, Myburgh Papers 14 18-23 113-116 and the
examples discussed on 31-49.

111 Indeed, in the case of violation of a female’s dignity animals of the perpetrators’ group may be
seized and ritually slaughtered to heal the injury through lustration: Myburgh Papers 93 94.

112 Today the practice of sorcery and witchcraft (and witch killings) occur commonly throughout
South Africa and the belief in magic is still strong. Although it was originally not known to the
Bushman, it became known to them and became part of their culture through contact with the
Bantuspeakers. In 1992 seven !Xu men of the Schmidtsdrift area were found guilty of the murder
of a !Xu sorcerer. It appeared from the evidence that the killing took place with the blessing of
the community and that it was not reported to the police. Vorster “Towery” discusses this case
at length. The increase in witch-related killings in the former bantustan of Venda prompted the
Human Sciences Research Council to launch a research project into these killings in 1991. The
research report was published in 1992: Minnaar, Offringa & Payze To Live In Fear: Witchburning
and Medicine Murder in Venda. Although it was found that political unrest contributed to the
sudden increase in such killings, it was established also that traditional beliefs and the worldview
of the Venda (the equilibrium in creation as a cosmic unity may not be disturbed) played an
important role. In a survey it was for instance established that police sometimes refrained from
prosecuting the perpetrators of medicine-killings (killing to use body parts in medicine) because
they were frightened of being bewitched themselves: See Minnaar 49 50. On February 5 1995
it was reported in The Sunday Times (19) that five alleged witches were burnt to death in the
Northern Transvaal by a mob of youngsters. Apparently a diviner had indicated to the
perpetrators that some magic intervention had caused the death of a young girl who had been
struck by lightning.
marks which will serve as concrete evidence in a court of law. The marks have to be made on the back to indicate that the perpetrator was caught in the act.\footnote{Information obtained in a discussion with Professor LP Vorster on unpublished fieldwork amongst the Swazi of the former KaNgwane.} Adultery is regarded as curse on the family name and of the ancestors. The defilement has to be removed through a lustration ceremony.\footnote{A ritual purification ceremony.} Beasts delivered to the woman's group (or seized by her group) are slaughtered and eaten to cleanse the community. The killing of the adulterer is regarded as self-help to obtain personal satisfaction and satisfaction for the group.\footnote{Myburgh Papers 45-47.}

The second postulate put forward by Pound, conflicts with the idea of shared rights and duties which is reflected in the indigenous postulate of collectivism.\footnote{See Myburgh Papers 15-16.} The third postulate may be summarised as the assumption of good faith in making representations and promises\footnote{Sawer 148; Rich 174.} and 3(c), more specifically, underlies the concept of unjust enrichment which was discussed above.

The fourth postulate not only entails negligence in the narrow sense of the word, but a much wider norm of reasonableness in human conduct. In this sense one is presented with the question whether the different forms of fault which are distinguishable in Western law, are also distinguishable in indigenous law, and, once again, whether it is at all possible to explain indigenous law in terms of Western jurisprudential principles. Some authors assert that fault is of little importance in indigenous law because of its overriding aim of restoring the equilibrium in the community; the community is collectively responsible in public as well as private law; and because there is no distinction between culpable homicide and murder in
homicide cases, all blood belonging to the king. However, the fact that indigenous law is underscored by these postulates should not preclude one from explaining certain concepts and principles by analogy with the Western concepts whilst not exactly equating them. Research has indicated that a general concept of fault does exist in indigenous law, albeit not identical to that of Western law. Nevertheless, it should be borne in mind that concepts of reasonableness or unlawfulness are not the same in indigenous law and Western law - especially in as far as these concepts are determined by public policy and the boni mores of culturally different communities.

The fifth postulate may be applicable in indigenous law and is evidenced in the fact that, as a rule, restitution is due where damage to property is caused by animals. Furthermore, a person may be held delictually or criminally liable for certain omissions, such as his failure to control a vicious dog. In Malawian law, a person has been held liable where his dilapidated house collapsed onto a neighbouring property causing damage.

118 See Van Niekerk Comparative Study 38. Kidder 160-161 is of the opinion that to apply and adapt the Western concept of the reasonable man in non-Western cultures, would deprive the concept of "most of its carefully construed and limited meanings".


120 Gluckman "African Traditional Law" 13 points out that the concept of a reasonable person is central to Barotse law. In indigenous societies the conception of a reasonable man is concrete and specific and closely related to an individual's position in the group. He explains that "[t]he reasonable person forms for each social position the nucleus of rights and duties which are the core of law, since it sets both the minimum demands on which the law insists and the maximum of permissible deviation". This conception of reasonableness in indigenous law is also adaptable to changing societal values: Gluckman "African Traditional Law" 13-14 22.

121 See Myburgh Papers 27.

122 See Van Niekerk Comparative Study 35.
2.c.iii  Criminal Law

It seems that the most fundamental postulate underlying Western criminal law is the doctrine nullum crimen nulla poena sine praevia lege poenali\textsuperscript{123} which is embodied in most Western criminal codes.

Indigenous criminal law has largely been abolished in most African countries. In South Africa indigenous criminal law is applied to a very limited extent in official courts. Yet it is still unofficially applied, not only by the Courts of Chiefs and Headmen, but also by the other unofficial institutions which were discussed above.\textsuperscript{124} Although indigenous law has to some extent been reduced to writing, its oral tradition is still prevailing, and this may seem to be an indication that indigenous law is uncertain. Nevertheless, the postulate of nullum crimen does not seem out of place in indigenous criminal law. Individuals are aware of what they are permitted to do and what not. The law becomes known to individuals through education, political organisation, economic organisation, religion, language and certain procedures characteristic of the legal system itself. Individuals participate in sacrifices to make amends for certain wrongs and they participate in ceremonies connected with marriage, death and succession. There are frequent discussions of the law, elders give advice and chiefs inform their followers of new legislation. New legislation is also proclaimed at certain religious ceremonies and festivals.\textsuperscript{125}

2.c.iv  The Interpretation of Statutes

Presumptions in the interpretation of statutes may be regarded as jural postulates which underpin the rules of that field of law. These fundamental norms are relevant in both procedural and administrative law. They are:

\textsuperscript{123} See also Hosten 706-707.

\textsuperscript{124} See Part I.IV.4.

\textsuperscript{125} See generally Myburgh Papers 52-53 61.
(i) The legislature makes laws for its subjects and not for the State, or government institutions.

(ii) The legislature does not involve or concern itself with the administration of justice.

(iii) The legislature covers general and not particular cases.

(iv) Legislation is not made with retrospective force.

(v) Legislation does not alter existing law more than is necessary.

(vi) The legislature does not intend unjust, inequitable and unreasonable results with its legislation.

(vii) Legislation does not contain invalid or useless stipulations.

(viii) Legislation promotes public interest.

(ix) Reference in legislation to other legislation or deeds is reference to valid legislation, actions or deeds.

The presumptions listed above are often regarded as individual human rights and as such entrenched in a Bill of Rights.126

In indigenous law legislation plays a relatively minor role in law-creation, custom being the most important source of law. The legislative process is quite informal and lacks the technicalities and formalities inherent in Western law. The legislative council of the Ndebele of the former KwaNdebele may serve as a typical example of this process in

126 Eg procedural rights. See Van der Westhuizen Human Rights Law 3ff.
indigenous law. This council consists of the chief, his private council (men of the reigning family) and the representative council (private council plus the headmen of the different wards as representatives of the people) or a general assembly of all the men of the wards. Proposed legislation is freely discussed by all the members. No voting takes place but members of the various councils are asked what their opinion of the proposed legislation is. The discussions and opinions of the councillors provide an indication whether the proposed legislation should be accepted or rejected.

Many of the presumptions listed above are applicable also in indigenous law. The fact that the people are actively involved in the legislative process ensures the primacy of public interest. Legislation is not made retroactively and new legislation is announced to the general assembly or to the people by their headmen. Also, in indigenous law legislation is aimed at just, equitable and reasonable results - but in an indigenous framework. In indigenous law reference to legislation will inevitably be reference to valid legislation or deeds, because it is only valid legislation which is continued through the indigenous oral tradition. Likewise, because of their oral tradition legislation is characterised by a lack of the technical detail which is found in Western legislation. Therefore, it is unlikely that useless or invalid stipulations will crop up in indigenous legislation.

In indigenous law there is no separation of powers, but this does not mean that the legislature will involve itself with the administration of justice. In fact, it is the non-specialised nature of indigenous law which ensures community participation in both the legislature and the administration of justice. It is community participation which inhibits the exercise of arbitrary State power.

2.c.v Procedural Law

Natural justice may on the one hand be regarded as a separate specific jural postulate

127 See generally Myburgh & Prinsloo 15-17.
of Western law. On the other hand it may be regarded as a diffuse postulate which underscores the specific postulates of Western procedural and administrative law.

In a narrow sense, natural justice is considered a term of art and is widely used in relation to the law of procedure. Whilst Wille\textsuperscript{128} regards natural justice as a continuation of the ideals of natural law, Du Plessis\textsuperscript{129} interprets it as so-called common-sense justice, which should be distinguished from natural law. Unlike natural law, natural justice should be viewed as an adaptable concept, and one which has indeed changed throughout the course of history.

Du Plessis\textsuperscript{130} describes the principles of natural justice as

"juridiese grondnorme wat veral (synde op regsprekende en vergeldende geregtigheid betrokke) aan die regspraak in hoofsaaklik "common law"-georiënteerde regsordes ten grondslag lê".

Natural justice comprises the judicial, normative and fundamental principles of audi alteram partem; nemo iudex in re sua, as well as the principle that government officials should not be influenced by irrelevant factors in exercising a discretionary duty. The latter two are directed at the elimination of prejudice. In procedural law, the principles of natural justice have acquired a technical meaning and yet they are almost intuitively observed by officers charged with the administration of justice. In administrative law they are regarded as the normative foundation for its development.

The most important basic postulates underlying indigenous procedural law are the reconciliation of the parties (including reconciliation with the superhuman) and the maintenance of a balance within the community and with the superhuman.\textsuperscript{131}

\textsuperscript{128} Wille 14.
\textsuperscript{129} Du Plessis Relevansie 825.
\textsuperscript{130} Du Plessis Relevansie 824.
\textsuperscript{131} Gluckman "Natural Justice" 190-191.
Reconciliation is so important that the Tiv of Northern Nigeria, views "truth" in a special light with reference to the equilibrium in the community. Bohannan\textsuperscript{132} explains that to tell "yie" is to say something which disturbs the equilibrium in the community. It may be the truth or a lie in the Western sense of the words. It is of no relevance if the yie is true or false, as long as it is not detrimental to another. If it is detrimental it is judged worse if the yie was false. But, it is sometimes preferred that an untruth is told, if it would enhance the possibility of a reconciliation between the parties to a dispute.

"Truth" in Tivland is an elusive matter because smooth social relationships are deemed of higher cultural value than mere precision of fact. We must not judge Tiv litigants or witnesses by our standards. They are not liars, as they are sometimes called: their truth has other referents than has European truth.\textsuperscript{133}

According to Gluckman\textsuperscript{134} the adherence to a doctrine of natural justice in Africa is best illustrated in indigenous procedural law where the court maintains the principles of law whilst at the same time restoring the disturbed relationships within the community and between the community and the superhuman. He further regards natural justice as a continuation of the concept of natural law and explains that Barotse judges were guided by the principles of milao yabutu, or the laws of humankind in their judgments. Yet, even if this is the case and even if indigenous procedural law is underscored by the principles of natural justice as natural law, it needs to be borne in mind that this higher law operates within a specific community with specific social structures and that it should not be likened to the concept in Western law.\textsuperscript{135}

\textsuperscript{132} Bohannan \textit{Tiv} 49 50.

\textsuperscript{133} Bohannan \textit{Tiv} 51; see also Gluckman "Natural Justice" 190 191.

\textsuperscript{134} Gluckman "Natural Justice" 176.

\textsuperscript{135} See for example Part II.II.3.b.i.(i); Gluckman "Natural Justice" 183-184 points out that many of the principles of ethics are indeed common to all societies.
3 JURAL POSTULATES IN INDIGENOUS LAW

3.a General

The jural postulates which Chiba discusses in his study of Japanese society show an interesting similarity to, and often coincide with the jural postulates underpinning indigenous law in Southern Africa.\(^{136}\) The postulates of Japanese law are:

(i) The "family idea" which induces individuals to act for the family as a whole in stead of for individual members themselves.

(ii) The "hamlet or small-village spirit"\(^{137}\) which prompts people to collective behavior, not only in traditional local communities, but also fictitiously in other social collectivities.

(iii) The "common-kin principle" which underlies the hierarchy of a main family and its branch families and induces member families to maintain the hierarchy.

(iv) The "status order" which demands the treatment of individual members in accordance with their social status within the larger group and which require that people behave in accordance with their status.

(v) "Tenno adoration" which is used to denote the moral and legal influence of the emperor in Japanese law and underlies the special esteem for the emperor and his family.

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136 Chiba "Three-level Structure" 353-355 gives a detailed exposition of the application of these postulates in Shinto society; see also Chiba "Unofficial Postulates" 63 64 65-67, Chiba Legal Pluralism 93-96.

137 Here "hamlet" denotes a traditional local community in indigenous Japanese society; see Chiba "Unofficial Postulates" 65.
Part II.11.3 Jural Postulates

(vi) The "god conception" which is embodied in certain religious rituals and festivals.

Specific postulates have a dual function. They specify the extent of the collectivity and they constitute a system of collective values with which members can identify. By staying within the boundaries of these values, these postulates preserve the collective identity and social equilibrium. 138

From these specific postulates, Chiba formulates two diffuse postulates which support the specific postulates and the unofficial laws in general. These are the "amoeba-like way of thinking" or the identity postulate, and "harmony of the collectivity". The identity postulate concerns the Japanese attitude of aversion to law and legal procedure, the close relationship between law and morality, and an indefinite conception of right and contract.

In an analysis of pre-colonial indigenous law, at least five specific postulates and three diffuse postulates come to the fore. The specific postulates are the "family idea", "hamlet spirit", "common-kin principle", "status order" and "esteem for the ruler". The diffuse postulates are "harmony of the collectivity", "superhuman" 139 forces are superior to man", and the "identity postulate". In line with the non-specialised nature of indigenous law, diffuse and specific postulates should be regarded as an integrated whole. Although many of the rules of pre-colonial indigenous law have changed, or no longer exists, these postulates still constitute the fundamental axioms which underlie

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138 Chiba Legal Pluralism 95-96.

139 In a discussion with Professor LP Vorster it was pointed out to me that ancestral spirits, witches, nature spirits, the supreme being, and so forth all form part of the cosmology of indigenous people. But these beings are regarded as part of their natural world and therefore it is incorrect to refer to them as supernatural. There is a direct and close link between these beings and living humans, usually through the ancestors. Mbiti Religions 83 points out that the ancestors still speak the language of the living with whom they have been recently (up to five generations of deceased ancestors according to Mbiti). However, they are bilingual and also speak the language of the superhuman. These forces are thus interpreted in human terms and called superhuman (in stead of supernatural). This is also in line with the primacy of human beings in indigenous culture and the solidarity of living beings and the superhuman. It is in contrast with the sharp distinction between the natural and supernatural in Western thinking. In Western thought the supernatural is mostly relegated to the realm of superstition: see Kaunda 29.
indigenous legal reasoning today.

3.3.1 Diffuse Postulates

(I) Harmony of the Collectivity

Harmony of the collectivity and the specific postulates it supports (status order, family idea, common-kin principle, hamlet spirit) are widely regarded as an important basis of legal reasoning in indigenous law. It is reflected in all spheres of the characteristically non-specialised indigenous legal systems and is explained in the writings of Myburgh, although he never explicitly refers to it as a jural postulate. It has been noted that jural postulates are often regarded as social postulates, and in indigenous society it is certainly true that harmony of the collectivity is equally important in law and in social ordering and still prevails in rural areas as well as, to a limited extent and in an adapted form, in urban areas.

The indigenous approach to law is permeated by the idea that the equilibrium in the community should be maintained. Disputes among individuals are an indication of disturbed relationships which threaten the coherence of the community and which may also disturb the relationship with the ancestors. Harmony and solidarity are regarded as the key virtues to which everyone should aspire and as the values which should be sought above all else. Horizontal solidarity should ideally exist between members of the group. But relationships do not cease with death and solidarity must be maintained also between the living and their deceased ancestors. Children yet to be born, as well as nature and the superhuman too form part of the network of

140 See Myburgh Papers for a collection of AC Myburgh's work on indigenous law in Southern Africa.

141 See Part II.1.1.

142 Omi & Anyanwu 141-143.

143 Omi & Anyanwu 143.
persons who should live in a state of harmony.\textsuperscript{144}

Practically, therefore, the concept of harmony of the collectivity goes beyond the concept of harmony and peace within the group as living individuals. Coherence of the group, the dead ancestors, and other superhuman beings is of great importance and indigenous normative systems are aimed at the maintenance of a broader harmony in the universe.\textsuperscript{145}

The fact that the law is aimed at the restoration or maintenance of an equilibrium, is clearly illustrated by the various processes available to settle disputes extra-judicially. Adjudication in indigenous law takes place only as a last resort. When a case in fact reaches a court, the presiding official first tries to restore peace and harmony before he actually adjudicates upon the case. Restoration of harmony is also reflected in the decisions of the courts. Decisions are aimed at the reconciliation of the parties. Even in criminal law it is attempted to reconcile the perpetrator and the victim.

An interesting phenomenon which occurs widely amongst indigenous people is the fact that certain acts are regarded to have a polluting effect on an individual or the community as a whole. Certain crimes are, for example, regarded as a defilement of the community which can be removed only by purificatory rites. These rites are necessary to restore the equilibrium in the community and in the relationships with superhuman forces. The commission of crimes which unsettle the relationship with the ancestors and with the supreme being are visited by divine punishment. Incest is an example of a highly pollutant crime. It is regarded as violation of a taboo and originally perpetrators were put to death.\textsuperscript{146} In a reported case amongst the Kwena, the perpetrators, who would have been killed if it had not been for the timely intervention

\textsuperscript{144} Mbiti \textit{Religions} 107.

\textsuperscript{145} See generally Darboe 105-106.

\textsuperscript{146} Certain crimes were for instance regarded as being inimical to rain: see generally Myburgh "Crime" 5-6, Omi & Anyanwu 137-138.
of the government, both eventually died childless. This was regarded as the consequence of violating the taboo of incest.  

The concept of pollution in indigenous societies, could be explained as an attempt to cope with the cognitive confusions that occur when boundaries are not drawn clearly. This phenomenon is closely connected with the violation of taboo and with certain crimes. New-born babies, corpses, widows and initiates are persons who are entering into new life phases and who are in the process of reclassification. These persons must undergo transition ceremonies or rites of passage which are performed at birth, when adulthood is attained, or upon marriage or death before they can enter the new life phase. They cope with the uneasiness which arises from the uncertainty about their position, by conceptualising it in terms of heat or dirt (pollution), which has to be removed by cleansing rituals.

In accordance with the lack of abstraction, and the prevailing realism in indigenous law and culture, the concept of chance is unknown. Concrete explanations are sought to explain why certain things happen. There are basically two theoretical explanations: The work of superhuman beings (such as ancestral spirits) or humans using superhuman means (witchcraft and sorcery).

Both these explanations entail for example that illness or misfortune is the result of a failure in social relations: relationships between members of the group or the relationship between the living and the superhuman. When misfortune is caused by

147 Vorster "Unnatural Sexuality" 87-88.

148 Hammond-Tooke Rituals 102.

149 Not all violations of taboos are regarded as criminal. Eg, sexual intercourse with a menstruating female has a polluting effect and is visited by supernatural consequences, but will not be punished by a court.

150 Pauw "Basic Concepts" 40.

151 See generally Hammond-Tooke "Beliefs" 335-336.
ancestors, it is as a result of the blameworthiness of an individual. When misfortune is caused by witchcraft or sorcery, it has nothing to do with the blameworthiness of the victim(s).

The relationship with the ancestors is similar to a parent-child relationship. Misfortune which is due to the interference of ancestors is regarded as an admonition. It is void of evil. Accordingly, it is believed that an illness sent by the ancestors is curable. In contrast, an illness caused by witchcraft or sorcery contains an element of evil and often results in death. The evil which flows from witchcraft and sorcery threatens the harmony of the collectivity and may be combated with drastic measures.\(^\text{152}\) It is believed that witches eat human flesh and even kill their own loved ones - an aggression against the very fabric of the kin group - and those actions make witchcraft such a grievous crime.\(^\text{153}\) Witches and sorcerers are regarded as professional and institutional sowers of discord, and as evil personified, because their corrosive influence destroys the harmony in the society.\(^\text{154}\)

To restore the imbalance caused by disturbed relations and which is reflected in misfortune, recourse is had to ritual, divination and magic. Hammond-Tooke\(^\text{155}\) describes ritual as a "stereotyped behaviour pattern, usually expressing its aim symbolically, that is believed to maintain or to effect a significant change in man's relationship with the supernatural." For example, the Kgatla believe that the crimes of infanticide and abortion create heat which may adversely affect rainfall. This imbalance between man and the superhuman has to be restored by a purificatory rite. Likewise contempt of court is regarded as a defilement of the community and has to be cleansed by a purificatory meal to be eaten by both the members of the court and the

\(^{152}\) Witches and their families were burnt in traditional indigenous law. The killing of so-called witches still occurs in present day indigenous communities.

\(^{153}\) Omi & Anyanwu 136.

\(^{154}\) Omi & Anyanwu 136.

\(^{155}\) Hammond-Tooke "Action" 344.
culprit. The fact that the court as well as the culprit takes part in this purificatory meal is an illustration of the importance of restoring the equilibrium between the living and the dead, as well as between the living themselves. This meal consists of an animal which is paid as a fine for contempt of court.\textsuperscript{158}

The need for the preservation of solidarity in the group has been explained by the fact that the individual's only means of survival was through the continued support of the group. In his treatise on the history of Germanic private law, Huebner\textsuperscript{157} points out that "[S]tate and law were too weak to protect the individual as such; only as a 'fellow' ('Genosse'), as one belonging to a union of his equals, could he find the security requisite for his existence". The fact that the State provided the individual with the security of commerce, law, education and the like, decreased the importance and necessity of maintaining group solidarity. Consequently communalism waned whilst individualism increased in importance. Today, in an age of individualism, preservation of group solidarity is no more than a belated constraint upon free individual action.\textsuperscript{158}

Whilst this explanation of the importance of the preservation of group solidarity in ancient communities may be true within a Western historical framework, it does not apply to African communities. Even in modern Africa today, social solidarity permeates all spheres of indigenous life\textsuperscript{159} and forms the foundation of indigenous legality, and indigenous legal and political ideology. In South Africa, where Western State institutions were superimposed upon traditional institutions, there was never a spontaneous development towards individualism. Moreover, State-imposed institutions

\textsuperscript{156} Myburgh "Crime" 6; Myburgh "Punishment" 44; Van Blerk "Contempt" 71 72.

\textsuperscript{157} Huebner 111.

\textsuperscript{158} Huebner 111.

\textsuperscript{159} Eg, stokvel, the indigenous equivalent of formal and informal mutual aid societies established for various social and economic reasons: see Lukhele 1-26. In his introduction Lukhele remarks: "Since 1652 ... the black experience has been one of conquest, domination and control. Blacks have been sustained throughout this period by the indigenous African system of communalism, sharing and co-operation. The stokvel concept cannot be clearly understood unless one realises that it thrives on this tradition."
could never substitute communalistic indigenous institutions and they thus came to be regarded as illegitimate. The natural inclination was to fall back upon alternative familiar structures. That is why alternative institutions were formed in the townships to take over the function of the original family structures which disposed of conflicts between members of the same group. One thinks here of the street committees and other similar institutions which, to an extent, have taken over the function of the family council in indigenous law. These institutions function as mediators in family disputes.  

(ii) Superhuman Forces are Superior to Man

In non-specialised societies religion organises individuals into a state of solidarity and provides a broad base for interaction between kin.  

Hoebel found that the postulate that magico-religious forces are superior to man, was the predominant postulate in the law of primitive man and according to Darboe indigenous law is based on the supernatural. Indeed, there is no doubt that superhuman forces play a primary role in indigenous legal thinking.

Law is aimed at maintaining the harmonious co-existence with these superhuman forces. There is a close connection between the metaphysical world and concrete experiences on earth. The visible world is interpreted in terms of superhuman forces. Both the physical and metaphysical are perceived to form part of reality and the transition from the physical world to the spiritual world is regarded as natural. All things in the world and beyond are connected. Consequently, as a result of mystical actions

160 See generally Part I.IV.4.
161 Hambrock 112.
162 Hoebel 286.
163 Darboe 98ff.
164 See generally Ayittey 10-14.
by gods, spirits, ghosts, and other magical forces, what affects one affects all.\textsuperscript{165} There are various beliefs which have to be contended with, but the ancestral spirits play the most important role in the lives of individuals.

The sky (the domain of the spirits of the living and unborn, and of natural phenomena such as lightning, rain, drought), the earth (the place where dead ancestors are buried and dwelling place of the living) and the world (the domain of all people) are seen as an integrated whole: the universe. The various components of this universe are represented by cosmic forces and it is important to maintain an equilibrium in the universe. An imbalance in the metaphysical world is experienced as natural disasters, barrenness of women, disease and death in the physical world.\textsuperscript{166} The function of superhuman beings is to provide intellectually and emotionally satisfying explanations for certain aspects of nature and for bewildering phenomena.\textsuperscript{167}

It is to an extent possible to generalise with regard to a supreme being and the ancestor cult in Southern Africa. Most indigenous people believe in an impersonal supreme being who created the universe. He does not take much interest in his subjects and there are few rituals directed at his worship. He is closely associated with nature and sometimes perceived to manifest himself as lightning or thunder. Belief in the supreme being is characterised by a lack of theology and a lack of any personal relationship or interaction between him and the living. Personal relationships are only experienced with the shades or spirits of the ancestors.\textsuperscript{168}

Second in the hierarchical ordering of the superhuman are those forces which are manifested in certain natural phenomena such as hills and rivers. It is not possible to generalise with regard to these nature and free spirits. Most people do in fact believe

\textsuperscript{165} Hammond-Tooke "Rituals" 21.
\textsuperscript{166} Ayittey 10 173.
\textsuperscript{167} Hammond-Tooke "Beliefs" 324; see also Ayittey 11-12.
\textsuperscript{168} See generally Hammond-Tooke "Beliefs" 318-321, Ayittey 10-11, Omi & Anyanwu 137.
in such spirits but these beliefs are unique and differ from one group to the next. It does seem though, that the majority do in fact believe in the existence of such spirits.  

Ancestral spirits form the lowest tier in the hierarchy of superhuman beings. The ancestors are the spirits of deceased members of the group. They are remembered for about five generations, but the chief's ancestors are recalled much longer. Certain rituals are performed to change the status of the deceased to that of an ancestor. Ancestors are believed by most to live underground. They are never referred to in the singular, because they are perceived to be the collective dead of the lineage. An important underlying principle in the ancestor cult, and one which underlies indigenous social ordering generally, is the importance of paternal authority and filial respect. In general, ancestors are regarded as protectors and mentors, but they are easily offended and jealous. As already mentioned, the relationship with the ancestors may be characterised as a parent-child relationship and ancestor worship lack the deference and devotion of, for example, Christian worship. Ancestor rituals strengthen the bond between kin. Ancestors are spiritually always present and influence the course of daily life. They are sometimes seen as the intermediary between the supreme being and the living people and as protecting the latter against witchcraft and sorcery.

Ritual plays a significant role in indigenous life. Rites are symbolic actions to bring about a desired or expected situation or to prevent undesired situations. Rites are resorted to to invoke the blessing of the dead ancestors. Hambrock makes a distinction between cyclical and occasional rites. Cyclical rites mark the beginning and

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169 See Hammond-Tooke "Beliefs" 321-324.
171 The ancestors are believed to punish chiefs who are guilty of misrule and individuals who displease them. Likewise, their pleasure is shown by prosperity, good rains and the like: see Ayittey 126 -127.
172 Hambrock 124.
end of events connected with the economy, kinship and political organisation. Occasional rights are occasionally held under conditions of misfortune, after the transgression of a taboo, or in case of illness. In contrast, Hammond-Tooke\textsuperscript{173} distinguishes between rites of kinship and communal rituals.

Kinship rituals are exclusively related to the ancestral cult. Kinship rituals comprise life cycle rites and contingent rites. Life cycle rites mark the transition to different life cycles and indicate the change in personal status. These rituals stress the solidarity between kin and if they are neglected the group will be visited by the wrath of the ancestors. Interestingly, Burman and Schärf\textsuperscript{174} found in their research in the Cape Town metropolitan areas that the majority of males still uphold the initiation ceremony from boyhood to manhood.\textsuperscript{175} Contingent rituals are rituals to pacify the outraged ancestors. These rituals clearly illustrate the close connection between law and rituals. Unlawful transgression of the legal rules will be punished by the ancestors unless they are pacified.\textsuperscript{176} Rituals also emphasise the unity between the living and the deceased ancestors. Ritual sacrifices express communalism and is regarded as a communion meal symbolically uniting the living and the dead.\textsuperscript{177}

Communal rites are directed at the unity of the tribe which shares a common culture and tradition and which occupies the same territory. Loyalty to the tribe, which is second only to loyalty to the kin group, must be restated in religious terms.\textsuperscript{178} These

\begin{itemize}
\item \textsuperscript{173} See generally Hammond-Tooke "Action" 351-356, Mbiti "Introduction" 126-136.
\item \textsuperscript{174} Burman & Schärf 730.
\item \textsuperscript{175} Various other rites too are still upheld in indigenous rural and urban communities. In fact, virtually all aspects of life are ritualised. Although buildings are not erected for the ancestors, a certain area in the hut, and even in modern homes, is dedicated to them. Among some of the Ndebele of Southern Transvaal a tray with offerings for the ancestors is left on a little table in this area of the house: see Hammond-Tooke "Beliefs" 333, Hambrock 139.
\item \textsuperscript{176} Myburgh Papers 52.
\item \textsuperscript{177} Hammond-Tooke "Action" 353.
\item \textsuperscript{178} Hammond-Tooke "Action" 354.
\end{itemize}
rituals involve rain making, securing of the crops, protection against lightning and hail and so forth. These rites are directed at the tribal ancestors, shades of deceased tribal chiefs, and occasionally, amongst some tribes, even at the supreme being.

The perception of a higher law which originates in the superhuman and to which all laws must conform, puts the role of the superhuman in indigenous legal orders into perspective. The following observation of Yelpaala\(^\text{179}\) attributes to Africa a natural law-like philosophy:

"Endowed with lethal powers, all the supernatural and cosmic forces exhibit and maintain an intricate, delicate and mysterious balance with their normative and functional inter-relationships harmonized into a set of coherent and non-contradictory higher norms, prohibitions and prescriptions to human beings. Therefore all other norms, legal or social, subordinate to and originating from ancestors or humans cannot contradict these higher norms of supernatural origins."

But all law is not derived from a superhuman authority. Indigenous law also comprises purely man-made law as well as penalties, even for serious offences, which have no religious basis. The breaking of purely human and administrative prescriptions are not visited by automatic divine sanctions.\(^\text{180}\) Indigenous law also comprises law which is perceived to be instituted by the ancestor spirits. This is the law which originate in the customs and usages and which, through tradition, is accepted as law. It is only natural that customary laws should be seen as originating from the ancestors because of the belief that life after death is a mere extension of life on earth.\(^\text{181}\) It is believed that ancestors uphold the law and are the guardians of tradition and that unlawful conduct is met by the wrath of the ancestors.\(^\text{182}\)

\(^{179}\) Quoted by Ayittey 11.

\(^{180}\) Omi & Anyanwu 138.

\(^{181}\) Schapera "The Tswana" 59-61.

\(^{182}\) Myburgh Papers 52.
The importance of superhuman forces in the daily lives of indigenous people is clearly illustrated in the norms relating to the violation of taboos. The violation of a taboo is automatically visited by divine penalties. In Tswana law there are, amongst others, seasonal taboos, taboos pertaining to critical events in human life and taboos pertaining to official secrecy. A seasonal taboo which is still widely observed in rural areas, prohibits ploughing certain times of the year and the divine punishment for the breaking of this taboo is spoilt crops. Violation of the seasonal taboo attached to castration of young bulls, turns rain into hail. Eating of the first fruits of the season, cutting certain trees, digging clay and cutting thatching grass near the fields between certain months of the year also fall in this category. Some of these taboos are still observed in rural areas today. Violation of these taboos are inimical to rain. Trading in beads and ivory when there is growing corn and the killing of certain animals such as elephants may also cause drought. Taboos in human crises, such as birth and death, for example forbid a father to enter the hut in which birth was given for at least three weeks, and forbid anyone to go to the fields on the day a person dies. Other taboos relate to unnatural sexuality such as incest and initiation ceremonies. Violation of the latter was traditionally visited by the death penalty.

Some other examples of the role of magic in criminal law were discussed above. But, it is not only in criminal law that the superhuman plays a role. In the law of contract the specific contract with a medicine man and diviner may serve as an example of the role of magic. A medicine man may for instance be paid with a sheep which he then slaughters and which is sometimes consumed by the family of the patient. The entrails of the slaughtered animal form part of the medicine. The medicine man may also be required to perform magical services such as providing protection of the home and fields, or protection against danger. In the law of contract a contract not to pay marriage goods and certain contracts with regard to land are considered to disturb the

183 See Vorster "Violating Taboo" 94-98.
184 Vorster "Unnatural Sexuality" 87-89.
185 The role of the superhuman in procedural law was pointed out in (I) above.
equilibrium in the group and consequently also the relationship with the ancestors.

Ancestors play an important role in the concept of land and the ownership of land.\textsuperscript{186} Land is regarded as an integral part of the social group. The use of land is governed by religious beliefs and social relationships. These relationships include relationships with kin as well as the relationship with ancestors. Land belongs to the ancestors and the living members of the group only inherit a right to use it. The ancestors keep a watchful eye on those who utilise it and see to it that it is fairly and properly used. Land may thus be seen as a bond between the living and the dead. Ancestors show their continued interest in the group through agricultural prosperity and the group, on their part, show their allegiance to the spirits by cultivating the land properly. Further, the ruler, who is regarded as an intermediary between the group and the spirits of the ancestors, is regarded as custodian of land.

The transfer of marriage goods by the husband's group may, amongst others, be regarded as the necessary means to restore the equilibrium in the community which has been (or will be) disturbed by the transfer of the limited authority\textsuperscript{187} over the women to her husband's group.\textsuperscript{188} The lobolo or bogadi institution must be seen as playing an important role in maintaining the equilibrium in relationships within the woman's group, the relationship between the two groups of the prospective husband and wife and the relationship between the living members of the social group and the deceased ancestors.

Although these examples of the operation of magical or religious forces are not overly important in modern-day metropolitan indigenous societies, and although all traditional beliefs are no longer followed, witchcraft and sorcery are still factors which generally

\begin{itemize}
\item See generally Ayittey 243 285-287; see also M'Baye 149, Paden & Soja 39-40, Dalton 71-72.
\item The authority is transferred in as far as it entails her reproductive capacity, sexual privileges and services in caring for the household: see Church "Lobolo" 28.
\item Church "Lobolo" 29; see also Part II.II.2.c.ii.
\end{itemize}
have to be taken account of while the belief in the omnipresence of the superhuman in some form or another remains an important factor in the lives of many indigenous people in South Africa. In fact, the influence of magic and ritual is even experienced in present-day Christian churches. The Nguni Zionist movement provides a good example of the unmistakable influence of indigenous traditional beliefs. Food and other taboos play an important role in the practice of their religion and similarities are found between the traditional diviner and a prophet in the Zionist movement. Yet, all their practices, however strongly influenced by traditional belief, are professed to be founded on the Bible. It should be kept in mind that Western institutions were often adopted and integrated into the existing system of beliefs, without ever really replacing them. This is another postulate which underlies indigenous law and social ordering, the ability to adapt to changing circumstances without losing the indigenous identity.

(iii) The Identity Postulate

Chiba describes this postulate in indigenous Japanese law in the following terms:

"The amoeaba-like way of thinking as a diffuse legal postulate characteristic of Japanese people has been identified as enabling the people to choose official law or unofficial law alternatively so as to adapt themselves to changing circumstances while maintaining their individuality and identity in the enjoyment of individual rights."

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189 See Part II.2.c.(ii).
190 On 110-132, Mbiti Religions discusses the important role rites of passage play in indigenous cultures.
191 Mbiti Introduction 184 190-194 discusses the tenacity of indigenous religion and the fact that it has accommodated various other belief systems such as Christianity and Islam, but not at the cost of their own religion.
192 See generally Pauw "Christianity" 415-440.
193 Chiba Legal Pluralism 153; see generally 159-169.
Thus, the identity postulate not only serves to maintain the identity of a legal culture, but also provides the framework for the development of a legal system to accommodate the changing needs of the community. Change may become necessary from within a legal system, or change may be induced by external stimuli such as the imposition of a foreign legal system upon the existing legal system. This postulate becomes especially significant in instances of cultural pluralism. Cultural pluralism compels the interaction of different legal systems and the values which underlie such legal systems are often very different and even irreconcilable.

In indigenous law the identity postulate is closely connected to the two diffuse postulates mentioned first. The identity postulate enables indigenous law to develop and adapt to changing circumstances whilst retaining its fundamental premiss namely, harmony of the collectivity and the superiority to man of superhuman forces. This postulate becomes apparent in the characteristically accommodating nature of indigenous culture which is responsive to change by integrating such change without displacing its existing structures.\footnote{194} Kaunda\footnote{195} explains this characteristic as follows:

"I think too, that the African can hold contradictory ideas in fruitful tension within his mind without any sense of incongruity. ... Every missionary is aware of the African Christian of some maturity who in one situation will behave as his Faith has taught him and in another follow the practices of traditional religion, or even combine the two. ... The African mind does not find it easy to think in terms of Either-Or. It is open to influences which make Both-And seem desirable. ... This attitude comes, I think, from the sense ... of inhabiting a large world in which there is no partition between natural and super-natural."

From a colonial point of view Southern Africa was easily conquered, but indigenous culture, and more specifically indigenous law and institutions showed a remarkable resilience to the imposed Western influences. It was one thing physically to conquer

\footnote{194}{See Part I.I. 2.}

\footnote{195}{Kaunda 29-30; see also Fabian 384 on the accommodating nature of indigenous culture as illustrated in its ready acceptance of Christianity whilst retaining traditional beliefs.}
a territory, subjugate its people and demand obedience by military force. But it was less easy, if not impossible, to force them to discard their traditions and to respond spontaneously and voluntarily to the prescripts of a foreign culture.\textsuperscript{196}

Before the Dutch came to the Cape in 1652, missionaries and traders had already made some inroads on indigenous culture. But these influences were very superficial and had no lasting effect. Similarly, the Dutch East India Company, which was interested in the Cape only for its strategic position, had little concern for the interior and less with the administration of justice in those areas. In fact, at that stage in the history of the Cape, the administration of justice was quite primitive. When the British occupied the Cape 1795, they followed a policy of civilising the indigenes by attempting to dislocate their "barbarous" laws and customs. Where indigenous laws were recognised, such recognition was subject to a repugnancy clause. The official indigenous law became a reflection of the coloniser's perception of that law and was often far removed from true indigenous law. Moreover, the indigenous population often abided by the distorted and transformed law in order to gain access to resources. They even made representations about their law and institutions to make it more acceptable for the Westerners.

Although indigenous law was uniformly recognised from 1927 onwards, its practical position changed little from that in the colonial period. Western laws were either ignored, or obeyed out of fear, but indigenous law was never displaced. Colonial and post-colonial policies weakened indigenous political structures and entrenched transformed legal structures by appointing "chiefs" and removing true traditional leaders. Although this process affected indigenous laws and institutions, they were not inherently changed by the imposed Western cultural values and they largely survived the adverse circumstances.

Today the remarkable resilience of indigenous cultural institutions against Western
influences is especially evidenced by the fact that unofficial indigenous law is widely applied. The indigenous law that unofficial institutions in metropolitan areas apply in an adapted form is still to a large extent supported by the diffuse postulates already discussed. The changes that were effected, were introduced in the context of an indigenous value system. This is especially apparent in the administration of justice by the community courts of the metropolitan areas. It is also evidenced by various indigenous institutions which still find application in these "Westernised" areas.

Elsewhere, in both Anglophonic and Francophonic Africa, traditional leadership and political structures were still in existence at the dawn of independence in the 1960's. Traditional indigenous values were still reflected in the writings of early statesmen like Kaunda and Nyerere. Unfortunately modern African nationalist leadership has rejected indigenous institutions as too backward and primitive for the successful development of Africa and has resorted to foreign institutions, backed by foreign values. Development became synonymous with change and with the substitution of indigenous institutions with foreign institutions. Indigenous institutions have been distorted to fit into foreign constructs and to suite the political purposes of African dictators. But, these foreign institutions collapsed because they were not rooted in Africa. At grass roots level indigenous law and institutions have persevered and have even survived their very abolition.

Having shed the yoke of another "colonialism," it is hoped that South Africa will not make the same mistakes and reject indigenous institutions. Neither colonial nor post-colonial laws were able to transform indigenous law. With regard to process and even to rules, there may have been some changes in indigenous laws and institutions, but these changes were not substitutionary. The fundamental postulates which underlie indigenous culture and law remain unchanged. It is in this cunning resilience of

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197 Ayittey 397.
198 Ayittey 423-431, Sanders "People's Philosophy" 41.
199 Sanders "People's Philosophy" 41.
indigenous law that the identity postulate is so clearly illustrated.

3.b.ii Specific Postulates

(i) Status Order

Seidman\textsuperscript{200} regards status as the central theme of indigenous law. Although the status order is an important postulate, it does not fall in the same class as solidarity of the collectivity, the postulate that superhuman forces are superior to man and the identity postulate. Whilst these diffuse postulates permeate all spheres of indigenous law and support the specific postulates, the status-order postulate supports only specific areas of law.

Status plays an important role in indigenous law.\textsuperscript{201} It determines an individual's position within the group and it determines the extent of the individuals rights and responsibilities in the group. But status does not influence the individuals dignity, nor his worth as a human being and as a component member of the group. An individual's physical and mental abilities do not influence his quality of life. As indicated above, an individual is not judged for what he can do for the group, but because he is there, because he is part of the group. The group's assets are available to fulfill the physical needs of every individual.

A member of a group shares his rights and duties in the group in accordance with his status in the group. Factors such as physical maturity, sex, marriage and rank determine the status of individual members. Bohannan\textsuperscript{202} is of the opinion that one should not regard sex as a sole criterion for social groupings. Sex should be combined with other factors such as marital status, or age (in indigenous law physical

\begin{itemize}
\item \textsuperscript{200} Seidman \textit{Jural Postulates} 17.
\item \textsuperscript{201} See generally Myburgh \textit{Papers} 48 77-83 110-111.
\item \textsuperscript{202} Bohannan \textit{Anthropology} 154.
\end{itemize}
maturity) or rank. In indigenous law it is also sex, combined with another factor which determines a person's status. For example, if one looks at those instances where men have certain competencies that women do not have, there is always another factor which is considered in addition to sex. Men, after puberty, are allowed to marry more than one wife; men, who are married, can become head of the agnatic group; adult men can represent their groups in the law of procedure and in legal transactions.

The fact that it is physical maturity, and not age, which, amongst others, determine a member's status, is in line with the non-specialised character of indigenous law which focuses on the sensory world and not on the abstract. Persons are for example allowed to get married after puberty and not at a certain age. Children's discernment generally determines his duties in the group. A young person who is able to make a good judgment and old enough to give an account of the facts, is able to testify. Babies and the insane cannot participate in representing their group in litigation, but they have a right to be maintained by the group. Their share in the obligatory, and personality rights of the group as well as their right of authority is exercised on their behalf by the other members of the group.

A female cannot become the head of an agnatic group or represent the group in litigation. The reason why women cannot represent the group is because of their monthly ritual impurity. The court is held in a spot adjoining the cattle kraal and this impurity is regarded to have an adverse effect on the cattle. If a woman has to be present at a court hearing, the venue of the court is moved to another place. Today, adult males and females are in some instances allowed to attend court proceedings. A woman's share in the right of authority over her is evidenced in the

203 A child's evidence will be weighed carefully in accordance with her mental capacity. Children are further protected by the court against harsh cross-examination: see Van Niekerk "Procedure" 135.

204 See Part I.II.4.b.

205 Van Niekerk "Procedure" 133; Prinsloo Public Law 120; see also Hammond-Tooke Rituals 95 on the ritual impurity of menstruating women.
fact that she is allowed to offer herself in marriage to the group of her choice subject to her own group’s approval. Amongst the Zulu the woman indicates her continued share in the property of her group of origin, by tapping the cattle that are delivered as marriage goods for her, on the head. Females play an active role in the taking of steps to obtain redress for the infringement of personality rights, thus indicating her share in such rights. Women’s duties in the group entail grinding, sweeping plastering, cooking and tilling, amongst others.

Although it is commonly assumed that the man’s position in the group is completely different to that of the woman, in practice there are many similarities in their positions. The man’s share in the right of authority is exercised when he takes a leading role in the transfer of the marital guardianship of females of the group. He shares ownership of the family’s cattle and may use some of it to obtain a wife or further wives. His share in the rights of personality is evidenced in the active part taken in self-help to obtain satisfaction for the violation of such rights. The man’s duties entail building, clearing soil, herding, milking and assisting the head when there is a claim against the group.

In the following instances, men’s position in the group is different to that of women. Unlike women, adult men can become head of agnatic groups or of several such groups; they may represent their groups in court; and may take up public office. It should be borne in mind that the fact that women are excluded from these positions does not adversely affect them as members of the group. The head of the group is there to protect the interests of all the members of the group, not only of the men. He promotes the interests of the collectivity, the living, the deceased and those yet to be born, also in litigation and in public office.

When people get married, their status is enhanced. A married woman has a major share in the right of authority over her children and this is evidenced by the fact that she may punish them. Her share in the property of her house is significant and the head of the household must consult her before her house property is used. Likewise,
she may take steps to prevent the head of the group (if he is her husband) or of her house from using more than his share of the livestock that belongs to the house. Moreover, he must obtain her permission to use such livestock. But, in turn, she owes the group her reproductive capacity and services, for example, rearing children, and maintaining her quarters.

A man’s status too changes when he marries. He is entitled to moderately castigate his wife and children as part of his right of authority over them. As a rule, only married men can become head of an agnatic group, qualify for a major share in the group’s rights, and represent the group in litigation and the conclusion of juristic acts.

Rank is an important factor in determining status. A man or a woman’s share in their group’s right of authority empowers them to give orders to younger brothers or sisters respectively. An eldest son, who is the successor apparent to the head’s position, the head of the group and his great wife are consulted in matters concerning the group as a whole. This demonstrates their participation in the rights of the group.

The head of the group, as a mentally sound, married male, has the greatest possible competency in the group. However, this does not mean that he is allowed to act in his own interest and to the detriment of the group. Everything he does must be in the interest of the group as a whole and with a view to maintaining the equilibrium in the community. He is obliged to consult the senior members of the group in exercising his powers. He is answerable to those members for unreasonable, inhumane and biased acts. Persistence with such acts may lead to administrative interference, dissolution of marriage, and in cases of cruelty, criminal prosecution. The head’s competencies entail, amongst others, the allocation of land and living sites for families; the determination, in some instances, of the rank of the various houses; the disinheriting of a successor; adoption of children and giving away of children in marriage.

See also Schapera “The Tswana” 36-37.
(ii) Family Idea

The family idea can be described as the specific postulate that individuals do not act for themselves but for the family or group as a whole.

In indigenous private law, groups and not individuals are the articulate factors\textsuperscript{207}. By this is meant that groups are the bearers of rights and that they share their liabilities.\textsuperscript{208} For example, civil action is generally taken by the group and against the group; the group is liable for delictual obligations incurred by its members; the notion of misconduct between members of the same group for which delictual liability is incurred does not fall within the framework of indigenous law and such misconduct is dealt with rather as a breach of discipline;\textsuperscript{209} groups and not individuals are contracting parties;\textsuperscript{210} the inheritance of an estate is unknown because the group cannot in principle cease to exist and estates vest in the group, succession takes place to the position of head of the household;\textsuperscript{211} marriage negotiations take place between the groups of the couple and not between two individuals involved; in criminal law the group is liable to pay fines for a crime committed by a member.

The family idea also comes to the fore in the phenomenon of feud-action. Feud-action is a means to obtain satisfaction by revenge for a wrong (for a personal injury, not compensation for patrimonial loss) committed against the group. Amongst the Nguni it is for example a grave insult to tell a woman that she will bear her father-in-law's

\textsuperscript{207} Myburgh Papers 15 16.

\textsuperscript{208} The practical application of this phenomenon was explained in detail in Part I.II.4.b.

\textsuperscript{209} However, in public law misconduct may be regarded as a crime or a violation of regimental or age-group rules.

\textsuperscript{210} Prinsloo & Vorster "Parties" 21 point out that individual property is increasingly recognised today and that persons may exchange such property. Sons who get married have the capacity to contract on their own and in some instances even unmarried sons over the age of twenty one have such capacity.

\textsuperscript{211} Myburgh Papers 94-97.
child. Such a remark will not outrage the living, but also the ancestors. The females of the group thus insulted will take a head of cattle of the culprit’s group, slaughter it, and pour the gall over their bodies to remove the pollution caused by the remark. Similarly, in case of seduction, the pollution is removed by slaughtering a beast that is seized from the seducer’s group. In the olden days feud-action often became a vendetta for the homicide of one the members of the group and such vendetta usually resulted in many deaths in both groups.212 Another example of feud-action is where women, in charge of fields which had been damaged by another’s cattle, in turn drive those cattle into the crops of their owners.

The indigenous concept of a family comprises more than a family of blood relations in the narrow, Western sense of the word. It encompasses a wide variety of living and deceased people. In indigenous law the smallest social unit is the household which consists of a man, his wife (or wives) and his own and adopted unmarried children. This nuclear family forms a religious, economic and jural unit. Duties in this unit are enforced by disciplinary action.

The family or agnatic group comprises different nuclear families who acknowledge a common elder senior to all in line of descent. It consists of men who are descended from a common grandfather or great grandfather. It may also include other relatives and even unrelated families.213 The solidarity of the collective is manifested by the transcendence of sociological relations over biological relations.214

It should be borne in mind that when one talks of a group or the family as a legal subject in indigenous law, that it may, depending on the circumstances, comprise either the nuclear family or the family or agnatic group as described above.215 For

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212 Myburgh Papers 18-20.
213 Myburgh Papers 76; Schapera “The Tswana” 40; Vorster “Kinship” 105-108.
214 Darboe 105-107 110.
215 Church Marriage 7.
example, in Tswana law marriage between agnates is not forbidden and marriage with the matrilateral cross-cousin\textsuperscript{216} is preferred. In these cases the groups that interrelate with regard to the marriage and contract with regard to marriage goods, are nuclear families belonging to the same agnatic group.\textsuperscript{217} In contrast, amongst the Nguni marriage between agnates is forbidden.\textsuperscript{218} Family groups or agnatic groups will therefore be the parties to marriage negotiations.

But in light of both the non-specialised nature of indigenous law, and the important role of social solidarity, one should never see the nuclear family or the agnatic group in isolation. They form part of a bigger unity. In fact, this unity includes other agnatic groups as well. After her marriage, the wife's group of origin continues to play an important role in her life, as well as in the lives of her children.\textsuperscript{219} Through marriage a special relationship is created between the family groups of the two spouses. Visiting (temporary and long term) between the two groups is common and maternal relatives sometimes become part of the permanent residential units.\textsuperscript{220}

Church\textsuperscript{221} explains that the reason for preferential marriages between cross-cousins in Tswana law lies in the fact that although a woman becomes a member of her husband's group upon marriage, she never loses the membership of her group of origin. In cross-cousin marriages special kinship relationships are established and the cultural bonds between the agnatic groups strengthen.\textsuperscript{222} This is of relevance in the economic sphere where a relationship of mutual assistance and co-operation is

\textsuperscript{216} Usually with the child of the malomē (mother's brother).

\textsuperscript{217} Church "Betrothal" 80.

\textsuperscript{218} Preston-Whyte 178-179.

\textsuperscript{219} Church \textit{Marriage} 29-35.

\textsuperscript{220} Preston-Whyte 178; Schapera "The Tswana" 45.

\textsuperscript{221} Church \textit{Marriage} 33-34.

\textsuperscript{222} Church \textit{Marriage} 34.
envisaged and in the legal sphere where both groups have a limited right of guardianship over the woman.

Even in cases where there are no cross-cousin marriages, the malomē, the mother’s brother, plays an important role in the strengthening of cultural bonds. He plays a part in litigation and in marriage arrangements. Preston-Whyte\textsuperscript{223} comments that “[t]he ‘warmth’ of the relationship with the mother’s brother is well established ... and the joking relationship\textsuperscript{224} between the malume and his sister’s son in Tsonga society has lead to much comment”. In Tswana law, a woman’s malomē may litigate on her behalf, and amongst the Barolong the presence of the malomē is regarded as just as important as the presence of the father of a person involved in litigation. In marriage negotiations, and the transfer of marriage goods the maternal uncies also play a significant role. The fathers of the couple to be married consult the maternal uncies and amongst the BaKwena the malomē on both sides have to be consulted if the wife is to be the great wife.\textsuperscript{225} If the malomē is disregarded in marriage negotiations, it will not affect the validity of the marriage but he may later refuse to become involved in the resolution of domestic problems.

It has been reported for the BaHarutse that the malomē is liable to pay the same in marriage goods as his nephew’s father, and that he is then entitled to at least one beast received in marriage goods for the marriage of his niece. Amongst the Tswana a person who contends for public office relies on his malomē for support and advice.\textsuperscript{226} He also plays an important role in the religious life of his nephew and offerings are regularly made to the gods of the mother’s family on behalf of the

\textsuperscript{223} Preston-Whyte 178.

\textsuperscript{224} This joking relationship includes amongst others, the snatching of the meat of the beast which the uncle sacrificed on behalf of his nephew: see Hammond-Tooke “Action” 347.

\textsuperscript{225} Church “Betrothal” 81-82.

\textsuperscript{226} Preston-Whyte 207-208.
nephew. These are but a few examples of the close connection with the maternal kin and the important role the maternal uncle fulfills.

However, it should be remembered that the family idea also extends beyond the grave. In the nucleus of the extended family, indigenous culture distinguishes between the recently dead and those who have been dead for some time. The deceased members of the family also include younger persons and children. The recently deceased are those who form the closest link between the living and the superhuman. The South Sotho may for instance pray to the "new gods" to intercede and to pray on their behalf to the "old gods". The lineage dead of the woman's family also play an important role. Amongst the Lobedu, Venda and Tsonga paternal as well as maternal ancestors are remembered, whilst the paternal ancestors are the most important shades in the life of the Nguni and Sotho.

The deceased are regarded as a mere extension of the group on earth. This is evidenced in the offerings of food and drink which are regularly made and in the lack of reverence with which the indigenous people behold their ancestors. There is no relationship of humble worshiper and omnipotent god. People pray to ancestors as one human being to another, often scolding them or reminding them of their duties to their children. The ancestors are regarded to be on the same level as humans and their worship is characteristically cheerful.

227 Hammond-Tooke "Action" 347.
228 The importance of the superhuman in indigenous social and legal ordering was discussed in 3.b.i. (ii) above.
229 Mbiti Religions 106-109.
230 Hammond-Tooke "Beliefs" 330.
231 Hammond-Tooke "Beliefs" 325.
232 Hammond-Tooke "Beliefs" 332.
Part II.3  Jural Postulates

But the group also comprises those who still have to be borne. Mbiti\(^{233}\) says about the unborn:

"They are the buds of hope and expectation, and each family makes sure that its own existence is not extinguished. The family provides for its continuation, and prepares for the coming of those not yet born. For that reason, African parents are anxious to see that their children find husbands and wives, otherwise failure to do so means in effect the death of the unborn and a diminishing of the family as a whole."

The importance of those still to be born is reflected in legal institutions such as the sororate and the levirate. Upon marriage, the marital guardianship is transferred to the husband's group. The marital guardianship comprises, amongst others, the right to the woman's child-bearing capacity which gives the husband's group the right to children. If a woman is unable to produce offspring, or if either of the spouses should die, provision is made through sororate and levirate secondary unions that the house is continued, the reason being that once a nuclear family is established it should not be allowed to become extinct.\(^{234}\)

If a wife is barren or dies before she has borne any (or enough) children, her group of origin sends a sister to bear children for her. Rules regarding the payment of marriage goods for the sororate union, the return of marriage goods if no children are borne, whether the husband's group has a right to a substitute, and how many children should be borne to qualify as a fulfillment of the wife's child bearing duty vary from tribe to tribe. But the underlying principle, the continuation of the family through the procreation of children, remains the same.

Similar to the sororate union is the levirate union, which is also regarded as a continuation of the original marriage. The approved relative of the deceased husband is not only obliged to beget children for the deceased, but takes full domestic and

\(^{233}\) Mbiti \textit{Religions} 105 107; see also Mbiti \textit{Introduction} 109, Ayittey 10 173.

\(^{234}\) Preston-Whyte 188-192.
marital responsibility for the widow and her children.

The family idea is also reflected in the fact that abortion is regarded as a most serious crime. Amongst most tribes, the expulsion of a human foetus, irrespective of the stage of its development, is regarded as criminal in indigenous law. It is also regarded as a polluting act which disturbs the harmony in the group and with the superhuman and which has to be cleansed through rites of lustration.

Today the family idea underlies social and legal ordering in urban townships. Family councils still play an important role in the metropolitan areas and communities are organised into fictitious family units (yards, blocks, streets and camps) in which social coherence exists. These civic structures are responsible for the general social well-being of the community, to encourage unity, comradeship and co-operation in the community, and also to resolve disputes between residents.

(iii) The Hamlet Spirit

Chiba uses the traditional concept of the hamlet, an autonomous local community, to illustrate the postulate which prompts people to collective behaviour in traditional local communities, and fictitiously in other social collectivities, and which underlies the creation of unofficial law to supplement and substitute the deficient rules of official laws.\textsuperscript{236}

The division of indigenous communities into social and administrative units or wards provides an example of how this postulate operates. A ward consists of a number of villages under control of a hereditary headman. The people living in a ward are not all related but they associate together, co-operate in many activities and support each another in case of trouble.\textsuperscript{236} The ward is a jural community and an important

\textsuperscript{235} Chiba \textit{Legal Pluralism} 97.

\textsuperscript{236} Schapera "The Tswana" 46.
component of the chiefdom. It is the smallest administrative unit. The ward headman represents members of his ward in the chiefdom, assists the chief in maintaining law and order and in allocating land to members of his ward, performs administrative tasks, settles and adjudicates disputes and try certain criminal offenses in the ward. The Court of the Ward Headman is an indigenous legal institution which today still has considerable influence in rural areas and which still plays an important part in the unofficial administration of justice and in the replacement of official law with unofficial law. The spirit of social solidarity in the ward, which comprises different groups organised into a single unit, may also be used to illustrate the family idea that individuals act for the group as a whole and not for themselves.

Today the hamlet spirit as a specific jural postulate in indigenous law is also practically illustrated in the social organisation of black metropolitan areas and the creation of unofficial law and dispute-resolution institutions in those areas.

(iv) Common-kin Principle

This principle underlies kinship relations in indigenous communities. Despite the fact that there are some differences in some kinship systems there are also striking similarities which justify certain general assumptions. Kinship is established either through blood (consanguinity) or through marriage (affinity). Kinship has religious, moral and legal significance for the individual. It governs social relationships between people in a community by determining marital customs and regulations and by

237 Traditional authorities are presently recognised in sections 181-184 of the Interim Constitution, Act 200 of 1993. However, this recognition is subject to the law that regulated these authorities before the commencement of the Act.

238 Prinsloo & Myburgh 57-59; Prinsloo Publiekreg 63-64 113-114 241-243 267; Schapera "The Tswana" 46-47.

239 See generally Bohannan Anthropology 54-71, Preston-Whyte 177-210, Ayittey 1-9, Vorster "Kinship" 85-93, Schapera "The Tswana" 43-46.

240 For example, the Nguni prohibit marriage and sexual relations between kin, while the remainder of the Bantuspeakers prefer marriage between kin.
determining individuals' behaviour towards each other. Kinship affiliation may even
determine residence. The kinship system also extends vertically to include the
departed and those yet to be born. Children are taught the genealogies of their
descent. Extension of the genealogical line provides a sense of depth, of historical
belongingness and a sense of sacred obligation.241

The kinship system provides the framework within which an individual classifies others
and the rules to guide interaction with them. For example, children are expected to act
in a certain way towards parents and especially towards the mother's brother. There
are specific rules for both the husband and the wife which regulate relationships with
affinal kin (kin through marriage).242 Zulu wives are, for example, expected to act in
a shy and respectful manner towards their husbands' kin and there is a taboo against
the use of certain words in the presence of a woman's in-laws. Another interesting
phenomenon is the joking relationship which exists between certain kin. Such people
are not only allowed, but expected to mock each other without being offended. The
joking relationship between the mother's uncle and his nephew may serve as example
in this regard.

For jural purposes, descent through males forms the basis for co-operation. Agnates
are individuals who recognise a common forefather and they are bound by a
fundamental bond. But, as indicated above, patrilineal descent does not take away the
importance of the mother's kin. Marriage is the other way in which kinship relations
may be established. There are three principles regarding marriage which are common
to all Southern African Bantuspeakers: the transfer of marriage goods; the fact that the
woman is physically transferred to her husband's group upon marriage; and the
principle that a woman may only have one husband whereas a man is allowed to have
more than one wife.

241 Mbiti Religions 105; see generally 104-106.

242 Vorster "Kinship" 91-92.
Although polygyny is on the decline due to economic circumstances and the spread of Christianity, indigenous marriages are still potentially polygynous and for that reason not recognised by official South African law. A polygynous marriage entails certain duties, prerogatives and privileges for the houses created by the marriages to the different wives. Each marriage establishes a new house consisting of a wife and her children. Such a house forms a basic social, domestic and economic unit. House property should be allocated equally to each house and is, as a rule, used for the benefit of children of that house. Marriage goods generally becomes the property of the house, but a father who wishes to use house property for other purposes should first obtain the permission of the wife concerned. Houses are ranked according to certain rules which vary from one society to the next and which vary also depending on whether commoners or aristocrats are involved. Amongst the Nguni wives are both ranked and linked to other wives, which makes the whole system quite complex. A wife's rank also determines where she lives. The ranking of wives has important consequences for the children as it determines their social position and their rights and order of succession. 243

(v) Esteem for the Ruler

This postulate is used to denote the moral and legal influence of the emperor in Japanese law and underlies the special esteem for the emperor and his family. In indigenous law, the ruler has a similar position of reverence and the royal family is also held in high esteem by the tribe.

Amongst the indigenous people of Southern Africa, political organisation is structured around an empire which consists of a number of tribes or remnants of tribes. Authority vests in a ruler, the king or a paramount chief. A chiefdom or tribe is the most important political unit in indigenous law and comprises those who pay allegiance to a ruler in a specific territory over which that ruler exercises his authority. Lesser

243 Preston-Whyte 179-182; Church Marriage 59-60; Schapera "The Tswana" 40; Vorster "Kinship" 94-95.
political units are wards, sections and districts. The ruler is the legislative, judicial and executive head of the tribe. His position is hereditary, based on patrilineal descent. As a rule, he is the genealogically highest ranking male of the ruling family. In some tribes, such as the Lobedu, women are head of State and in others, such as the Sotho, women may from time to time succeed to the position of ruler.\textsuperscript{244}

The ruler has extensive powers\textsuperscript{245} which are exercised in-council. He is the guardian of fundamental values, the religious head and the direct, living representative of his ancestors who guard the tribe and see to its well being. He is the head of the army. His councils advise and assist him in the administration of the tribe and keep him in control by preventing any abuse of power and by voicing dissatisfaction and criticism.\textsuperscript{246} His position and functions are also linked to other cultural aspects, such as law (the ruler is head of the judicature); kinship (formerly the ruler had to grant permission for marriage); education (the ruler is the head of the tribal school); economy (the ruler controls the tribal area, agricultural activities and public labour); language (praise-poems and special forms of address\textsuperscript{247} are used for the ruler); art (insignia mark the ruler's position)\textsuperscript{248} and with religion (the ruler is the priest and the link with tribal ancestors).

In Southern Africa there is no specialised office of priest. The head of the tribe usually acts as priest and takes charge of rites. His religious duties include the doctoring of

\begin{itemize}
\item \textsuperscript{244} Vorster "Political Organization" 79-84; Schapera "The Tswana" 51-53; Myburgh & Prinsloo 4 5-11; Ayittey 108-113.
\item \textsuperscript{245} Discussed in Part I.II.4.a.
\item \textsuperscript{246} Ayittey 95-96 118-119.
\item \textsuperscript{247} The Ndebele address their ruler as "lion"; "hero, match for our enemies"; "big, forest-like beard"; "jaw for which no bone is unmanageable"; "you are black and fearsome"; "war-hero, you who have risen above us". Failure to address a ruler by special names may constitute the crime of contempt of the ruler: see Myburgh & Prinsloo 8.
\item \textsuperscript{248} The Ndebele ruler's insignia are amongst others a special garment of leopard skin, a royal sceptre of rhinoceros horn, a sweat spoon of ivory and a needle which fits into a special sheath: see Myburgh & Prinsloo 9.
\end{itemize}
Part II.III.3 Jural Postulates

the army after his father's death; consecration of the capital when it is moved to another site; doctoring of tribal boundaries in times of pestilence and drought; initiation of boys and girls into membership of age regiments; sowing, first-fruits, and harvest festivals; and, above all, the making of rain.249

Like other people, the ruler retains his position after death. All members of the tribe worship the ancestors of the ruler and acknowledge them as the source of the tribe's prosperity and welfare, just as they had been when they were still alive.

In the ancestor cult (the aggregate of ancestor beliefs and ritual which involves the worship of the dead ancestors) the ruler acts as mediator between the ancestors and the group. The goodwill and co-operation of the ancestors are essential to the existence of the tribe and the ruler pays homage to them or placate them by rituals and offerings. The ruler's main task is to maintain the equilibrium between the tribe and the superhuman. He symbolises a people at one with its moral order, at peace with itself and in harmony with the ancestors.250 This close connection between the ruler and his chiefly ancestors, puts him in a deferential religious relationship with his followers. The position of ruler is regarded as sacred and as a repository of his ancestral spirits.251 This position of reverence is also associated with the idea that he becomes a tribal god on his death. In fact, it is not unusual for rulers to claim superhuman powers in the exercise of their religious duties. This is done as a matter of expediency to inspire awe and social control. It is also believed that religious sanctions serve to retain a tyrannical ruler. Fear of the ancestor's wrath checks the ruler against becoming cruel and inhumane. It is also regarded to be in accordance with the norms of royal conduct as laid down by the ancestors for a ruler to be humble.252

249 Schapera "The Tswana" 60.
250 Ayittey 177 173-181.
251 Ayittey 126.
252 Hambrock 130-133 135; Schapera "The Tswana" 60; Ayittey 118-119 126.
The high esteem for the ruler and his family and the close connection between the ruler and the superhuman are further reflected in the fact that offences against them are regarded as more serious than those committed against other individuals and that such offences are often regarded to have a polluting effect on the community. Contempt of the ruler's court, for instance, is associated with pollution, which has to be removed through a purificatory meal. This purification takes place when the ruler and the culprit eat a meal of conciliation to restore the equilibrium both in the community and with the superhuman. The violation of allegiance to the ruler, disloyalty to the ruling family, or the rejection of the ruling dynasty constitutes treason. Treason is the most serious crime in indigenous law because it threatens the survival of the realm, which, of course, extends beyond the grave. Treason used to be punishable by death without trial as a form of lawful self-help to obtain public satisfaction for the outraged community.²⁵³ But banishment and the confiscation of property are nowadays the competent sentence. The confiscated property is burnt to remove the pollution which the commission of the crime has generated. The punishment for adultery with the royal wives is also death. Amongst the Ndebele bewitching the ruler too is regarded as a crime punishable by death. Contempt of the ruler is a serious crime because it poisons the whole community. Acts such as raping of his wife, not addressing him by his ceremonial titles, leaving a meeting which was convened by the ruler without permission, and accusing him of black magic are instances of contempt of the ruler.²⁵⁴

4 SUMMARY

In summary it should be mentioned that there are indeed cases where, prima facie, the jural postulates of Western law seem to find application in indigenous law. However, it should be borne in mind that indigenous conceptions of such postulates

²⁵³ Myburgh "Satisfaction" 20-23.
²⁵⁴ Schapera "The Tswana" 52; Van Blerk "Contempt" 65-67; Myburgh "Treason" 62-64; Myburgh & Prinsloo 9 88-90.
usually differ from Western conceptions, and that different results would be obtained, depending whether an indigenous or Western approach to legal reasoning is employed. Many such examples have been mentioned earlier. Of relevance here are all the instances where, amongst others, concepts of public policy, boni mores, public interest, equity, reasonableness and good faith come to the fore. One has to guard against the distortion of indigenous law in order to conform it to the underlying postulates of Western law. It is important to remember that the clarification or analysis of indigenous laws, principles and institutions is usually done by analogy with Western laws, principles and institutions and that the Western terminology should merely be used as a device to explain or understand indigenous law.

The most basic differences between indigenous and Western law lie in the diffuse postulates of these two legal cultures. These differences are so important because it is the diffuse postulates which determine the content of the specific postulates and which direct legal development. In Western law the concepts of individual freedom and equality are reflected in the modern, liberal perceptions of justice. In contradistinction, harmony of the collectivity, the superiority of the superhuman and the accommodating nature of indigenous law are the most important basic precepts which underscore indigenous law and determine the content of its specific postulates.
CHAPTER III

THE FOUNDATION OF JURAL POSTULATES IN SOUTH AFRICA

1 INTRODUCTION

Jural postulates in Western law are characteristically specialised and are bedrocked in Judeo-Christian and Romano-Germanic cultural traditions. In these legal traditions the emphasis is on individualism. In contrast, indigenous jural postulates are by nature non-specialised and are founded upon the African cultural tradition which focuses on social solidarity.

1.a The Foundation of Jural Postulates in Western Law

The Judeo-Christian and Graeco-Romano traditions form the fundamental basis of Western law.¹ On the one hand the moral basis of that law is rooted in the biblical perception of law and justice;² and on the other hand the necessary connection

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¹ See Smith & Weisstub 195, see also Berman "interaction" 387-391; Wieacker 6 regards the European ius commune which comprises Roman law (Justinian law adapted to the needs of the time, glossed by the glossators and commented upon by the Commentators) and canon law as the foundation of Western legal culture.

² Cf however Mayer-Maly's view that the notion of boni mores (which at 61 62 he regards as an extra-legal order based on everyday ethics) may be traced back to classical Roman law and that it is not founded in post-classical or Justinianic moralism: Mayer-Maly 76-77.
between law and reason is rooted in the Graeco-Romano scientific cultures. The jural postulates which underlie the Western component of the South-African legal system are thus also founded in these legal traditions. Although the role of the Romano-Germanic tradition is usually emphasised, the Judeo-Christian tradition has also played an important role in developing the content of the basic principles which underlie our official South African legal system. And this is an ongoing process. The principles of justice, morality, order and equity are continuously influenced by the perceptions and beliefs of the community. In South Africa, religion indeed plays an important role in all spheres of cultural life and affects law to a large degree. With regard to the Western component of this community one has only to think of the extensive influence, whether positive or negative, that the teachings of Jean Calvin has had on South-African legal thinking.

1.a.1 Judaism and Christianity

The fact that Judaism and Christianity played a particular role in the development of Western law and jurisprudence cannot be denied. However, opinions as to the extent of this influence differ. Studies in the history of South African law usually emphasise the role of the learned or scholarly Roman law which was received in Western and even Eastern Europe. Usually only scant attention is paid to canon law and it is, as

3 Du Plessis "Geregtigheid" 546 points out that a negation of the Hebraic heritage of our legal culture could lead only to its impoverishment.

4 See Denning 391-393.

5 In South Africa, Calvinism became "the source of moral and spiritual justification for an oppressive system as apartheid": Du Plessis "Calvin" 60; On 47 he points out that "Calvinism" is in fact a misnomer, for it refers to a much broader theological tradition and, further, that the reformist tradition is in fact rooted in the ideas of Calvin.


7 Zajtay & Hosten 181-186 190-192 distinguish between the reception of norms and the reception of the scientific structure and framework of Roman law. This scientific reception had a wider influence in Europe and extended to Eastern European countries such as Hungary and the
a rule, mentioned only as a vehicle for the reception of Roman law whilst its influence is regarded as being limited to medieval Roman law. Yet it is a historical fact that canon law infiltrated Roman law, whether through a conscious or accidental process, and moulded that law, formed part of the European ius commune and consequently impacted on the development of Western law.

The influence of canon law is evident in various spheres of our law and jurisprudence and is perhaps most marked in the concept of justice, as reflected in the notions of reasonableness, equality, generality, good faith, conscience, honesty or integrity (honestas) and compassion (misericordia).

The fourth century saw the first real influence of Christianity in Western-Europe. Constantine granted religious freedom to the Christians in the years 306-337 and thus started the conversion of the Roman Empire to Christianity. Although the early Church ordinances cannot be regarded as canon law in the true sense of the word, they did eventually give rise to canon law. The Christian emperors regarded it their duty to reform the law in the direction of greater humanity. In the post-classical period, Roman law was reformed under the influence of Christianity. In family law, for example, the consent of both parties to a marriage became a requirement for a valid marriage, it became more difficult for a man to divorce his wife and the right of life and death (ius vitae necisque) of the head of the household was abolished. In the law of property the rights of slaves were increasingly protected; a slave was given the right to appeal to

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8 In a discussion of equity and Roman law in legal thought, Van Zyl "Equity" 109 points out that already in the post-classical period Roman law was strongly influenced by Christianity and was as a result characterised by a tendency to make law more ethical and more accessible.

9 Kleyn 339; see also Berman "Interaction" 387-391. In an article on the influence of the Old-Testament perception of justice on modern Western law, Du Plessis "Gerregtigheid" 521-522 546 comes to the conclusion that despite the differences, fundamental similarities exist in the Western and Hebraic notions of law and justice; Du Plessis "Opmerkings" 407-409 discusses the Christian foundation of human rights.

10 Berman "Interaction" 387.
a magistrate when his master abused his powers, or in case of cruelty, the right to freedom.

The Church survived the fall of the Western-Roman Empire in the fifth century and grew from strength to strength. It played an important role in the survival of the classical tradition and the rebirth of Roman law. In the sixth and seventh centuries the monasteries became the channels of learning throughout Gaul, Southern Germany and Northern Italy and thus established the link between the Frankish Kingdom and the Church of Rome. In 800 the Frankish king Charlemagne was crowned emperor of the Holy Roman Empire by Pope Leo III. This event completed the process of converting the Franks to the Christian faith. The various compilations of Roman law by Justinian and his successors were partly induced by the belief that Christian humanisation of the law required its systematisation.  

The twelfth century was marked by the application of two eminent systems of law - canon law and Roman law. The influence of the Church, as a supra-national world power, was gaining strength, as was the conflict between Church and State. Canon law and ecclesiastical courts run by trained lawyers came to the fore during this period and personae miserabiles such as widows, orphans and slaves were allowed to appeal to these courts for redress. Moreover, so-called spiritual matters (causae spiritualae) fell within their jurisdiction, and they consequently dealt with matrimonial and succession disputes, as well as cases concerning Church property, usury and contracts bonae fidei. In criminal law heresy, blasphemy, bigamy, witchcraft, perjury, fraud and other matters affecting the conscience of its members were dealt with by the ecclesiastical courts.  

A renewed interest in the scientific study of Roman law and the Justinian Code,  

11 See generally Berman "Interaction" 387-389; see also the discussion of intellectualism in 1.a.ii below.  

12 Canon law was the only law applied in these courts.
produced highly trained secular jurists. Canon jurists also studied this Code and jurists of the law schools of Bologna, Montpellier, Oxford, Orléans, Cambridge, Heidelberg, Louvian and Aberdeen, founded from the thirteenth to the fifteenth centuries, studied both the ius civile and the ius canorum and obtained the degree doctor utriusque iuris. Furthermore, Canonists such as Rufinus, Tornacensis and Huguccio taught canon law at Bologna and thus through their teaching and publications enlarged the influence of canon law not only in Italy but also France. It was also during this period that Gratianus compiled his Decretum Gratiani upon which the Corpus Iuris Canonici was founded. Yet it may perhaps be highly artificial to maintain a distinction between canon and secular lawyers, because the study of canon law and civil law was a reciprocal exercise and both disciplines were interdependent.¹⁴

The Ultramontani, who were mostly Canonists, under the supervision of Revigny and Belleperche, were the first to lay down rules for the application of canon law in Roman law. These rules, known as the Bereichslehre, provided that due to the equity of canon law (aequitas canonica), canon law should be applied in certain fields to temper the severity of Roman law.¹⁵

Commentators like Cinus, Bartolus and Baldus¹⁶ developed and refined these rules of the Bereichslehre and determined three instances in which canon law, which was characterised by equity derived from Christ, should override secular laws. The first two instances mainly concerned ecclesiastical matters. In the third instance canon law was applied when the application of secular law would amount to sin.

¹³ England is regarded as part of the broad European community and its law as part of the European ius commune: see generally Zimmerman "Synthesis".
¹⁴ Hosten 41.
¹⁵ Kleyn 335.
¹⁶ Other Commentators who wrote important commentaries on canon law were Durantis, Andreae, Imola, and Tartagnus.
The Humanists, who were strongly influenced by Protestantism, adhered to a strict division between divine law and human law tried to limit the application of canon law. But Duarenus and Alciatus who were champions for the continued study of canon law extended their influence not only in France, but also elsewhere in Europe.

The Usus Modernus Pandectarum disclaimed the theory that canon law should be applied when secular law amounted to sin (the ratione-peccati theory) and advanced a new theory based on the general preference of canon law. The reason for this was that canon law had applied in Germany earlier than Roman law. This theory of a general preference was also followed by the historical school, but for a different reason: according to them canon law was received with Roman law as part of the European common law or ius commune, but the preference for canon law was based on the fact that it was accepted as being of more recent origin than Roman law. The theory was not applied where canon law was in conflict with existing court practices, where statutes gave preference to Roman law or in countries where Protestant law prevailed. The Pandectists gave the law of practice preference and according to them only in cases of uncertainty was canon law to prevail over Roman law.

Canon law also had a distinct influence in the Netherlands and was applied to temper the severity of Roman law ratione peccati. In the period of the early reception (thirteenth - the middle of the fifteenth century) the officiales or ecclesiastical judges who were usually schooled at Bologna and Orléans, played an important role in the reception of Roman and canon law. They had both judicial and administrative functions and relied on Romano-canonical procedural law in drawing up legal documents. The ecclesiastical courts of this period in the Netherlands had a wide jurisdiction extending not only to matters affecting the conscience, but also to secular matters such as marriage, sexual deviance, fraud and usury. The law applied by these courts came to be considered part of the law of the land. The ecclesiastical courts were abolished only in the eighteenth century when the Reformed Church became the Dutch State Church.

17 The conflict between Catholicism and Protestantism is of no consequence to the basic influence of Christianity on the development of our Western law.
The canonical influence upon Roman-Dutch law was readily accepted by great writers such as Grotius, Voet, Van Bynkershoek, Van der Keessel, and Van der Linden.\(^\text{18}\)

It should be borne in mind that canon law also found its way into our law via English law. The strong canon-law influence in English law was especially pronounced in the Court of Chancery and in the ecclesiastical courts.\(^\text{19}\) The evolution of the concept of equity in England, for example, was influenced by the principles of Roman law as adapted by canon law through its application in the chancery courts.\(^\text{20}\) Zimmermann\(^\text{21}\) explains:

"Thus we have the interesting situation that an idea, originating in Roman Law, has been received in England at first via canon law by the ecclesiastical courts, then taken over by the Court of Chancery into Equity, developed in the course of centuries into a comprehensive doctrine before it has come 'home', back into the last resort of the old European ius commune".

1.a.ii The Graeco-Romano Tradition

Wieacker\(^\text{22}\) describes personalism or individualism,\(^\text{23}\) together with legalism and intellectualism, as the three invariables which give European legal culture a specific
character. These unchanging elements in the Western legal tradition may all be regarded as manifestations of specialisation. Specialisation in a legal culture is reflected in the separation, differentiation, classification, and delimitation of, amongst others, knowledge, concepts, ideas, duties and interests. It is further characterised by individualism and abstraction.\(^2\)

Roman-Dutch law is the product of both a scientific and a practical reception of Roman law.\(^25\) Whilst it is commonly accepted that intellectualism, which is evidenced in legal scholarship and the scientific study of Roman law, emerged in Europe in the twelfth century,\(^28\) and that this period saw the beginning of a theoretical exposition of the concepts, categories and divisions of Roman law, its specialised character evolved at a much earlier time. In the first century BC, Q Mucius Scaevola, following the Aristotelian technique, employed the dialectical method in his work. He laid the foundation of Western jurisprudence with his classification of law into four main divisions, namely the law of inheritance, persons, things and obligations.\(^21\) But the first traces of specialisation in Roman law could be discerned even earlier when the concept of a State, and the concept of individual property evolved.

It is possible that the development of the Roman State may be the reason why the

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24 Myburgh Papers 2.

25 A distinction should be drawn between a scientific reception of Roman law and a practical reception of that system which comprises a reception of the substantive rules of Roman law. A scientific reception encompasses a reception of the basic framework or structure of Roman law: Zajtay & Hosten 183; see also Berman Law and Revolution 539, Wieacker 9. According to Wieacker a scientific reception also comprises the reception of common values. These are values of justice, order and equality - the basic postulates which underlie Western law. But conceptions of these values differ, not only in different communities, but also in different time spheres.

26 Berman "Origins" 400-401; Wieacker 4. Berman "Origins" 400 points out that the approach to law changed also because of political developments. Strong central governments and a body of professional jurists (practicing lawyers and legally trained judges) emerged.

27 Each category was further divided into subdivisions: see Berman "Interaction" 407. Berman "Origins" 405-407, points out that this system of classification was based on the Greek dialectical approach from which scholasticism later developed.
significance of group solidarity was so short lived in the early development of the Roman culture. The beginnings of State organisation could be discerned already in the city State. The Romans were influenced by the Etruscans, inhabitants of the neighbouring Etruria, as far as their political organisation was concerned. The Roman royal dynasty of the Tarquinians was of Etruscan origin and by the end of the sixth century Rome was ruled by the Etruscan and Roman nobility under a constitution devised during the period of Etruscan predominance. Some symbols of the Roman magisterial power originated in the Etruscan political system. In the early Roman monarchy three elements could be distinguished in their State organisation, namely the king, the council of elders (senatus) and the assembly of the people. This division of the State into various bodies indicates the first traces of specialisation in their State system.

The Etruscan influence also induced the urbanisation movement in the early Latium, Campania and Umbria. It was exactly this very early movement to urbanisation which served as the impetus for the development of individual ownership. The city was regarded as the birthplace of commerce and commerce demands free rights of property. The Etruscans extended their influence not only to the political

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28 The Roman conceived of State not in the abstract modern meaning of the word, but related it to the Roman populus collectively: see Kunkel 9; see also generally Sohm 34-47.

29 Cary 18 remarks that "in the political history of Italy the first chapter belongs, not to the Greeks, but to the Etruscans"; see also Van Oven 435-436, Cary 22-25, Yaron 345. Although there is no reliable information on Etruscan institutions, an Etruscan influence on Roman law cannot be ruled out completely. However, it is unlikely that Etruscan institutions extended any influence on republican institutions: see Yaron 345.

30 The Etrurian Empire consisted of various large cities and had a strict aristocratic political organisation. Until the sixth or fifth century BC executive power was vested in their city-kings who were elected by the noble families. They were later replaced by annual magistrates: see Rostovtzeff 9 22.

31 Jolowicz 7; Rostovtzeff 17.

32 See generally Rostovtzeff 12-23, Kunkel 4-6.

33 Sohm 43.
organisation of Rome, but also to the field of economics.\textsuperscript{34} The Etruscan influence on the Roman political and economic systems outlived their actual supremacy of the region\textsuperscript{35}.

Another reason why collectivity and group solidarity gave way to individualism at such an early stage of Roman legal development, is the fact that the position of head of the household and its associated patriarchal authority developed as an important institution.\textsuperscript{36}

The powers of the head of the household reached a zenith in the early republic when the restrictions of the monarchal period had disappeared.\textsuperscript{37} The deterioration of the ancestral cult and the gradual decrease in the persuasive power of public opinion led to the increasing abuse of the patriarchal authority and a concomitant awareness that that power should be accompanied by a certain pietas. This decrease in importance of the ancestral cult and the increasing intervention by the State through legislation, also led to an awareness that law and morals could be separated and that the powers

\textsuperscript{34} Etruscan cities had growing metal and textile industries and well developed trade links with Greece and her colonies in Phoenician Carthage and in Southern Italy: Rostovtzeff 9 10 11. Economic and social life in Rome were also influenced by Greece and Carthage. According to Yaron, the remnants of the Semitic influence which originated in Carthage could be traced in early Roman law: see generally Yaron; Rostovtzeff 14.

\textsuperscript{35} Rostovtzeff 21 24.

\textsuperscript{36} Van Warmelo 53 mentions that the association of persons under the authority of an individual male who had no living ascendants, originated in the primitive agrarian era of Rome when the family formed a close-knit union under the absolute power of the land owner. While the paternal authority and patriarchal joint-family organisation (consisting of various generations living together in the same household and united as a socio-political unit through common worship, work and property: see generally Westrup Vol III 149-150) were not exclusively Roman, it should nevertheless be kept in mind that it was the Roman patriarchal authority, based on the economic solidarity of the house community, which alone had grown in importance and influence and which became recognised as legal institution: see Maine 143-148.

\textsuperscript{37} Westrup Vol III 147 150 151 186-187 regards the archaic family constitution as a form of government with the patriarch as sacral head, judex domesticus and economic manager. He equates the early family organisation, which was united through a common cult and common property with a "community of law under a patriarchal government organised through ancient custom" and the patriarchal authority as "a distribution of Justice founded and bound by ancestral legal traditions": see Westrup Vol III 186.
of the head of the household fell under his moral duties which were not enforceable. Towards the close of the republic, the State started curtailing the powers of the head of the household and started intervening in the autonomous family organisation which resembled a State within a State. 38

In primitive Roman times, the patriarchal authority as legal institution, maintaining the solidarity of the undivided joint family, was regarded as a social necessity to safeguard the economic security and material basis for the perpetuation of the family and the ancestral cult. 39 It was economic expediency which prompted the early development of individualism in this society. Diósdi 40 explains as follows:

"A developed commodity turnover, and a lively commerce require the economic independence of the individual, while the basically autarchic peasant economy necessitates on the contrary the concentration of property. So the paterfamilias had to become very soon the sole owner of the family property. ... Because of the increase of the family, the maintenance of family property would have endangered the unity of peasant economy and in consequence the basis of economic life in Rome."

The period during which property rights vested in the clan was probably followed by a transitional period in which property rights vested in the family as a whole. However, it may be assumed that all traces of communal ownership had been erased by the time of the Twelve Tables and that by then the principle of absolute individual ownership had come to the fore. 41 The basis of this assumption is the fact that the Twelve Tables made provision for a judicial remedy for the division of the family property, which suggests the recognition of each family member's right to individual

40 Diósdi 49.
41 Jolowicz 142-144 refers to the relative right of possession which preceded the absolute individual ownership of the earliest republican times. It should be kept in mind that the primitive perception of ownership differed from the modern perception. See generally Westrup Vol II 157-172; Van Oven 113-116.
property and the abolition of the compulsory community of the family.\textsuperscript{42} Also, the head of the household’s competency to dispose of the family property upon his death is a clear indication that the idea of family property had become a mere formality by the time of the Twelve Tables.\textsuperscript{43}

The Twelve Tables provided for special bequests (legacies and manumissions), but the institution of heirs was only introduced into Roman Law around the fourth century BC.\textsuperscript{44} However, there was no restriction upon the legacies and the head of the household theoretically could dispose of the family property as a whole.\textsuperscript{45} The Twelve Tables also provided for the acquisition of land by prescription.\textsuperscript{46} Again economic expediency is the rationale for this new development in the direction of specialisation.\textsuperscript{47}

Some authors go further and make a distinction between familia and pecunia. This distinction, which is based on certain texts of the Twelve Tables,\textsuperscript{48} may be a further indication of the recognition of private property in this very early phase of Roman legal

\textsuperscript{42} The members of the family who became sui iuris upon the death of the head of the household automatically became co-owners of the family property and continued the family community. The actio familiae eriscundae was an action for the division of this common property. See generally Westrup Vol II 39 43 45 61-65; Van Oven 570-571; Kaser 123 -124 367-368; Diósdl 44-46.

\textsuperscript{43} Van Oven 81-83; Diósdl 43-46. Kaser 360 doubts whether the head of the household ever had separate property. He is of the opinion that whilst, even in classical times, the members of the family had no proprietary capacity, they nevertheless had a dormant interest in the family property during the lifetime of the head of the household. This explains why the sui heredes acquired their inheritance automatically, without the necessity of an act of acquisition.

\textsuperscript{44} Kaser 332 leaves open the possibility that the institution of heirs may date back even further in antiquity.

\textsuperscript{45} Kaser 331-332.

\textsuperscript{46} Westrup Vol II 50 51; Diósdl 85-93.

\textsuperscript{47} Agriculture was the basis of the early Roman economy and it was in the interest of the community that land should be cultivated by the owners: see Diósdl 92.

\textsuperscript{48} The texts expressly refer to familia and pecunia.
development.\textsuperscript{49} The dispute amongst the authorities regarding the question whether a distinction is feasible between familia and pecunia has been raging for more than a century and yet no unanimity has been reached.\textsuperscript{50} It seems that there are basically two main streams of thought. On the one hand familia is regarded as members of the household, especially slaves, and pecunia is regarded as cattle. The assumption is then that in the Twelve Tables the exact meaning of the words had become obscured through the lapse of time and that they were used as synonyms, denoting property. On the other hand familia is regarded as family property and pecunia as the separate individual property belonging to the head of the household and which could be disposed of by legacy.

Westrup\textsuperscript{51} too, draws a distinction between familia, being property used for the subsistence of the family as a whole, and pecunia, being personal property.\textsuperscript{52} Familia\textsuperscript{53} was hereditary property in the sense that it belonged to the family (the living family members, the dead ancestors and posterity) and was passed down from one generation to the next, whilst pecunia formed the object of individual ownership and passed down with the individual to the grave.\textsuperscript{54} Diósdi\textsuperscript{55} points out that familia and

\begin{tabular}{ll}
49 & Van Oven 519-521; see also generally Van Oven 58-59 510. \\
50 & See Van Oven 520-521, Watson 54-59, Diósdi 19-30. \\
51 & Westrup Vol II 24-42 56-58 61. \\
52 & This distinction is based on G 2 157 and Paulus D 28 2 11, where it is stated that the members of the family are, during the life time of the head of the household to some extent regarded as owners of the family property: see generally Westrup Vol II 32-33, Vol III 264-265; Kaser 360 307; Van Oven 519-521. \\
53 & The head of the household had the competency to control the family property during his lifetime but had no right to dispose of it by testament, because it belonged to the family as a whole. \\
54 & This distinction between familia and pecunia appears to have been made with reference to the function of the thing, rather than its nature. Thus, the house, a small allotment of land, annual crops, slaves and domestic animals which were used for the subsistence of the family, constituted communal family property. Stock-farming was the most important means of production and source of the acquisition of wealth and preceded tillage. Members of the family had the use and enjoyment of the fruits of the property which was managed by the head of the household but which could not be alienated. It thus seems that this was not a form of ownership known in the modern sense of the word: see Diosdi 50 60-61. \\
\end{tabular}
pecunia should be regarded as designating the essence of ancient property, namely cattle and manpower. Whereas it cannot be ruled out, that cattle, at some stage, may have been the common property of the clan, it appears that slaves never formed the object of common property and should indeed be considered as the very first objects of individual ownership in ancient Roman law. It may thus be assumed that movables formed the first objects of individual ownership in ancient Roman law.

By the time of the Twelve Tables, land which formerly formed the common property of the clan, had already become the object of private ownership. Therefore, in line with changed economic and social circumstances during this time, the words familia and pecunia had obtained a general meaning and could be regarded as signifying property in general, including land.

Whichever view one adopts, it is important to bear in mind that even in ancient Roman times, traces of individual ownership, and thus specialisation, could be discerned.

Nevertheless, the concept of individualism in Western law should not be restricted to the Roman tradition. The idea of individualism was also notable in the Christian-Judaic concept of an individual soul and a personal God as well as in the medieval Church’s rejection of the idea of collective responsibility. The personal relationship with God gave rise to individual freedom of decision and personal responsibility. This personal relationship also had an impact on the idea of law. Law came to be viewed within the

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55 Diósdí 30. At 22-23 he points out that the etymological origins of the words “familia” and “pecunia” do not support the distinction between the words, namely as designation of different kinds of property. Familia is derived from the word famulus which means slave and could be extended to include other members of the household, but cannot support the theory that it embraces the family property. Pecunia which is derived from pecus, clearly does not embrace personal property, such as booty, clothes and weapons.

56 Diósdí 43.

57 His “ownership” should rather be considered as a position of power held by the clan: see Diósdí 43.

58 Although the individual ownership vested solely in one person, the head of the household.
framework of inter-personal relationships between individuals. This influence of Christianity was already apparent in Greek and early Roman law where the idea of magic guilt developed into the concept of personal individual accountability;\textsuperscript{59} where magic fides developed into an ethical principle of bona fides; and where rights came to be characterised as emanations of the individual will.\textsuperscript{60} Generally, the protection of individual rights in Roman law (of slaves and women) developed under the influence of Christianity and it was Christianity which introduced the concept of equity into Roman law.\textsuperscript{61}

Legalism, as a characteristic feature of Western law, is based on the separation of law and other norms, for example, political, moral and social norms.\textsuperscript{62} This feature comprises the power of a State legislator to generate and to change law. It also encompasses the ordering of social relationships in accordance with general rules of law which are not necessarily consonant with moral and social values and purposes. It is the separation of law from the living world. Thus, law functions independently of external social and economic conditions. Legalism, which separates law from social values and purposes, distinguishes Western law from indigenous law where, because

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59 With the establishment of the censorship in the fifth century BC, the collective popular disapprobation when a moral precept was violated, was expressed by literally putting a nota censoria against the name of the culprit in the census list: see Jolowicz 50-52; Westrup Vol II 95. Administrative action was taken against the head of the household (deprivation of his good name befell him) who did not cultivate his land as was expected of him, or who squandered the paternal property: see Westrup Vol III 176-177. Further, the head of the household who abused his power and jeopardised the economic well being of the family by selling his son's labour more than twice, forfeited his patriarchal authority. It was quite exceptional for transgression of a rule to be visited with punishment: see Westrup Vol II 97-102, Westrup Vol III 162-169 260-261, Sohm 58 482.

60 Wieacker 20-23.

61 Berman "Interaction" 387-391. On 391 he makes the observation that "the key to the renewal of law in the West from the sixteenth century on was the Protestant concept of the power of the individual, by God's grace, to change nature and to create new relations through the exercise of his will ... [T]he Protestant concept of the individual will became central to the development of the modern law of property and contract". See also Van Zyl "Equity" 106-109 for the foundation of equity in Roman law and the influence of Christianity on the development of this concept in post-classical Roman law.

62 See Wieacker 23-25.
of its non-specialised nature, there is a close relationship between law and other norms.

This feature of Western law may be traced to the development of the professional administration of justice in Rome which, on its part, was derived from the expert functions of the high priest (pontifex maximus). As indicated above, in the twelfth century professional jurists emerged who developed the concept of law as an autonomous body of rules and principles. Legalism not only evidences the separation, classification or delimitation of legal material, but also brings individualism to the fore again. Legalism resulted in a conflict between individual interests and rationality, and also created an awareness that the interests of individuals had to be protected and that formalised, rule-directed justice had to be restricted. Equity of canon law and the discretionary powers of the praetor developed to correct this imbalance. The curtailment of the powers of the head of the household also illustrates the increasing importance of the individual and the awareness that law and morals should be separated.

Another invariable characteristic of Western law is intellectualism. It may be described as the thematisation, conceptualisation and contradiction-free consistency of empirical legal materials. Intellectualism also encompasses generalisation and abstraction in legal reasoning. Abstraction in legal reasoning gained greater prominence in the classical and post-classical Roman periods. By formally ordering legal science, it gave law creation and the application of law a systematic scientific character. Intellectualism was derived from Greek philosophy, and it induced Roman and later European jurists, starting in the twelfth century with the revival of Roman law in Bologna, to conceptualise and systematise legal phenomena. European jurists of the

63 See also Berman "Origins" 399-400.

64 Wieacker 25-27; see also Berman "Origins" 403ff.

65 See also Smith & Weisstub 315-317.

66 Smith & Weisstub 242-244.
time employed the dialectical method of the ancient Greeks, as well as of the classical Roman and post-classical Roman period as the foundation for their research. It was during this period too that the scholastic method of research emerged. This method consisted of the analysis and synthesis of sometimes conflicting doctrines and principles of secular and ecclesiastical law. Greek intellectualism shaped justice to an abstract concept which entrenched material equality before the law and deemed natural, historical and social distinctions legally irrelevant.

2 THE FOUNDATION OF JURAL POSTULATES IN INDIGENOUS LAW: THE AFRICAN TRADITION

It is often assumed that indigenous law is not only founded in the tradition of primitive legal cultures, but that it also stagnated at a primitive level of development that most legal systems went through in the earliest phases of their development. This implies that indigenous law did not pass through the evolutionary stages from communalism to individualism, from status to contract and from criminal to civil law. Indigenous law should rather be regarded as being founded in the African tradition. But, if

67 Berman "Origins" 401-405. See also Berman "Interaction" 390-391 for the influence of the Church in the transformation of Roman categories into abstract legal rules.

68 Evolutionary theories of law (especially the very simplistic generalisations of Henry Maine) have been refuted by some legal historians. However, Elliott 38-40, argues that theories of evolution of law are not limited to the nineteenth century, but that there is a strong evolutionary jurisprudence in America which today still underlies many assumptions about law. He divides these theories into four basic groups namely social, doctrinal, economic and sociobiological theories of legal evolution. The evolutionary tradition in law starts with the social theories which focus on the historical evolution of society and its culture and the corresponding changes that take place in law. Proponents of this theory propose an alternative to the positivist perception of law-creation through the will of a sovereign. The social evolutionists laid the foundation for modern sociological and anthropological jurisprudence. Savigny was the first exponent of this school of thought. Maine continued this tradition and extended Savigny's theory in his well-known Ancient Law. Wigmore interpreted legal evolution as the continued adaption of law to changes in the environment (Elliott 40-50). The doctrinal theorists takes it a step further and indicate that evolution also occurs at the level of legal doctrines (Elliott 50-62). The economic theorists focus on the process that causes changes in legal doctrines. They regard law as evolving towards rules that increase economic efficiency (Elliott 62-71). The sociobiological theorists emphasise not only the internal dynamics of legal systems but the evolutionary process through which law comes into existence and which determines the content and form of law (Elliott 71-90).
indigenous law is founded in the African tradition, why is it not called African law? "African law" has become a generic term for law of the African continent. It comprises indigenous law or those remnants of it which are still applied, those laws of religious and cognate origins which are recognised by African States, laws and judicial institutions introduced by colonial powers and the laws and decrees of independent African States. Indigenous law is clearly a more appropriate term to use. 

But is it at all possible to discuss the indigenous laws of different African communities, with all their cultural variation, as a single entity? Do these indigenous legal systems display a distinctive indigenous legal style or approach to law that could justify their classification as a legal family? Zweigert and Kötz use various criteria which could be employed to determine the style of legal systems. These are: historical background and development; kind of legal sources and the way they are utilised; distinctive institutions; predominant and characteristic mode of thought in legal matters; and ideology.

First, the historical background and development of indigenous laws of Africa (at least of Africa South of the Sahara) are largely similar. It should be kept in mind that pre-colonial indigenous law forms the subject of discussion, because the legal style of indigenous law can best be determined by an assessment of the unadulterated indigenous law of that period. In colonial and post-colonial periods indigenous law was influenced, adapted and even distorted by external factors. Moreover, colonial influences varied depending on the particular colonial power which ruled. It is therefore not so easy to extricate the true and core indigenous law from all such external influences. However, this does not mean that indigenous law has lost its distinctive

69 Kodwo Mensah-Brown 7.
70 See General Introduction: Terminology.
71 Zweigert & Kötz 67.
72 Zweigert & Kötz 69-75; Van Zyl Regsvergelyking 49-54.
qualities. Indigenous law has proved to be rather tenacious. Sanders⁷³ has remarked that

"[p]rocess-wise and even rule-wise, today's customary law [African law as described above] may not always correspond to that of the pre-colonial past, but value-wise it has retained its communal/socialist nature, as distinguished from the individualistic/capitalist character of the superimposed European law".

Secondly, as regards the sources of law, indigenous law is mainly derived from custom and to a lesser extent from legislation. However, sources of law should be seen in connection with the other factors and is by itself not a decisive factor.

Thirdly, there are legal institutions which lend a distinctive style to indigenous legal systems. Examples of such characteristic qualities of indigenous law which come to mind are the following: In family law, the transfer of the bride to the husband's group and the obligation to pay bridewealth; in the law of succession, the concept of succession to the position of head of an agnatic group and the absence of any notion of inheritance of a deceased estate (because estates vest in agnatic groups which are not subject to decease); in procedural law, the lack of professional jurists; in constitutional law, the fact there is no separation of powers; and in private law, the idea of shared rights and duties.

The fourth factor which may be taken into account is legal ideology. Diverse factors determine and direct legal ideology, for example politics, religion and economy, social structure and philosophy.⁷⁴ Indigenous cultures focus on social solidarity and from an ideological point of reference, indigenous law is regarded as communal or socialist. Traditional indigenous government is government by discussion and consent. But political and economic relations are closely connected and individuals participate in political and economic processes to create and maintain a strong and wealthy

⁷³ Sanders "People's Philosophy" 41.
⁷⁴ See also Zweigert & Kötz 64.
community which at the same time protects the individual. Indigenous communities are subsistence communities in which everything is communally owned. The kinship group lies at the core of the indigenous social structure. Social solidarity focuses on the maintenance of an equilibrium in the group, the unity between the living members, deceased ancestors and those who are still to be born. In a religious context the emphasis is on the omnipresence of the superhuman.\footnote{See also Otite 147-149.}

Fifthly there is the distinctive mode of legal thinking or legal technique. By this is meant a particular technique in legal reasoning, in dispute resolution, in process and generally in the approach to law and legal institutions. Also at this level there are more similarities than differences between the indigenous legal systems of Africa, and various indigenous laws and institutions have been regarded as variations upon common themes,\footnote{Darboe 100; Sanders "Characteristic Features" 333-334.} or as variations upon common postulates. From this point of view indigenous legal systems are non-specialised. An interesting stylistic feature of Western law noted by Zweigert and Kötz\footnote{Zweigert & Kötz 71-72.} is the "struggle for law". This feature entails that even though law is aimed at achieving peace, the individual must nevertheless struggle to achieve that peace; a duty rests on every individual to fight for his rights. This feature is reflected in Western procedural law where the outcome of a dispute is described in terms of winning and losing. In contradistinction, indigenous procedure is aimed at reconciliation by the employment of a practical and empirical approach.\footnote{See also Darboe 108-109. At 109 he observes that, "instead of trying to bring about a discourse that would ensure the establishment of knowledge, the African approach to law aspires to give birth to a practice which would not only assure the continuity of social groupings, but also would enable the entire society to sustain conflicts which may arise to threaten social coherence and equilibrium".}

Although it is the very features of non-specialisation and communalism (as well as the strong reliance on custom) which usually induce people to classify indigenous law as
primitive law,\textsuperscript{79} these concepts have a unique meaning in an indigenous law context, a meaning which is rooted in the African tradition. Indeed, there are enough similarities in procedure, principles, institutions, ideology and technique to regard the various indigenous laws as belonging to a separate family of laws which is founded in a single African tradition.

The African tradition transcends extra-African influences and encapsulates the African spirit of ubuntu. It is this ethos of ubuntu which gives indigenous law a different dimension and which distinguishes it from mere primitive law, or from mere religious law or mere customary law or African law in its present day-meaning. Ubuntu is a fundamental value; an inherent belief system which underscores indigenous cultures and indigenous legal orders in Africa. The concept of ubuntu has been subject to many interpretations by different people at different times.\textsuperscript{80} Oakley-Smith\textsuperscript{81} translates this Nguni word\textsuperscript{82} as "humaneness" or the "link that binds men together" thereby

\textsuperscript{79} Ancient laws, religious and other, were basically of a non-specialised, communal character. Maine 134, explains that "society in primitive times was not what it assumed to be at present, a collection of individuals .... [I]t was an aggregation of families. The contrast may be most forcibly expressed by saying that the unit of an ancient society was the Family, of a modern society the individual." Maine's primitive society is explained from a basic Western point of view. His frame of reference is patriarchal Indo-European societies. Although there are similarities between those primitive societies and indigenous African societies, there are also certain very real differences. Non-specialisation and communialism were also present in early Celtic clan associations as well as in primitive Greek and Roman cultures. Also ancient Germanic law is often likened to African law: see Wessels 16-22. Yet in Germanic law there are traces of specialisation in the individual ownership of the half-free. Originally land belonged to the group or tribe. But, in time the individual ownership of land developed under Roman influence. In Germanic law there was further a lack of abstraction or the "predominance of the sensory element": see Huebner 12. Thus, legal reasoning was founded in the visible and tangible or sensory observation and then related to an inner or intellectual basis as is the case with indigenous law. There was no separation of private and public law: see Huebner 15.

\textsuperscript{80} Tambane 37 refers to it as the body of rich norms, ethics, values and cultural behaviour patterns of the indigenous people of Africa. At 38 he puts forward an interesting version of the evolutionary theory: colonisation foisted advanced capitalism on the indigenous populations of Africa. As they skipped the evolutionary stages of slavery and feudalism, they were enabled to retain the essentially tribal values of ubuntu whilst accommodating capitalism.

\textsuperscript{81} Oakley-Smith 29.

\textsuperscript{82} In Sotho languages it is botho.
emphasising the connection between the individual and the community. The term has also been described as "the art of being a human being", a description which focuses on tolerance, compassion and forgiveness in relation to other human beings. It has been likened to the English "person-hood", an abstract term which aims at community building and which manifests itself through concrete acts in different situations.

Ubuntu has often been presented as African humanism and it is perhaps easier to explain the concept with reference to the familiar Western concept. Humanism puts the human being at the centre of all things. It is a belief in the centrality, the sacredness, the primacy of human beings in all spheres of life. It emphasises the values of human dignity, safety, welfare, health, beauty, love, development which should take priority over economic financial and political considerations.

But ubuntu can be understood only within the context of the world view of indigenous people. They regard the world as an integrated whole of nature, life on earth and

83 Cowley 3 compares ubuntu with the Japanese concept of "wa" which comprises unity, cohesiveness and "esprit de corps". It is "the vibe achieved by the group or team being in time with group effort and spirit".

84 Dhlomo 49-51; He refers to ubuntu (for which all indigenous African languages have a term) as a purely African philosophy of life.

85 Trinca & Valenté 44-47.

86 Malekane 2; Vilakazi 7. Omi & Anyanwu 139 describe African humanism as "virtues of the heart". These virtues are self-control and humility; faithfulness and friendship; and goodness and kindness. These virtues are aimed at maintaining the equilibrium in the group. Both horizontal social solidarity (between the living, and between the living, the deceased ancestors and those not yet born) and vertical solidarity (between the living and the creator god) must be maintained.

87 Vilakazi 7.

88 Hammond-Tooke Rituals 33 explains that world view "is essentially a (cognitive) attempt to make sense of the world, and impose meaning on it". Besides intellectual statements to explain the world and life, world view comprises concepts and beliefs, with a strong emotional content, about the sense of being and as such it comprises subjective value systems.
the after-life. According to them, the world should exist in a state of harmony. People on earth should live in harmony with each other, with nature, and with the gods and the ancestors. To maintain this harmonious state of affairs, the interests of the individual, as a component of the collectivity, should be looked after. His dignity, health and social welfare should be protected. But the welfare of the individual is but one side of the coin, the other side being the welfare of the community. And therein lies the essence of ubuntu: the welfare of the individual is inextricably linked to the welfare of the collectivity which is in turn inextricably linked to a harmonious relationship with the ancestors and with nature. Although man is at the centre of things, man can be defined only in relation to other men. But the community can likewise be defined only with reference to its individual members:

"The relationship between 'man' and 'society' was never thought of in hierarchal terms. Ubuntuism teaches that 'I am because they are; and they are because I am.' The 'community' is the 'i' writ large - and the 'i' is the community individualised. And ... this tie-up between the 'i' and the 'community' reaches beyond the grave." 

Kaunda and others trace the historical roots of the concept back to small-scale societies in Africa. In the first place indigenous communities are characterised as mutual communities. They are subsistence communities in which resources are communally owned and administered to satisfy the needs of every person as member of society. The only perception of life is life-in-community. Disturbed harmony has to be restored and parties to a dispute reconciled and forgiven so that opposing parties are both again integrated into society. To this may be added that indigenous decision making is aimed at removing dissent through community participation.

89 This is comparable with the Buddhist tradition which has a profound influence on the Japanese world view. It recognises "the temporal, passing, impermanent and changing nature of the ego, and by so doing finds the true self through identification with universal oneness": see Smith 355.

90 Trinco & Valenté 45.

91 Kaunda 22-28; see also Koopman 34, Vilakazi 9, Dhlomo 51, Malekane 2.

92 Kaunda 34.
Communication in the community takes place outwardly with the emphasis on transparency.\footnote{Koopman 33-36. At 35, emphasising Africa's oral tradition, he observes that Africa evolved out of the spoken word and thinks aurally, not through the written word.}

Further, indigenous communities are characterised as accepting communities. Members are "valued not for what they could achieve but because they are there". This feature emphasises the high regard for human dignity in indigenous culture, irrespective of personal "usefulness" to society.\footnote{This explains the indigenous African's inability to grasp the Western attitude towards the elderly. With reference to old-age homes in Western societies (which have become a necessity in modern societies where family care for the elderly cannot be taken for granted any longer), Kaunda 26-27 comments that "in a society which regards person to person relationships as supremely important no one can be so isolated that responsibility for his welfare cannot be determined and assigned".} All persons are regarded as important components of the group and have a specific role to fulfill in the community.

Thirdly, indigenous communities are inclusive, participatory\footnote{Malekane 1 2.} communities. This means that relationships and responsibilities must be seen within the context of the extended family. Indigenous Africa cherishes family life. The human community is regarded as so important that not even death can interfere with it. Thus the ancestors are regarded as a mere extension of the group on earth and as an integral part of the extended family. This feature emphasises an acceptance of wide responsibilities and care for others. It rejects the idea of absolute individual freedom, also in the realisation of human dignity.

In the light of what has been said about ubuntu, one could now take another look at legal ideology and legal technique in indigenous law. However one must remain aware of the fact that in indigenous law, ideology and technique are intertwined and influence each other. Sanders\footnote{Sanders "Characteristic Features" 335.} submits that ideology accounts for the non-specialised nature
of indigenous law. By the same token it may be said, though, that in indigenous law the lack of specialisation determines ideology.

From an ideological point of view indigenous law is communal or socialist. Yet social solidarity and harmony of the collectivity as fundamental principles of indigenous law must not be seen as a means to promote societal welfare or the common good to the exclusion of individual human needs. The common good must always be seen in relation to the individual as an inextricable component of that community. In the same way that humanism has a very specific meaning in indigenous law, so does socialism. Otite remarks that African socialism is "humanist and egalitarian, a defense of communalism" and that the qualities of brotherhood, familyhood, mutual dependence and benevolence, and a "cherished communocratic society" create a unique content for socialism in Africa.

The lack of specialisation is reflected in all spheres of indigenous law. Thus, for example law, morality and religious expectations are not rigidly distinguished and there is also no rigid distinction between public and private needs. It is in these examples of the non-specialised nature of indigenous law that the ethos of ubuntu is best illustrated. Ubuntu gives the close relationship between law and morality and public and individual needs a fundamentally humane dimension. Ghandi once said that the "true practice of law" and the "true function of the lawyer was to unite parties riven asunder", and Leopold Senghor said that "emotion is Africa, reason is Hellenic".

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97 Otite 141.

98 Otite 145. He also explains that "society is not an undifferentiated mass of peoples. Man is not a tool for social continuity and economic development. He is human".

99 Otite 154.

100 Koopman 34 refers to the bias for "morals and emotions" in indigenous decision making. In practice it is, eg, illustrated by the reintegration of criminals into the community and by the reconciliation of the parties to a dispute.

101 Smith 346.

102 Trinco & Valenté 45.
Bearing the similarity of indigenous and Japanese jural postulates in mind, it comes as no surprise that one finds a comparable emotional foundation in Japanese law.\textsuperscript{103} The important link between law and compassion in both indigenous African and indigenous Japanese law is manifested in a reluctance to litigate and a preference to mediate; in an avoidance of confrontation and a distaste for adversarial procedure; and in the fact that dispute resolution is aimed at restoration of harmony, a harmony which "rests in a sense of identity within the community, which is generated mainly by emotional means".\textsuperscript{104}

In an article on the ideas of the self in Japanese and Western legal consciousness, Smith discusses the concept of "amae" in Japanese law. There is an interesting similarity between this concept and the African concept of ubuntu. A cryptic exposition of this concept in Japanese law may shed some light on the content and role of ubuntu in indigenous legal ordering. Amae may be described as the spiritual foundation of Japan.\textsuperscript{105} It forms the basis of the whole social and legal system and of the jural postulates which underscore Japanese law. In abstract terms it may be translated as the dependence of the individual on community acceptance. This dependence can in indigenous terms be likened to a mutual dependence between the community and the individual.

The Japanese distinguish between a sense of having a self and a sense of having no self. A sense of having a self can be developed only once a strong we-consciousness has been developed. Total isolation from the group induces a sense of having no self. Therefore, an individual's acceptance and position within the group is very important. In indigenous law, the importance of the acceptance by the group is illustrated by the fact that the punishment of ostracism is regarded in a very serious light. Accordingly, banishment is a competent punishment for serious crimes such as black magic,

\begin{itemize}
  \item[103] Smith 346 347; Yasaki 185.
  \item[104] Smith 347.
  \item[105] Smith 347, see generally 347-352.
\end{itemize}
murder and treason.¹⁰⁶

Because of the weak position of "we" as opposed to the strong position of "I" in Western cultures, Western legal orders are characterised by analysis, discrimination, differentiation, individualism, intellectualism, objectivism, inductive reasoning, scientific thought, generalisation, conceptualisation, legalism, organisation, self-assertion, impersonality. In contrast indigenous Japanese and indigenous African legal orders, because of a well developed we-consciousness, are characterised as synthetic, totalising, integrative, non-discriminative, non-systematic, dogmatic, intuitive, non-discursive, subjective, communalistic and spiritually individualistic.¹⁰⁷

The difference between ubuntu and amae seems to be that the I-consciousness in Japanese law is weak and the we-consciousness is strong; whilst ubuntu is founded upon a strong we-consciousness as developed through a strong I-consciousness. Ubuntu is more in line with the ideal position in which the I-consciousness and we-consciousness develop in harmony. "I" and "we" are not regarded as conflicting opposites between which a balance should be maintained. "There can be no 'I' without a 'we', nor conversely, a 'we' without a set of 'I's'."¹⁰⁸

3 CONCLUSION

In mainstream liberal jurisprudence the most important diffuse postulate of Western law is reflected in the concept of absolute individual freedom. The protection of the individual in Western law has become a reasoned process which is sadly devoid of human feeling, emotion and compassion. The Western conception of individual rights is regarded to be characterised by conceptual difinitude. This means that, because individual rights are so rigidly conceptualised, Western jurisprudence has as its main

¹⁰⁶ Myburgh "Punishment" 48 49.
¹⁰⁷ Smith 355.
¹⁰⁸ Smith 354; Chiba Legal Pluralism 143.
objective the interpretation of a conceptual framework in which rights are systematically organised; it does not concern itself with possible individual variations and functions in practice.\textsuperscript{109} Otite\textsuperscript{110} has written that "Western societies took their departure [from the process of humanisation of society] through industrialisation" and "the more Westernised the African societies become, particularly after the exploitation through colonial activities, the less of this universal humanism remains". Individuals not only stand in radical isolation, but human beings are objectified in Western legal thought.\textsuperscript{111} The protection of individual human rights has developed into a formal technical weighing of individual claims without any sense of ubuntu (or amae). MacIntyre\textsuperscript{112} notes that rights are ascribed to individuals as individuals and without taking into account any relationship with other individuals or with the community. Rights thus become claims to protect the individual against threats presented by others. Rights become primarily rights \textit{against} others.

It is this conception of rights which makes it so difficult to explain indigenous legal phenomena with reference to Western concepts. In indigenous law there is no conception of rights and of the protection of rights, even fundamental human rights, for the sole benefit of one individual against other individuals or against the group. It is even difficult to translate the Western conception of rights into an indigenous context by saying that rights are the claims of groups for the sake or benefit of one group against other groups. In indigenous law there is another dimension to rights: even if rights are regarded as the individual claims of constituent groups, the protection of rights are for the benefit of society as a whole. Disturbed relationships in the

\begin{flushleft}
\textsuperscript{109} Chiba \textit{Legal Pluralism} 142.
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\textsuperscript{110} Otite 150.
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\textsuperscript{111} Smith 359 mentions the holocaust, slavery and the condition of industrial workers in nineteenth-century England as examples of such objectification of human beings. Likewise, and in a South African context, the whole system of apartheid with all its annexures of forced removals, pass laws, and the negation of the law and culture of a people are but examples of the objectification of human beings.
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\begin{flushleft}
\textsuperscript{112} MacIntyre 495.
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community unsettle relationships with the superhuman and this may cause a variety of detrimental consequences for all. Therefore, claims must be adhered to and rights protected for the sake and benefit, not of the individual group, but for society as a whole. Likewise individual interests must be protected to maintain the equilibrium in the group and in the community as a whole.

But, faith in absolute individual freedom in Western law is faltering. The supremacy of this freedom is challenged and its protection countered through the application of the principles of public policy, public interest, boni mores and equity. Although individualism is still reflected in these principles, the position of the individual as part of a larger whole is coming to the fore, thus limiting the absolute primacy of individual freedom. If the Western idea of freedom is to mean something more than the satisfaction of individual desires, it must comprise solidarity with others through participation.  

Apart from the important feature of individualism in Western legal reasoning, legalism and conceptualism also give the Western legal culture a specific specialised character which is not reconcilable with indigenous legal cultures. Legalism is reflected in the separation of law and other norms. It separates law from social values. This is in contradistinction with indigenous law which maintains a close relationship between law and other norms. Intellectualism too, which comprises thematisation, conceptualisation and abstraction in legal reasoning, is not compatible with the non-specialised indigenous legal reasoning which focuses on the visible, tangible or sensory world and which is characterised by lack of differentiation, classification and conceptualism.

113 Smith 352, see also 356-365.
CHAPTER IV

INDIGENOUS LAW AND WESTERN LAW IN
A NEW CONSTITUTIONAL DISPENSATION

1 INTRODUCTION

1. Introduction
   1.a The Constitution and the Application of Indigenous Law

2 Application of the Bill of Rights with Regard to Indigenous Law

3 Indigenous Law and Equality
   3.a Indigenous Law and Equality Before the Law
   3.b Indigenous Law and Equal Protection of the Law
      (i) Ethnic Origin, Race, Colour, Culture and Language
      (ii) Religion, Belief and Conscience
      (iii) Sexual Orientation
      (iv) Social Origin
      (v) Gender and Sex
      (vi) Conclusion

4 Indigenous Law and the Sanctity of Human Life

5 Indigenous Law and Freedom

6 Conclusion

1 INTRODUCTION

The historical events which gave rise to legal pluralism in South Africa have been discussed in the preceding chapters. It has been shown that the systems of law which are potentially applicable in this country are supported by diverse legal postulates which reflect different values, inherent in different cultures. Because there is no agreement with regard to the values which support the present official legal system, it is today regarded as culturally illegitimate by the majority of South Africans. Before the enactment of the Interim Constitution Van der Vyver remarked that

1 Van der Vyver "Post-apartheid" 822. Kaganas & Murray "Contest" 425 also go out from the premiss that the values endorsed by the Constitution has a moral legitimacy afforded by the democratic nature of the process by which it was adopted. However, they point out that "cultural practices are themselves the product of an active process of creation and subject to continuing
"[s]ince all major participants in the South African constitutional initiatives agree that the new constitution and its Bill of Rights are to emerge as the product of a negotiated settlement of the political dispute and that the negotiations ought to involve representatives of all political persuasions with meaningful support in the country, the problem of legitimacy will not likely arise. It is worth noting once again, however, that superimposed constitutional formulae, or constitutional arrangements that borrow too heavily from the practices of foreign jurisdictions and do not address the real causes of discontent and friction in the society to be served by those formulae and arrangements, are sure to generate their own legitimacy crisis."

However, even if the real causes of discontent and friction within the South African society have been addressed in the Interim Constitution; even if political legitimacy has been achieved and the Constitution, human rights declarations and legal system reflect the society's political history, struggles and aspirations, it is still, to a large extent, underscored by Western jural postulates and does not accommodate indigenous values. It does not address the conflict of the values which underscore indigenous law and Western law respectively; it does nothing to address the cultural legitimacy of the legal system. The only difference that the new political dispensation has brought about in the theoretical and practical position of indigenous law, is that its continued application and status are as will be indicated below, now more than ever before shrouded in uncertainty.

In this chapter some practical examples will be discussed of where indigenous law and its jural postulates are in conflict with Western law and its jural postulates. It seems that the entrenchment of a Bill of Rights in the Constitution, which is framed from a distinct Western perspective, has given new impetus to the debate surrounding the continued re-evaluation and modification ... [and] cannot be considered immune from challenge.

2 It is debatable whether the present legal order in which one legal system has the status of a dominant system, reflects the whole society's political history, struggles and aspirations.

3 Van der Westhuizen "Tiger in Africa" 11-14 points out that legitimacy may be viewed from different points of view. A distinction may be drawn between political legitimacy (as explained above), cultural legitimacy (legitimacy appraised in its cultural context) and socio-economic legitimacy (legitimacy determined with reference to access to human-rights instruments and legal institutions). These three should be seen as an integrated whole and overlap to some extent.
Part II.III.3  Foundation of Jural Postulates in South Africa

application or possible reform of indigenous law. This is not a new debate. Whereas the focus used to be on the compatibility of indigenous law with Western perceptions of public policy and natural justice, it has now moved to the compatibility of indigenous law with Western perceptions of human rights.  

The first question that arises is how compatible this Bill of Rights is with indigenous law? Some jurists assume that the concept of human rights is quite foreign to indigenous law: although regard for human dignity is predominant in that society, and although there is an intimate link between human rights and human dignity, these are not regarded as equivalent concepts. The concept of human rights as natural, inherent, inalienable rights held by virtue of the fact that one is born a human being remains a creation of Western civilisation and is foreign to indigenous law. In indigenous society rights are assigned on the basis of communal membership, family, status or achievement.

It seems to be the inherent conservative and collective nature of indigenous law which causes the belief that human rights are foreign to that system of law. Collectivism or the preservation of group solidarity is often referred to as a lack of individualism, and this in turn is perceived to conflict with the concept of individual human rights. However, whilst there is indeed a lack of individualism, individualisation is an important feature of indigenous law and concern for the individual and human

4 The generally accepted substantive human rights are the right to life, liberty (freedom from slavery, forced labour, and freedom of movement and residence), property, education, social security, and freedom of belief and expression, association and assembly. Procedural rights are the right not to be held guilty of any criminal offence on account of any act not embodied in law and the right to a fair trial before a public court. A fair trial is characterised by a presumption of innocence, public trial without undue delay, the right to legal assistance, time to prepare a defence, the right to examine witnesses, the right not to be compelled to confess guilt or to testify against oneself: see Van der Westhuizen Human Rights Law 3.

5 See Donnelly "Human Rights" 303 305 306 308, Donnelly "Cultural Relativism" 410; see also Cobbah 309-310 Mahmud 489-491.

6 Members of the group share their rights and duties in accordance with their status within the group.
dignity takes high priority in indigenous culture. From an indigenous-law perspective, some basic individual human rights may in fact be distinguished, some comparable to Western conceptions and others with a distinct indigenous character quite foreign to Western law. Moreover, human rights should be considered also in the context of the individual’s protection from the State and State power. In this context too one should bear in mind that the very fact that in indigenous law the group share certain fundamental rights does not mean that such rights are not protected against the arbitrary execution of State power (albeit within the limited indigenous law sense).

Thus it is accepted that human rights as the claims or demands that an individual has by virtue of the fact that he was born a human being indeed find application in indigenous law. As with other rights and principles, human rights may be explained by analogy with the Western concept of human rights. But a distinction should be made between "concept" and "conception". Whilst the former has a settled meaning, the latter may vary depending on time and circumstance. Therefore, it should always be borne in mind that even if one assumes that the concept of human rights exists in indigenous law, the conception of human rights may not necessarily be the same in Western and indigenous societies because the jural postulates which provide the respective starting points for legal reasoning are so different. Likewise, the fact that certain human rights are as such distinguished in Western society but not in indigenous society does not mean that the concept of human rights does not exist in

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7 This may be observed, e.g., in dispute resolution, where special care is taken that substantive justice is done and individuals involved are reconciled. In criminal law it is the individual’s mental health, consciousness and sobriety which determine his responsibility for his act. In the case of assault the victim is allowed to inflict upon the attacker an injury similar to the one he had suffered. Amongst the Zulu the culprit responsible for the injury of another in a kraal encounter, visits the injured party frequently and offers assistance in sympathy: see generally Part I.II.4.

8 The expression of these rights should be seen in their indigenous cultural context where kinship plays a primary role.

9 See Mahalu 3, Welch 13; Marasinghe 32-44, Reyntjens "Human Rights" 41; for a contrary view see Mahmud 489-491, Cobbah 309-310, Donnelly "Human Rights" 303 305 306.

10 What something means, the definition.

11 A concrete specification of a concept.
indigenous law.

Deng\(^{12}\) points out that human rights are universally inherent in the very notion of humanity. This does not mean that the cultural context of its conception should be denied. On the contrary, a proper understanding of the diversity of the cultural contexts of human rights may only enhance prospects for cross-cultural enrichment in this regard. For example, if the indigenous spirit of ubuntu\(^{13}\) were to influence the Western concept of absolute individual freedom, protection of human rights in Western society may move away from the formal technical weighing of individual claims and the objectification of human beings; and individuals may no longer find themselves in the situation of radical isolation they often experience despite the conscientious protection of human rights in Western society. Likewise indigenous law may be enhanced by Western cultural influences. For example, the Western concept of democracy can only have a positive influence on indigenous political thought. The one-party State is often perceived to be part of the indigenous political heritage. Yet indigenous political systems functioned in circumstances which were irrevocably changed with the introduction of the nation-State.

From the outset it must be remembered that even human rights in indigenous law are not the exclusive claims of individuals. Individuals should always be seen within the context of the group as a whole, and groups, which are the legal subjects in indigenous law, should be seen as entities composed of individuals.\(^{14}\) The fact that an individual is regarded as an entity in the group does not take away that, as individual in the group, she has some natural, inalienable and fundamental rights by virtue of being a human being. And although indigenous-law rights are determined by

\(^{12}\) Deng 261.

\(^{13}\) See Part II.III.2 for a discussion of this concept.

\(^{14}\) Elias 85 explains that the group is made up of individuals and that it is not an independent self-contained unit. The group responds to its members and may even change in accordance with the needs of its members: see generally Elias 76-95 on the importance of the individual within the group.
a person's status and although status is in turn determined by a person's position within the group, all persons, irrespective of their status and irrespective of their position within the family group, have these inalienable rights.

It is indeed so that the present state of the protection of human rights in Africa underscores the assumption that the concept of human rights is foreign to Africa and its indigenous cultures. However, this assumption is based on circumstances directly or indirectly resulting from the imposition of a foreign culture upon indigenous cultures through colonisation. The following factors, and not indigenous African tradition and practices, appear to be responsible for these circumstances:

(i) The disruption of pre-colonial indigenous social and political structures and the legacy of command. The nation-State was introduced and artificial boundaries imposed in the colonial scramble for Africa. Foreign political structures were imposed by the colonial powers. The time of authoritarianism provided no encouragement for respect and protection of human rights. Indigenous government was "civilised", leaders were reduced to the status of puppets in colonial regimes, and indigenous institutions were subjugated. Existing indigenous rights were abridged and Western values imposed because of a belief in the superiority of the latter. Indigenous practices were altered and individual expression regarded as superior to collective expression. Eventually, after independence, nationalist leadership was urged to include justiciable bills of rights in their new constitutions. Yet the indigenous people were not permitted to play any role in drawing up these constitutions which

15 The following sources have been consulted in this regard: Van der Westhuizen "Tiger in Africa" 14-23, Sanders "Bill of Rights" 190-194, Welch 13-19, Reyntjens "Human Rights" 40-43, Mahalu 4-7 14-17, Eze 9-15, Wriedu 243-260.

16 Mahmud 489 regards the creation of the nation-State as the most important obstacle in the implementation of the communitarian ideal.

17 This authoritarianism was and is not at all in accord with the spirit and practice of traditional political systems on the continent and may be described as "abberations facilitated by colonial legacies": see Wai 115.
inadequately reflected indigenous communitarian values. Under the banner of social and economic development, the protection of human rights was soon curbed and appeals to traditional practices and values became a cloak for self-interest and arbitrary rule.  

(ii) Economic hardship and under-development. It is quite obvious that colonial control over land and agriculture had far-reaching consequences for pre-colonial Africa. Whether it was the sole reason for the economic dilemma is debatable. Importantly, the protection and recognition of human rights were influenced by low levels of economic development, by the perception that economic resources had been distributed unequally, by the fact that post-independence leaders strove for economic upliftment, emphasising collective achievement through government, and by a desire for substantial change in international economic relations.

(iii) The imposition of foreign law and the judiciary's lack of legal standing. Only indigenous civil law was recognised and then only to a limited extent. Foreign Western law and institutions were imposed on the indigenes and this caused confusion over applicable standards and values. Access to justice became increasingly restricted, due, amongst others, to illiteracy, the high cost of legal aid, and the fact that Western law, language and institutions were largely foreign. Moreover, courts became viewed as instruments of oppression.

(iv) Lack of information and condonation. Authoritarian rulers restricted the role of the media in the disclosure of human-rights violations. Foreign media displayed a lack of interest in "black on black" violation of human rights.

In order to establish the influence of the Bill of Rights on the interaction of indigenous law and Western law, it has to be determined to what extent the concept of human

18 Donnelly "Cultural Relativism" 412; see generally Donnelly "Cultural Relativism" 411-414.
rights finds application in indigenous law and how indigenous and Western conceptions of human rights differ. This will be done by way of some examples where there would appear to be a conflict between indigenous law and Western law. But before this can be established, a short exposition is required of the provisions in the Constitution\(^8\) which deal with indigenous law.

1.a The Constitution and the Application of Indigenous Law

Indigenous law is expressly dealt with in sections 33, 35,\(^{20}\) 181, 183, Constitutional Principle XIII and Schedule 6 of the Constitution.\(^3\) The terms "customary law" and "indigenous law" are employed interchangeably.\(^2\) In Chapter 3 which contains the Bill of Fundamental Rights, section 33(2) and section 33(3) of the limitation clause, and section 35(3) of the interpretation clause refer to "customary law". These sections are general sections which refer to the common law, customary law and legislation.\(^2\)

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20 S 35(3) determines that customary law shall be interpreted, applied and developed within the spirit of the Bill of Rights.

21 S 7(2) too, refers to indigenous law. It states that the Bill of Rights shall apply to "all law in force". Du Plessis & Corder 114 point out that the wording ("legislation" was first used and thereafter "laws") of earlier drafts of the Constitution was changed to the inclusive singular term "law", in order to make it clear that the term includes categories of law other than legislation.

22 It seems that it was not the intention for these terms to denote different legal systems: see Kerr "Fundamental Rights" 722 n6; see also the explanation of terminology in the General Introduction.

23 Section 33 determines:
33(2) Save as provided for in subsection (1) or any other provision of this Constitution, no law, whether a rule of the common law, customary law or legislation, shall limit any right entrenched in this Chapter.
33(3) The entrenchment of the rights of this Chapter shall not be construed as denying the existence of any other rights or freedoms recognised or conferred by common law, customary law or legislation to the extent that they are not inconsistent with this Chapter.
Section 35(3) determines: In the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of this Chapter.
In Chapter 11, sections 181 and 183, and in Constitutional Principle XIII, which deals exclusively with indigenous law and institutions, the term "indigenous law" is employed. Section 181(1) determines that traditional authorities which observe indigenous law and which are recognised before the implementation of the Constitution, shall continue as such authorities and continue to exercise their powers in accordance with "the applicable laws and customs [indigenous law], subject to repeal of such laws and customs". Section 181(2) determines that indigenous law "shall be subject to regulation by law". Section 183(2)(a) makes provision that the house of traditional leaders shall be entitled "to advise and make proposals to the provincial legislature or government in respect of matters relating to traditional authorities, indigenous law, or the traditions and customs of traditional communities within the province". Schedule 6 indicates "indigenous law and customary law" as one of the legislative competences of the provinces.

Section 14(3) states that nothing in Chapter 3 shall preclude legislation which (a) recognises a system of personal and family law adhered to by persons who profess a certain religion and (b) the validity of marriages concluded under such a system of religious law. However, even if one accepts that indigenous law is a religious legal system, there is no legislation which recognises indigenous marriages as valid marriages and this section is therefore not applicable to indigenous law.

Kerr\textsuperscript{24} points out that there is a conflict or at least competition between Constitutional Principle XIII and the equality clause contained in section 8 of the Bill of Fundamental Rights, as well as between Constitutional Principles XIII and III.\textsuperscript{25} On the one hand, Constitutional Principle XIII determines that the Constitution will protect the "institution, status and role of traditional leadership, according to indigenous law" and that "indigenous law, like common law, shall be recognised and applied by the courts, subject to the fundamental rights contained in the Constitution and to legislation

\textsuperscript{24} Kerr "Fundamental Rights" 723.
\textsuperscript{25} The constitutional principles are contained in Schedule 4 of the Constitution Act.
specifically dealing therewith". On the other hand, section 8(2) determines that there shall not be any unfair discrimination on grounds of, amongst others, gender, sex and age; and Constitutional Principle III determines that the Constitution "shall prohibit racial, gender and all other forms of discrimination and shall promote racial and gender equality and national unity".27

Whilst Constitutional Principle II makes provision that a new, revised Bill of Rights be drafted after due consideration of the existing Bill; the Constitutional Assembly is bound in terms of sections 71(1) and 74(1) by the Constitutional Principles contained in schedule 4 when they draw up the final Constitution and they are not allowed to amend or repeal these principles. Also the preamble to the Interim Constitution requires that the new Constitution shall be "in accordance with a solemn pact recorded as Constitutional Principles". Therefore, whereas the Constitutional Assembly is free to alter the existing Bill of Rights or to insert further limitations upon it should they find that it is in conflict with Constitutional Principle XIII, there is little they can do to remove any conflict which may exist between Constitutional Principles II and XIII.

Chapter 3 of the Constitution will be used as a framework for a discussion of the areas in which conflict between indigenous law and Western law seem to be most likely.

26 Kerr 723 n14 points out that there is nothing in the Constitution to indicate any difference between gender and sex. Thus, discrimination on the ground of sex is equivalent to discrimination on grounds of gender. According to Albertyn & Kentridge 167 there is a difference between these two concepts in feminist literature and the inclusion of both terms indicate that it is not permissible to discriminate unfairly against women or men on grounds of either biological features (sex) or patterns of behaviour (gender); see also Du Plessis & Corder 143.

27 Also the preamble to the Constitution states that there shall be equality between men and women and all races.
2 APPLICATION OF THE BILL OF RIGHTS WITH REGARD TO INDIGENOUS LAW

With regard to the question whether the Bill of Rights has horizontal application, the following may be noted. Section 7(1) determines that the chapter on fundamental rights shall bind "legislative and executive organs of State at all levels of government". If section 7(1) is strictly interpreted, this means that the Bill of Rights regulates only vertical relationships between the State and individuals, and not also horizontal relationships between different individuals.

In an interim report the Law Commission noted that the Bill of Rights "regulates the 'vertical' relation between State and subject" and that Civil Rights Acts which will bring relations between individuals into line with provisions of the Bill of Rights may be legislated in future. The Law Commission observed further that the Bill of Rights "leaves the same latitude as that provided by the US bill of rights" to implement it horizontally, thus foreseeing indirect horizontal application. Moreover, according to the Commission's report, interpretation of all legislation should be in accordance with the Bill of Rights, as is the case in Germany. But in De Klerk v Du Plessis Van Dijkhorst J made the following observation:

"As the people of South Africa, who are governed by the text of the Constitution, are entitled to order their lives on the strength of what they read therein without reference to the writings of contemporaries of the drafters or the drafters themselves, the drafting history of the Constitution should ... be regarded as irrelevant to its interpretation."

28 The following sources were consulted on the horizontal application of the Bill of Rights: Davis Chaskalson De Waal 128 210-211, Du Plessis & Corder 110-114, Cachalia 19-21 121-122, Kerr "Fundamental Rights" 720-721, Hawthorne 5-7, SA Law Commission Group and Human Rights 489-494, Noor 37-38, Van der Vyver "Post-apartheid" 795-801, Carpenter "Constitutional Law" 981, Rautenbach 82-87, Basson 15-16.

29 SA Law Commission Group and Human Rights 493.

30 1995 2 SA 40 (T) 47F-G.
It is therefore important to look briefly at the text of the Constitution. Section 4, which deals with the supremacy of the Constitution, determines that the Constitution shall be binding on all legislative, executive and judicial organs of the State, at all levels of government. Section 7(2) makes Chapter 3 applicable to "all law in force", which includes the common law and customary law. Section 33(2) expressly subjects the common law and customary law to the rights contained in Chapter 3 and renders any common-law limitation on such rights unconstitutional if it does not conform to the requirements of section 33(1). Common-law and customary-law rights that are not contained in Chapter 3, but that are not inconsistent with the Chapter, are recognised in section 33(3). Section 33(4) says that the Chapter does not "preclude measures designed to prohibit unfair discrimination by bodies and persons other than those bound in terms of section 7(1)". Section 35(3) determines that in the interpretation of any law, and in the application and development of both common law and customary law, a court must have regard to the spirit, purport and objects of Chapter 3.

This subsection may be seen as an express indication that the Bill of Rights is horizontally applicable; or it may be seen as an indication that all existing law may, by way of seepage, be influenced by the values entrenched in Chapter 3. However, it should be borne in mind that section 35(3) may also be interpreted as an indication against the horizontal application of the Bill of Rights. The argument then is that section 35(3) was drafted to ensure the generous application of the rights contained in

31 In *Mota/av University of Natal* 1995 3 BCLR 374 (D) 381 the court determined that the expressio unius exclusio alterius principle is not applicable to this subsection and that in the light of sections 4 33(1) 33(2) 33(3) and 35, Chapter 3 is horizontally applicable. In *Gardener v Whitaker* 1994 5 BCLR 19 (E) and *Mandela v Falati* 1995 1 SA 251 (W) it was also determined that the Chapter has horizontal application. Du Plessis & Corder 112 point out that the judiciary is bound by section 7(1) because of its specific role and status as one of the three components of State authority; see also Rautenbach 83.

32 Thus the courts are enjoined to interpret all law, including statutory law in the spirit of Chapter 3, and to develop and apply common law and customary law (not statutory law) in the spirit of this Chapter: see Davis Chaskalson De Waal 210; see also Basson 15.

33 See Du Plessis & Corder 112-113. The Bill of Rights will of course only be applicable to legal relationships which have to be enforced or confirmed by a court: see Davis Chaskalson De Waal 210-211; see also Du Plessis & Corder 113.

34 Davis Chaskalson & De Waal 128.
Chapter 3, because the Bill of Rights does not have horizontal application. Finally, these provisions should be seen in the context of the preamble which states that

"there is a need to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional State in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms."

It may further be noted that various sections of the Bill of Rights make no distinction between laws which regulate relationships between, on the one hand, individuals and the legislature, or the executive government, and, on the other hand, between individuals inter se. These general sections seem to indicate that the Bill of Rights is not confined to law which regulates relations between individuals and the State. However, this does not mean that purely constitutional issues should be extended to the private-law sphere. It is preferable that Civil Rights Acts be legislated to define the horizontal application of the Bill of Rights.

Moreover, many basic human rights which are recognised in Chapter 3, are in any event well-known and existing rights which have been regulating relationships between individuals even before the implementation of the Constitution and which will continue to do so irrespective of the Bill of Rights. It should be borne in mind that fundamental rights now fall within the ambit of positive law and may thus be interpreted by the courts to regulate relations between individuals. In the meantime, until Civil Rights Acts have been legislated, indirect horizontal application may also be achieved by interpreting the open-ended norms, such as boni mores and public policy, in accordance with the values entrenched in the Bill of Rights. It should be remembered that whilst these open-ended norms may extend the application of fundamental rights, such extensive interpretation should still be in accordance with "evolving moral consciousness and perceptions of the people in a developing

35 SA Law Commission Group and Human Rights 490.
36 Rautenbach 84-85; Nörr 37; Hawthorne 6.
But the "moral consciousness and perceptions of the people" should not exclusively reflect Western values; it should also take close account of indigenous values. And indigenous values may conflict with the values entrenched in the Bill of Rights.

Should the Bill of Rights have only vertical application, as the Court determined in De Klerk v Du Plessis, its sole relevance for indigenous law would be with regard to Chapter 11 which deals with the powers and functions of traditional authorities. But should it have horizontal application, as the Court found in Gardener v Whitaker, Motala v University of Natal and Mandela v Falati, it would have far-reaching consequences for indigenous law.

3 INDIGENOUS LAW AND EQUALITY

There are various interpretations of the right to equality. Its meaning in international jurisprudence differs from one country to the next, depending on the specific wording of the Constitution in which it has been entrenched and also, amongst others, on the historical, cultural and socio-political context in which it is applied. In view of the fact that one may regard equality as one of the basic values underlying the South African
Part II.IV.3 Indigenous Law and Western Law in a New Constitutional Dispensation

Constitution it is important to determine its meaning within the context of the South African situation. Much emphasis is placed on equality and freedom in the Constitution and the phrase "in an open and democratic society based on freedom and equality" is used in several places. Moreover, it is section 8, the equality clause which may hold the most far-reaching consequences for the continued existence of indigenous law as it is currently applied. In order to establish what effect the entrenchment of the right to equality would have on indigenous law, it is also necessary to ascertain to what extent equality plays a role in indigenous law and how conceptions of equality in indigenous and Western law differ. But then it should be remembered that the indigenous law which is officially applied in this country does not always reflect the jural postulates of pre-colonial indigenous law.

Bennett is of the opinion that by implicitly recognising indigenous law in the Constitution and at the same time enacting a gender equality clause, "the Constitution brought about a head-on confrontation between two opposed cultures", and that "the gender equality clause threatens a thorough-going purge of customary law", the reason being the important role of senior men, the principle of patriarchy, that underlies indigenous law.

Before attempting to analyse the indigenous conception of equality, it is perhaps necessary to give a brief exposition of a possible interpretation of section 8 of the Constitution within a Western framework.

43 Van der Westhuizen Human Rights Law 4, describes human rights as claims or demands against the State which embody values, the most important of which being human dignity and equality. Carpenter "Fundamental Rights" 32 too gives primacy to these two fundamental rights: "If pressed to nominate the one right which is the most fundamental of all in the South African context, I would opt for the right of equal treatment ... with the right to human dignity as a very strong contender".

44 Bennett "Equality Clause" 123. Kaganas & Murray "Contest" 426 too are of the opinion that if indigenous law is challenged on grounds of gender inequality, it will be a challenge to the very heart of that culture which may have serious consequences for the continued application of its law. But at the same time they point out that indigenous law is capable of "evolving to become more egalitarian" because of its inherent dynamic nature.

45 Section 8(2).
Section 8 of the Constitution determines as follows:

"8. (1) Every person shall have the right to equality before the law and to equal protection of the law.

(2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of the provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.

(4) Prima facie proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established."

I will not attempt to give a comprehensive analysis of the exact philosophical meaning of "equality". Neither will I discuss the subsections of section 8 which deal with the restitution of land rights and affirmative action. For purposes of this thesis I will concentrate on those provisions dealing with equality rights generally and their practical implication for indigenous law.

From a Western jurisprudential point of view equality is understood to mean the Aristotelian concept that equals should be treated equally and unequals unequally to the extent that they are different. It is generally understood that absolute or formal equality, as a neutral norm which underscores identical treatment of all individuals, without taking into account factual differences, is unacceptable. The Universal Declaration of Human Rights makes provision for differentiation between individuals in as far as it does not lead to inequality with regard to human dignity. Also within the South African constitutional context, equality should be interpreted as substantive equality and not formal equality. Formal equality may lead to more inequalities, whereas substantive equality takes account of the actual social and economic conditions of groups and individuals to determine whether the constitutional

46 See Du Plessis & Corder 149, Hawthorne 3.
commitment to equality has been upheld.47 Taking this a step further, one may say that substantive equality should also take account of the value systems and basic axioms of the legal system in question.

Proceeding from the assumption that subjects cannot be treated identically and that it is necessary for effective government and social ordering to classify subjects, the criteria upon which such a classification may be made must be determined.48 Section 8(2) will serve as a guideline in this regard. The factors mentioned in subsection (2) may be regarded as criteria upon which there should not be a differentiation between subjects. These criteria embrace human characteristics that are immutable or difficult to change or inherently part of human personality and which should not form the basis for legal classification. The criteria could also broadly be described as elements which are constitutive of human identity.49 This subsection does not provide an exhaustive list of all possible instances in which an unfair classification may be made, it enumerates only those based on human attributes.50 Cachalia51 is of the opinion that the words "without derogating from the generality of this provision" indicate that it is not a comprehensive list, but that it should remain limited to analogous grounds which have to do with involuntary human attributes or inherent features of human personality. Another interpretation is that the grounds listed are but examples of the most prevalent bases for the subordination of vulnerable groups or classes of people. The general principle, then, is against the subordination of such groups.52

47 Albertyn & Kentridge 152-153.
48 See generally Davis "Equality" 208 210, Du Plessis & Corder 141-144, Cachalia 24-32.
49 Albertyn & Kentridge 168 feel that this general description is not as forced as that of an immutable personal characteristic which is quite strained when it comes to religion, conscience and belief.
50 See Davis "Equality" 208, Du Plessis & Corder 143-144, Basson 22. Du Plessis & Corder 143 point out that the courts will probably not attach the same weight to instances of discrimination which are not explicitly mentioned in the section.
51 Cachalia 27 30-31; see also Davis "Equality" 208.
52 Albertyn & Kentridge 170.
It should be mentioned that the use of the word "unfairly" indicates that discrimination must be seen against the background of specific circumstances. This keeps the door open for affirmative or corrective action, justifiable legal classification or differentiation. The use of the word "unfairly" could be seen as a limitation of the equality clause within the clause itself and has the effect that grounds for the limitation of rights entrenched in Chapter 3 is not limited to the limitations clause (section 33) only.\(^53\)

Although it is practically impossible to treat all persons identically and although legal classification is necessary, differentiation should not take place on an arbitrary or unjustifiable basis. The words "unjustifiable" and "arbitrary" inevitably make the principle of cultural relativism spring to mind. Therefore one should be cautious not to reject indigenous-law principles simply because they appear to involve, from a Western point of view, an arbitrary or unjustifiable differentiation between individuals. It has been noted that legal classification should be reasonable in relation to the legitimate objectives of law.\(^54\) But are the legitimate objectives of Western law the same as those of indigenous law? If one considers the underlying postulates of indigenous law and Western law, the inevitable conclusion is that they are not. The tension lies between, on the one hand, the maintenance of harmony of the collectivity and the preservation of group solidarity and on the other hand, the maintenance of absolute individual freedom. But then one should not lose sight of the fact that absolute individual freedom is increasingly being limited in Western law by the application of open-ended norms such as public policy and boni mores.

The two phrases "equality before the law" and "equal protection of the law" as contained in section 8(1) are not identical. They should be regarded as an integrated

\(^{53}\) See Davis "Equality" 208-209, Albertyn & Kenridge 160-163 175-177, Cachalia 28-29, Du Plessis & Corder 142-143.

\(^{54}\) See Du Plessis & Corder 141, Cachalia 27.
whole which provides a framework for the protection of the right to equality.

This framework should be adaptable to new situations. "Equality before the law", or formal equality, denotes equality in legal process and is thus a procedural guarantee which is applicable in the administration of justice and has no bearing upon the content of the law. In contrast "equal protection of the law" denotes equality in the substance and content of the law. "Equal protection" would include also the sphere of private law. Should a narrow interpretation of subsection (2) be accepted, cases not covered by it would still fall under the general provision of subsection (1).

3.a Indigenous Law and Equality Before the Law

Van der Westhuizen links procedural rights to the concept of rule of law, the antithesis of which is arbitrary government. Procedural rights comprise a fair trial in a public court and the right not to be held guilty of an offence which is not embodied in law. A fair trial again includes a presumption of innocence, a public trial without undue delay, the right to legal assistance, time to prepare a defence, the right to examine witnesses, and the right not to be compelled to confess guilt or testify against oneself.

55 Davis "Equality" 207, Albertyn & Kentridge 157-160, Basson 22. Cachalia 27-28 is of the opinion that the phrase "equal protection of the law" does not add anything new to the principle of "equal treatment" of the first phrase.

56 It is indeed important to regard this framework as adaptable to changing needs of society. In the interpretation of this clause one should always be sensitive to the underlying value systems of the community as a whole, including the indigenous community.

57 Thus Albertyn & Kentridge 160 note that "the state will foster equality by protecting vulnerable persons and groups from domination by more powerful individuals and groups, within the public or private domain".

58 Van der Westhuizen Human Rights Law 3.

59 The applicability of this concept was discussed in some detail in Part II.II.2.c.1 above.

60 The rights entrenched in sections 16, 21, 23 and 24 are all in some way or another connected to the concept of arbitrary government and fall within the ambit of this discussion. These rights are: the right to assemble and demonstrate with others and to present petitions; political rights (to form, campaign for and participate in a political party and to vote); the right to have justiciable disputes settled by a court; the right of access to information which is required for
Although indigenous law is generally unwritten, indigenous authorities do not have arbitrary discretionary powers. First, the law is certain and becomes known to individuals, amongst others, through education, political organisation, economy, religion and language. Individuals are aware of what they are permitted to do and what not. Secondly, there are measures curtailing the judicial, administrative and executive powers of the ruler and other organs of government. For example, the ruler is dealt with administratively when he issues unjust orders in a court of law and unreasonable orders issued outside a court may lawfully be ignored. A headman exceeding his criminal jurisdiction is guilty of an offence.

Nevertheless, one should not try to force indigenous political systems into the Western, liberal, democratic paradigm. Pre-colonial indigenous government fits neither modern democratic, nor socialist forms of government. It displays characteristics of both, but of a specific African hue. Yet the fact that indigenous political systems do not fit into these paradigms does not mean that indigenous law should be characterised as permitting arbitrary government. On the contrary, pre-colonial indigenous governance is open and participatory and decisions are mostly made on a consensual basis, the highest concern being societal welfare. Discussion is open and persons are free to dissent from the majority opinion, and express their views. Political parties and voting are concepts quite foreign to indigenous political systems which are based on kinship and ancestry. But adult members of the group are free to make certain

the exercise or protection of an individual’s rights; the right to lawful administrative action where an individual’s rights and interests are affected and procedurally fair administrative action where rights are threatened).

61 See generally Myburgh Papers 52-53 61.

62 The State in its abstract Western meaning was not known in indigenous law. See generally Part l.II.4.a where indigenous constitutional and administrative law are discussed in greater detail.

63 Vorster "Disobeying Orders" 74-77; Myburgh "Responsibility" 37-40.

64 Some regarded it as contempt of the ruler’s court, whilst others regarded it as the offence of disobeying the ruler’s order: see Myburgh "Contempt of Court" 69.

65 Oyugi 44; Wai 116-118.
political choices and political grudges and dissatisfaction with the ruler can be made known through the private council and through petition.

Although the ruler, whose position is hereditary, is the legislative head, the legislature comprises the ruler, his private council, and a people's assembly or general council on which the leaders, chosen by the people, are represented. Decisions are made in consultation with these councils and legislation may be passed only if adopted by the legislature as a whole. Generally, preventative measures are taken against the incompetence, aloofness or despotism of the ruler.

Under certain circumstances a ruler may be publicly criticised with impunity and an unsatisfactory ruler may be deposed and replaced. In the exercise of all duties, the ruler acts in-council and is answerable to the ruling family. An important function of the private council is to protect, but also to control the position of the ruler. More importantly, the private council ensures that intercession is always open to an aggrieved individual. In certain communities disagreement within the ruling family is dealt with by an assembly of all available men. An important check on the powers of the ruler is his close connection with the ancestors. It is his duty to maintain the equilibrium between the living members of the group and the deceased ancestors. Because he is the closest link between the living and the superhuman, his position is regarded as sacred and a fear of the ancestors' wrath deters him from acting despotically and thus disturbing the equilibrium.

The non-specialised character of indigenous culture provides that administrative justice is founded on the same principles which underlie constitutional law. The ruler-in-council is the chief administrative organ and is, in the exercise of his powers, subject to the

66 The general council consists of the ruler's private advisors, less immediate kin, the heads of jural communities and influential and able commoners.

67 The ruler has to be old enough (he must at least have passed through the initiation school).

68 See generally Myburgh Papers 55-58.
same checks and balances as described above. Although he is above the realm of private law, he is dealt with in terms of administrative law should he transgress the limits of his powers. A ruler who acts despotically has to account to his private council, and if he persists he may dismissed or suspended (in the olden days, even assassinated). He is then usually succeeded by the next in order of succession. Various checks on the powers of other administrative functionaries also exist. Mediation is an important means to settle differences with them and disciplinary action may be taken by age groups and regiments. An important administrative function of the ruler, assisted by his private council, is to consider the petitions of individuals, irrespective of their rank.

The most important fundamental principle underlying indigenous procedural law is the conciliation of the individuals involved, so that the harmony of the collectivity which has been disturbed by the conflict be restored. This postulate also underscores present-day informal dispute-resolution procedures in the metropolitan areas of South Africa. It follows naturally that harmony cannot be obtained where both formal and substantive equality are not upheld. Social equilibrium can only be maintained where individuals accord each other a minimum of respect and the right to full human dignity. Pre-colonial indigenous procedural law and evidential law embrace procedural values that are to an extent comparable with the values which should ideally underscore Western procedural rights and equality before the law.

Trials are held in public and in the interest of all persons involved. They are conducted speedily, lest important evidence of which there is no written record, be forgotten. Women are present only when involved in a case as complainant or witness. In such cases the venue of the court may have to be moved away from the cattle kraal which

69 Eg, a chief of a neighbouring tribe may act as mediator between a chief and his people. Myburgh Papers 65-67.
70 Myburgh & Prinsloo 30-32.
71 See Part II.11.2.c.v.
usually adjoins the court. This is so because women's periodic ritual impurity is believed to have a detrimental effect on the cattle and consequently on the agnatic group. Nowadays there are special court buildings and adult males as well as females are allowed to be present.

Although formal legal representation as it is known in the Western sense is foreign to indigenous law, agnates, assisted by representatives of their jural communities, aid members involved in court proceedings. Tarde\textsuperscript{72} has remarked that an ideal procedure does not necessarily imply the existence of "barristers, attorneys, bailiffs". Even though indigenous procedure does not always accord with Western procedures, basic equality before the law may still be upheld through different mechanisms. Everyone present at a trial is allowed to ask questions, examine and cross-examine witnesses. Both sides have to be heard before a court reaches a decision. The burden of proof in criminal cases rests on the chiefdom.\textsuperscript{73} It is customary and preferable that a criminal case first be investigated by the court of the jural community (ward headman)\textsuperscript{74} before it is taken to the Chief's Court and the accused is thus granted the time to prepare his defence.

Extraordinary methods of obtaining proof, such as divining, ordeal and torture should be seen within the context of the diffuse postulates which underlie indigenous law. These methods are usually employed in certain cases of theft, witchcraft and poisoning.\textsuperscript{75} Theft of public resources, witchcraft and poisoning have a polluting effect, the last two also have a close connection with magic. The belief in the primacy of the superhuman and in the importance of retaining the balance between the superhuman and the living explains why superhuman means are allowed to solve these serious crimes which threaten the very fabric of the community and its peaceful

\textsuperscript{72} Tarde 704.

\textsuperscript{73} There Is no State in the Western sense of the word. See Part I.II.4.a above.

\textsuperscript{74} See Part I.II.4.a above.

\textsuperscript{75} Myburgh & Prinsloo 142.
existence. These methods to obtain proof are currently forbidden by legislation.

The principle of equality before the law is also reflected in certain Tswana legal maxims: "do not concentrate on the person, but on the error"; "it is not the person that is resented, but the error"; "the law is a blind animal and may even mulct the one administering it"; "the law is a lion, it bites the great man too".

Finally, the court plays an active role in the characteristically inquisitorial indigenous procedure. Evidence is judged on merit, not on technical rules. The simplicity, lack of technicalities and fairness of indigenous legal procedural law, and also the free system of evidence underline the principle of procedural equality in indigenous law. It seems that values which underscore Western procedural rights are not absolutely in conflict with those which underpin indigenous law. The entrenchment of procedural rights in the Bill of Rights will neither lead to serious confrontation, nor will it lead to the eradication of indigenous law - as long as indigenous law is not assessed from a purely Western perspective and as long as the jural postulates which underscore indigenous law are kept in consideration.

3.b Indigenous Law and Equal Protection of the Law

In any discussion of substantive equality in indigenous law, one has to distinguish between the indigenous law for indigenous people and the indigenous law of the indigenous people. Indigenous law for the people is the law laid down by the State, it is official law as has already been explained. Indigenous law incorporated in legislation and applied by State courts is valid, irrespective of the support of the indigenous people from which it supposedly originated. This law does not necessarily coincide with true indigenous law, that is with indigenous law of the indigenous communities of South Africa. This indigenous law is adaptable and responsive to the

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76 See Myburgh "Punishment" 56.
77 See Part II.I.2.b.ii.
changing values of its corresponding social group and loses its validity once it loses the support of its related social group. It should be established whether this indigenous law, and not the official indigenous law, is inherently discriminatory in nature and whether and to what extent it is compatible with the ideals of substantive equality.

The grounds upon which discrimination is prohibited in the Constitution,\(^78\) will be taken as the framework for the discussion of the effect which human attributes or "elements which are constitutive of human identity" have on the principle of equal protection of the law in indigenous law. The differences in the jural postulates underlying law and social ordering in indigenous and in Western communities should form the background to an analysis of this kind.

(i) *Ethnic Origin, Race, Colour, Culture and Language*

Indigenous social structure is such that concepts of ethnic origin, race, colour, culture and language do not have the same significance or meaning in indigenous communities that they have in a Western context. Harmony of the collectivity, the transcendence of sociological relations over biological relations, the importance of the superhuman, the family idea, the emphasis on group solidarity, collectivity, the status order and the kinship principle\(^79\) give these human attributes a different dimension.

In indigenous societies language, magic and religion have an integrated relationship.\(^80\) The affinity between these cultural attributes influences all facets of indigenous cultural existence. Language is the oral expression of indigenous cultural life. It is important in kinship terminology and the various language taboos\(^81\) illustrate the connection of

\(^{78}\) See section 8(2).

\(^{79}\) The kinship principle underlies the structuring of the group, consisting of blood relations in the narrow sense of the word as well as non-agnates who fall under the authority of the group.

\(^{80}\) See generally Myburgh "Language" 140-144.

\(^{81}\) When speech taboos are violated the spirits punish the group.
language with the superhuman. For example, amongst the Zulu there is a taboo on the use of certain words when a woman addresses her in-laws and amongst several Nguni, parents-in-law and children-in-law should avoid words phonetically resembling each other's names. The titles of rulers form a significant part of the institution of chieftainship and the manner in which a ruler is addressed and in which reference is made to him forms part of the indigenous political organisation. The terms employed to refer to cattle differ depending on whether used in legal (for instance in matters of marriage goods or farming out), religious (for instance where a sacrifice involves ancestral spirits) or kinship (when cattle are owing to an agnatic group) context. These are but a few examples of the role of language as an essential part of the complex nature of indigenous culture. It should be clear that one cannot regard language in the same light in indigenous and Western societies and that discrimination on the ground of language just does not fit the ethos of indigenous law.

Likewise, discrimination on the ground of culture, or race, or colour or ethnicity are concepts foreign to indigenous law. Social ordering is underscored by the postulates referred to above. The unity within the group is based on obedience to a common elder and religion forms the basis for interaction between kin. Kinship relations are extremely complex and have important consequences for social ordering generally. Although kinship relations are not absolutely identical in all indigenous communities, they are largely similar. Kinship ties in indigenous societies have moral, jural and religious implications. Kinship linkages provide guidelines for the interaction between kin and others that are not kinship related. Kin and non-kin are treated differently and individuals are treated in accordance with the category of kin within which they fall. Kinship principles have an important effect on social, economic and domestic relations. It should be remembered that kinship does not necessarily comprise genetic

82 See generally Vorster "Kinship" 91-93 on the importance of terminology in kinship relationships.
83 Hambrock 112.
84 The most fundamental difference in kinship principles in South Africa occur between the Nguni-speaking people who prohibit marriage and sexual relations between kin, and the other groups who prefer marriage between kin.
relatedness. Kinship relationships broadly encompass cultural relationships which bind individuals by their common acceptance of the various aspects of that culture, such as language, religion and law, \(^85\) - irrespective of colour, race \(^88\) or ethnic origin. "Races" have always been viewed within a Western idiom as categories of human kind based on physical differences. \(^87\) As a basis for the classification of, or differentiation between people, it is foreign to indigenous social ordering. The same may be said of ethnic origin and colour.

(ii) Religion, Belief and Conscience

Religion or belief \(^88\) in the superhuman can never be regarded as a ground for differentiation between individuals in indigenous law. This is because of the fact that the superhuman is regarded as a natural extension of the group on earth. There is no conceptual difference between the natural and the supernatural, between the human and the superhuman. The close-knit unity between the living, the superhuman and nature makes it an unlikely criterion for differentiation between people. It would again just not fit the ethos of indigenous culture to distinguish between people on the ground of their religion. It is, after all, religion which organises members of the group into a state of solidarity and provides the foundation for the interaction between kin. \(^89\) Closely connected to the concepts of religion (a system of belief, worship of the supernatural) and belief (convictions, persuasion) is the concept of "conscience".

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\(^85\) That is if one accepts that culture denotes standards or norms which apply to speech, thought and material objects, commonly recognised among the people concerned. Components of culture are amongst others law, religion, political organisation, art.

\(^86\) Bohannan *Anthropology* 186 describes race as "a classification of human beings ... [it] does not exist as anything except an ideal classification of empirical biological differences ... [race] is, in short, not part of the data, but it is a way of looking at data".

\(^87\) See Bohannan *Anthropology* 205 206.

\(^88\) The SA Law Commission *Group and Human Rights* 283, describes "belief" as a concept broader than religion which encompasses non-religious convictions. Because of the primacy of the superhuman, belief in indigenous culture would usually be tied to the superhuman, which makes the distinction between these concepts of little consequence.

\(^89\) Hambrock 112.
"Conscience" as "a sense of right and wrong governing persons' words and actions" is likewise so intertwined with the belief in the superhuman that it is an improbable ground for the classification of individuals.

(iii) **Sexual Orientation**

Convictions about sexual orientation in indigenous law is again coloured by religion and the belief in the superiority of the superhuman and the belief in its involvement with life on earth. Amongst the Ndebele\(^91\) homosexuality is classified, with incest and bestiality, as forms of unnatural sexuality. They are known by the generic term of ukuhhlola, signifying something ominous, and are all regarded as highly pollutant crimes which are punishable and which have to be cleansed by the appropriate rites. But in the light of the conciliatory spirit of indigenous law, it is doubtful whether sexual orientation would form a ground for discriminating against a person. In contrast, amongst the Tswana\(^92\) homosexuality is not regarded as a crime. Tswana experts who were interviewed, were aware of one case of sodomy for which the culprits received a thrashing. Lesbian practices are common amongst older girls but are not regarded as reprehensible. Amongst the Northern Sotho,\(^93\) again, homosexuality is regarded as reprehensible but is not regarded as a crime and is dealt with within the family.

(iv) **Social Origin**

In indigenous communities status forms the basis for the legal classification of people. Although the Constitution couples "social origin" with "ethnic origin", these cannot be

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90 Collins Concise Dictionary and Thesaurus.
91 Myburgh & Prinsloo 102.
92 Vorster "Unnatural Sexuality" 88-89.
93 Prinsloo Publiekreg 223.
grouped together in indigenous law. Social origin includes "birth", "status" and "class". Status is determined by gender, rank, mental and physical maturity, and marriage. In indigenous law the individual does not stand outside the group and individual rights must always be considered within the framework of the group’s interests. Every individual in traditional indigenous law is the bearer of rights in accordance with her or his status. Gender, sex, age and disability therefore fall under the status order in indigenous law.

But status does not influence the individual’s dignity, his worth as a human being and as component member of the group. Nhlapo remarks in this respect that

"true worth or excellence [is] divorced from role and associated more closely with being. Even in the case of traditional societies there is nothing compelling the conclusion that human worth divorced from social role was not highly regarded".

An individual’s physical and mental abilities, his usefulness and productiveness in a narrow sense, do not influence his quality of life. Indigenous communities are geared at the satisfaction of the basic physical and emotional human needs of every person in the community. Old age, youth and disability do not form grounds for discrimination. In line with the spirit of ubuntu, individuals are not judged on what they can do for the group; they are valued because they are part of the group. Their dignity is as conscientiously protected as the dignity of an able person. Their physical and mental well being is just as important to the maintenance of an equilibrium in the group (and with the superhuman) as that of any other person in the group. Those who are physically able accept responsibility for the physical tasks that the young, the old and

94 See Albertyn & Kentridge 168 n91.

95 See generally the discussion of status in Part II.3.b.i(i); Kaunda 24-28; Nhlapo "Future" 19-20. For a contrary view, see Sinclair 561 who is of the opinion that whilst human rights stress the importance of the individual, indigenous law focuses on the group, and group interests "are framed in favour of men". Consequently, according to Sinclair, women are not seen as valuable in themselves but merely as "adjuncts to the group".

96 Nhlapo "Future" 19.
disabled cannot perform. The old are, in fact, held in an honoured position and play an important role in the education of children. They are "embodied wisdom; living symbols of our continuity with the past." They are about to become the ancestors.

Interestingly enough, Nhlapo\(^97\) is of the opinion that the very value of respect for elders is inherently discriminatory against the young. He argues that there is a link between institutionalised inequality and the security of the elderly in that the elderly make demands on the young (in terms of labour and property) as security for their old age,\(^99\) for example, the marriage to a young second wife (often with the approval of the first wife). He nevertheless points out that it should be possible to remove the negative aspects of this cherished value of respect for the elderly and yet retain the positive aspects, of which there are many.\(^100\) With regard to children, he notes the following.\(^101\) Whilst sons ensure the survival of the group, daughters increase the group's wealth through the bridewealth paid for them. Children are important in establishing relationships with other groups and are participants in the household economy. The family, in its extended sense, has an interest in the upbringing, socialisation and marriage of its children. According to Nhlapo communal values are positive and only the discriminatory expression of these values should be adjusted.

The importance of the group finds expression in the fact that children's relationship with their father and his group is emphasised. Yet, the role of the mother in the relationship between parents and children should be enhanced and rules with regard

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97 Kaunda 26.
98 Nhlapo "African Family" 141 142.
99 The elderly likewise cannot afford to lose the goodwill of the younger members of the group because they have to rely on them for support in their old age.
100 Respect for the elderly is a way of teaching habits of humility, courtesy, consideration and decency. It also ensures care for the aged.
101 Nhlapo "African Family" 143.
to custody should be changed.\textsuperscript{102} Nhlapo\textsuperscript{103} nevertheless expresses himself strongly in favour of the retention of the institution of the extended family: "It would be perverse to argue for the abolition in Africa of the role of the wider family and the community in marriage".

The group provides emotional, economic and political support for all its members, also its children. However, the duty of parents to support their children should be considered very carefully.\textsuperscript{104} Children share in the patrimony of the group and have a right to use it for their maintenance and the group has a duty to maintain its children. Although this right to be supported within the group is not enforceable in the sense that children may claim maintenance from their group or parents in a court of law. It should be remembered that groups, and not individuals are legal subjects in indigenous law. Therefore, where another group becomes involved in the maintenance of children, that group has an enforceable right against the children's group of origin. Should a mother then take her children with her upon divorce, her group of origin has an enforceable claim against her husband's group for the maintenance of those children.\textsuperscript{105}

In a recent case\textsuperscript{106} the Transkei Appellate Division decided that a son who has been adopted by a woman according to indigenous law, has an action against the estate (in the Western sense of the word) of his deceased adoptive parent. The Court

\begin{footnotes}
\item 102 However, one should bear in mind that a mother and her group of origin have anything but an inferior role to play in her children's lives. The important role of the mother's brother and her group of origin in various cultural spheres was explained above in Part II.II.3.b.ii(ii). It should also be remembered that upon marriage a women does not loose membership of her group of origin which has a continued interest in her well being and that of her children.

\item 103 Nhlapo "African Family" 143.

\item 104 Labuschagne "Menseregte" 345 is of the opinion that parents have a legal duty to support their children.

\item 105 Van Niekerk "Maintenance" 99-100.

\item 106 Kewana v Santam Insurance Co Ltd 1993 4 SA 771 (Tk).
\end{footnotes}
found\(^{107}\) that adoption in indigenous law\(^{108}\) received express recognition in the (now-repealed) Republic of Transkei Constitution Act 15 of 1976 (Tk). Because the deceased had lawfully adopted the child, there was a legally enforceable duty upon her to maintain him. This duty accorded with indigenous law and was thus legally enforceable in terms of this Act which recognised the application of indigenous law, subject to a repugnancy clause. The Court noted that "[t]he existence of an enforceable duty of support is derived from customary law, but the right for compensation is governed by that [the Constitution] Act."\(^{108}\) Seeing that it was not contrary to the repugnancy clause, or modified or repealed, the son's right to support was regarded as enforceable.

However, as indicated above, the notion of an enforceable right to maintenance within the same agnatic group is foreign to indigenous law. Nevertheless the underlying jural postulate is that the extended family should be continued through its members. The family idea dictates that members of the family should physically and emotionally be supported by the group. Therefore, while this decision is not in line with the indigenous-law rule, it is still consonant with the underlying jural postulate. Although it was in all possibility not the intention of the court in this particular case, indigenous law was adapted in line with its underlying postulates.\(^{110}\)

Generally the following may be noted with regard to the position of children in indigenous law. Physical maturity and not age determines a child's competencies in

\(^{107}\) At 774H 775H-J.

\(^{108}\) For purposes of this discussion it is not necessary to pursue the question whether the concept of adoption is known in indigenous law.

\(^{109}\) At 771 775.

\(^{110}\) Du Plessis "Aanneming" 842 comments: "Die Kewan[a]-saak het getoon dat die gewoontereg en die gemenereg nie net naas mekaar bestaan nie, maar dat dit deel van die Suid-Afrikaanse regstelsel vorm. Indien 'n regsreël volgens die een stelsel bestaan, behoort dit nie as 'n rede beskou te word om 'n els kragtens die ander regstelsel te laat vaar nie. Die gewoontereg is Inherent deel van die Suid-Afrikaanse reg en daarom moet die twee stelsels eerder met mekaar versoen word as om in konflik tot mekaar beskou te word - dit is een van die groot pluspunte van die Kewan[a]-saak."
indigenous law. The sexual integrity of children, physically immature persons, is protected in both criminal law and the law of delict. But a child's physical integrity is not protected to the same extent. A father has a right to moderate chastisement of his children, but excessive disciplinary action constitutes assault and is punishable.

Child marriages are unknown in indigenous law. Betrothal of infants which were formerly known in indigenous law, have been declared unlawful by Western courts. Under pre-colonial law, two groups may agree on the marriage of infants once they have reached a marriageable age. Gifts are transferred to the girl's family in part performance. Nevertheless the consent of the parties involved is required before they can actually get married. Should a girl refuse to marry, the betrothal gifts are returned. Although some authors are of the opinion that consent is not required for marriage, the better view seems to be that consent of both parties is indeed a requirement, even where marriages are arranged. Lack of consent is considered as jeopardising the stability of the marriage and this in turn disturbs the equilibrium in the group and with the ancestors.

The tasks which children fulfill in the group are sometimes referred to as child labour. But child labour is really a misnomer in this context, for these tasks are regarded as a learning process for children. Girls help to fetch water and wood, stamp corn, cook

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111 See Part II.II.3.b.ii(i).
112 Labuschagne "Menseregte" 343.
113 Myburgh & Prinsloo 81. Labuschagne "Menseregte" 343 is of the opinion that physical chastisement of children is against the Western principles of criminal law, as well as the law of delict. He points out that it has lost support world-wide, also in Africa.
114 Labuschagne "Menseregte" 344.
115 Church Marriage 27-28.
116 Bennett "Equality Clause" 125; Labuschagne "Menseregte" 344. Kaganas & Murray "Law" 116 observe that the consent of marriage partners is not necessarily central to marriage arrangements and that the interests of the prospective marriage partner are "incidental to family interests which are secured by institutions such as bridewealth".
117 Myburgh Papers 85 86; Church Marriage 25; Church "Betrothal" 80.
and clean and act as nursemaids to babies. Boys have other tasks such as herding and milking, running errands and hunting. These tasks are as a rule not physically exerting and are regarded as children's duty to their group. It also prepares them for their future role in the social structure of the group.\(^\text{118}\)

Finally it should be remembered that although the protection of the physical and emotional welfare and the dignity of children are consonant with the aims of pre-colonial indigenous law and the jural postulates which underlie that law, urbanisation and changed economic and social circumstances may now demand that indigenous law be adapted to bring it once again abreast of its underlying postulates.

(v) Gender and Sex

What remains to be considered, then, are gender and sex. Gender and sex are perceived to be the most contentious grounds of discrimination in indigenous law. Polygyny and bridewealth are often used to illustrate the subordination of women in indigenous law. And women’s proprietary capacity, and succession are also subject to much criticism.

Bennett\(^\text{119}\) is of the opinion that it cannot be proved that polygyny and bridewealth are responsible for the subordinate position of women in indigenous law and that these are such sensitive issues that the legislature, and not the courts, should address the problem with extreme caution. Kaganas and Murray\(^\text{120}\) too come to the conclusion that it is patriarchy, a characteristic feature of indigenous culture, and not polygyny which causes the oppression of indigenous women. According to them it is not only in polygynous unions that women are treated as property, that sexual

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118 Labuschagne "Menseregte" 347-348.

119 Bennett "Equality Clause" 124.

120 Kaganas & Murray "Law" 125.
stereotyping takes place and that males dominate.  

But because polygyny has become symbolically associated with the oppression of women, it is deemed to be incompatible with a social order in which the liberation of women is recognised as a goal. Sinclair observes that polygyny has been condemned on religious and moral grounds in most civilised societies and that it is not compatible with the notion of sex equality in a democratic South Africa. She is of the opinion that the abolition of polygyny would be a first step in the destruction of patriarchy. Still, where polygyny is firmly entrenched, communities will continue to practice it irrespective of legislative indication against it.

If one analyses pre-colonial law and its underlying jural postulates, it is often found that gender inequality exists not in the pre-colonial law, but in the distorted version of that law. Nhlapo observes that "rules that appeared designed for the subjection of women often operated to ensure their security. The economic priorities underlying the pre-eminence of marriage and large families produced practices which worked in part to ensure that no woman was left without someone

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121 However, it is difficult to envisage a polygynous relationship in which the man does not dominate. Kaganas & Murray "Law" 127 rightly point out that structural inequality occurs and should be addressed also in monogamous indigenous unions.

122 Kaganas & Murray "Law" 129.

123 Sinclair 563-565. She notes that even if it is found that polygyny falls within the jurisdiction of the Constitutional Court and in terms of s 98(5) an order is made by the Court that legislation be passed which prohibits polygyny prospectively (whilst preserving existing rights of women and children in polygynous unions and fully recognising indigenous-law marriages), those practices which are perceived to be oppressive would persist despite such prohibition because they are in fact rather connected to patriarchy.

124 Kaganas & Murray "Law" 129 observe that it is the version of indigenous law as evolved by the State courts, which disadvantage indigenous women. Nhlapo "African Family" 136 points out that traditional leaders exploited the institutions of marriage goods and guardianship in an effort to regain their diminishing power, and that the colonial administration misunderstood the nature of indigenous institutions and regarded indigenous women as rightless entities under the authority of men.

125 Nhlapo "African Family" 144.
Part II.IV.3 Indigenous Law and Western Law in a New Constitutional Dispensation

directly responsible for her maintenance”.

In this distorted indigenous law women are considered to be unequal in indigenous marriages, whether they are de facto polygynous or monogamous. In this regard the following criticism has been levelled against indigenous law:

First, women bear children and have the responsibility for them but they have no rights over their children, because all rights with regard to children are vested in men.\footnote{126}

It is indeed true that children born of a lawful marriage become members of their fathers’ group. However, this is not because they are paid for by the transfer of marriage goods,\footnote{127} or because all rights are vested in men. The reason is that the woman’s capacity to bear children forms part of the marital guardianship which is transferred to her husband’s group upon marriage. All rights are shared within that group. The mother, as well as other female members of the group in accordance with their status and as members of that group, also has a share in rights regarding her children. This is for example evidenced in the important role played by females in case of seduction or rape. It is also evidenced by the important role played by the mother’s brother in the marriage negotiations of her children, or, where daughters are concerned, in litigation. Further, marriage goods should not be seen as payment for children or solely as a quid pro quo for the transfer of the limited authority over the women. As explained above, it is a means to restore the equilibrium which is disturbed by the transfer of the marital guardianship and it does not affect the legitimacy of children.\footnote{128}

\footnote{126} Kaganas & Murray “Law” 127.

\footnote{127} Bennett “Equality Clause” 128 says that in theory the transfer of bridewealth determines the guardianship of children, but that the rule is not strictly applied and may be altered in accordance with any agreement between the families concerned.

\footnote{128} See Part II.II.2.c.ii.
It should also be noted\(^\text{129}\) that divorce was for various reasons uncommon in pre-colonial indigenous law but that it has become more frequent in recent years. It is incorrect to say that custody of children is awarded to the husband in the event of divorce. The fact that parents divorce makes no difference to their children's membership of the group to which they belong. They remain members of their group of origin, which is also their father's group of origin. Even where a mother physically takes her young with her to her group of origin, the children remain members of their father's group.\(^\text{130}\) It is only upon marriage that a daughter becomes a member of her husband's group too, and even then she still retains membership of her group of origin. Labuschagne\(^\text{131}\) points out that State courts have in the past awarded custody to the mother because it is in the best interest of the child, a universally applicable principle. In indigenous law the emphasis is on the best interest of the group, but this can only be maintained where the physical and emotional well-being of its members (in this instance, the children) are protected. Thus, the best interest of the child is in fact maintained in indigenous law, but through different mechanisms, or for different reasons.

If one analyses the principles underlying rights over children within an indigenous law perspective, it is clear that it is not the inherent superior position of the husband (who only shares in the rights that his group of origin has over his children), or the inferior position of the wife which in indigenous law determines the rights over children. The whole issue of custody should not be narrowed down to a conflict of interests between a husband and wife. It is kinship which determines social structures in indigenous culture and which determines a child's membership of a group. And membership of a group holds both rights and privileges for children.

The second point of criticism against indigenous law is that women carry the burden

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129 See Part II.II.2.c.ii.

130 Van Niekerk "Maintenance" 99-100.

131 Labuschagne "Menseregte" 346-347; see also Bennett "Equality Clause" 128.
of labour within and outside the home so that their husbands prosper materially and enhance their status. Polygyny serves the purpose of increasing the man’s labour force for expanding his agricultural holding and thus adds to his wealth and prestige. Numerous children not only extend his labour force, but ensure a male heir to perpetuate his father’s spirit. Agnatic heads control the family’s wealth and the wives have few proprietary rights. The male head represents the household in all dealings with the outside world. He has extensive powers within the household.\textsuperscript{132}

As explained above,\textsuperscript{133} women’s position in the group is in many ways similar to that of men. They all share in the right of authority, ownership and rights of personality. Whilst men’s duties entail building, clearing soil, herding, milking and assisting the head of the group when there is a claim against the group, women’s duties in the group entail, amongst others, grinding, sweeping, plastering, cooking and tilling. Wealth is shared in the group and applied in the interest of the group. The fact that the head of the group represents the group does not mean that he acts in his own interest. As explained, the family idea dictates that all individuals act for the family as a whole and not in individual interests. It may be noted further that whilst women are indeed dependent on their husbands for access to resources, their positions are not necessarily prejudiced by the fact that there may be more than one wife. On the contrary, more wives may mean an increase in wealth for the household rather than a decrease.\textsuperscript{134} One of the diffuse postulates of indigenous law is, after all, the maintenance of the equilibrium in the group, and this cannot be accomplished if the family head disregards the needs of the family. It should also be remembered that a male heir does not perpetuate the spirit of his father (in the interest of the father as an individual), but that he ensures the survival of his group, which is in the interest of the group as a whole. The designation of the man as the family head is also regarded as an expression of women’s inequality. Although this is the rule, female heads of agnatic

\begin{itemize}
\item \textsuperscript{132} Kaganas and Murray "Law" 129-130.
\item \textsuperscript{133} The division of labour in the extended family was discussed in Part II.II.3.b.ii(iii).
\item \textsuperscript{134} Kaganas & Murray "Law" 128.
\end{itemize}
groups are known amongst some people. Whilst it is indeed discriminatory to exclude women from this position, it still does not affect her position of dignity and honour within the group. The head of the family acts in the interest of the group as a whole and acquires no personal gain or wealth. Females have an important role to play in the group. For example, they represent the group when they take steps to obtain redress for the infringement of personality rights. They also have a substantial share in the house property and the agnatic head must consult a woman before her house property is used.¹³⁵

The third point of criticism levelled against indigenous law is that the levirate and sororate are indications against the equality of men and women.¹³⁶

These institutions should also be regarded in light of the family idea as expounded above.¹³⁷ If a woman is unable to produce offspring, or if either one of the partners in marriage should die before children have been born, provision is made through sororate and levirate secondary unions for the house to be continued. The reason is not because women are regarded to be inferior, or because the man should directly benefit from it at the cost of the woman. The aim of these institutions is that once a nuclear family has been established, it should not be allowed to die out.¹³⁸ These institutions also secure the position of the women and her children when her husband dies, because she can continue her life within her husband's group with all the resources available to her. In any case, these institutions have similar social consequences for both men and women. In case of the sororate, a barren or deceased wife's sister is placed in her house to bear children in her place, and in case of the levirate an approved relative of the husband is put in the house to beget

¹³⁵ Part II.IV.3.b.ii(i).
¹³⁶ Nhlapo "African Family" 138; Sinclair 561; Kaganas & Murray "Law" 117; Bennett Sourcebook 413-416.
¹³⁷ Part II.IV.3.b.ii(ii).
¹³⁸ Preston-Whyte 188-192.
children in his place. In addition, this relative also takes other responsibilities for the widow and her children and provides security for them. Moreover, woman-to-woman marriages are also known in indigenous law and are common amongst the Lobedu, Venda and Pedi. Thus a woman marries another woman to bear children for her. The "spouse" (the former) either appoints a lover, or the woman who bears the children chooses a suitor. The idea is again to secure the continued existence of the family. This phenomenon may for example occur where a widow is childless, or where a widow does not have a son.  

The fourth point of criticism is that in indigenous law polygynous men may renounce their marriage unilaterally, and introduce new wives without the consent of the existing wife or wives. Moreover, it is more difficult for a wife to obtain a divorce; the husband may recover the bridewealth if he can show that his wife could not fulfill her obligations (for example could not bear children); and women cannot initiate divorce proceedings because it must be done by the "bridewealth holder" who may be reluctant to co-operate lest he loses some of the bridewealth.

Dissolution of marriage in indigenous law may happen at the instance of either the husband or the wife. It is in fact the husband's group or the wife's group of origin who repudiates the marriage. This usually happens on good grounds such as misconduct, impotence, or sterility. The institutions of levirate and sororate may remedy the last-mentioned reasons. Incapability to bear children are sometimes just condoned by the husband's group. Myburgh is of the opinion that the return of marriage goods upon divorce is dependent on the extent to which the wife has fulfilled her

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139 Preston-Whyte 191-192.
140 Kaganas & Murray "Law" 129-130; Sinclair 568.
141 Myburgh Papers 86-87; Preston-Whyte 194.
142 Myburgh Papers 87.
duties. However, Church, basing her view on extensive field research amongst the Tswana, comes to the conclusion, that marriage goods are not returnable, whether the wife has children or not and whether a substitute has been provided or not. This seems to be the better view in light of the fact that marriage goods should not solely be regarded as a quid pro quo for the transfer of marital guardianship to the husband's group but also, importantly, as a means to restore the disturbed equilibrium.

The fifth criticism is that the institution of marriage goods has the effect that women are treated as property. It objectifies and commercialises women.

It is clear that the transfer of marriage goods is important in many spheres of indigenous culture and that it was not originally devised to subjugate women in any way. The transfer of marriage goods in pre-colonial law has various functions. It is part performance in terms of a real contract (the woman's group transfers the limited right of authority to the man's group); it is a form of thanksgiving for the fact that the woman's group raised her; it softens the "blow and tries to obtain the friendship of the girl's family"; it ensures that the ancestors make the wife fertile; and it stabilises the marriage. Moreover, it should be seen as a social and spiritual symbol of the bond between the two families and is closely connected to the ancestors.

Bennett observes, that "even a superficial knowledge of customary marriage would
show that the wife is neither a slave nor a chattel". However, the institution has changed and is now far removed from its pre-colonial antecedent. It has taken on a commercialised character which contributes to the subordination of women and jeopardises her financial security upon divorce. In order for the institution to survive, it will have to be adapted.\textsuperscript{147} If it is reformed, the aim should be to bring it back in line with the underlying indigenous law principles. In short, there should be a movement away from the idea that marriage goods should satisfy the immediate economic needs of the woman's group, and that it justifies the husband's refusal to support his wife and children upon divorce, that it is no more than a purchase price for the woman. The emphasis should once again be on the pre-colonial principles which focus on the establishment and maintenance of good relations between the groups, between the marriage partners and with the ancestors. If this is the aim, the amount to be paid would again take on reasonable proportions and the woman would not so readily be regarded as economic commodity.

It should also be remembered that in pre-colonial law the husband, or rather his family, is responsible to maintain his wife and her children while she is still living with him. When the wife leaves her husband and takes the children with her, his family remains responsible for the maintenance of the children. The wife then becomes the responsibility of her family. This being the indigenous-law position, the husband in an indigenous law marriage, or his family, should have the legal responsibility to support the children upon divorce. All this would of course be possible only once indigenous law marriages are accorded full recognition. However, Burman\textsuperscript{148} is of the opinion that it is in any event futile to try and obtain maintenance for children from their fathers. By updating the institution of marriage goods and constituting a "Bridewealth Fund" which may serve as a source of funds in the event of the marriage ending, or a which may be a lump sum saving to help in old age if the marriage survived, the problem of maintenance for children upon divorce may be ameliorated.

\textsuperscript{147} See Bennett Sourcebook 201-202.

\textsuperscript{148} Burman "Women, Welfare and the Law" 217 219-221.
Sixthly, it is said that women are regarded as perpetual minors who fall under the authority of their fathers or their husbands and that their locus standi and contractual capacity are limited. They are also discriminated against in the law of succession.\textsuperscript{149}

It is indeed true that indigenous law as it is applied by the State courts and as it has been distorted by the legislature, is generally discriminatory, but this indigenous law is not always a true reflection of pre-colonial law and is more often than not inconsistent with the fundamental postulates which underscore indigenous law.

Widows and children cannot inherit in pre-colonial indigenous law. Universal succession takes place through the oldest male. However, because he does not inherit any property in his personal capacity but succeeds to the position of the deceased head of the household, everything that is inherited, is applied for the benefit of the family as a whole. The fact that everything is owned communally and inherited communally provides security for widows and children. They are taken care of within the circle of the extended family, or by the wife's own family should she decide to leave her deceased husband's group. The notion that a woman and her children should suffer at the death of her husband is foreign to indigenous law.

Bennett\textsuperscript{150} asks whether the equality clause should be so interpreted that it generates rights that did not previously exist, namely by granting widows the right to inherit. He concludes that such cases, which are neither vague nor contradictory, should rather be left to reform by the legislature. However, one should not regard indigenous law as an immutable legal system; it is adaptable. The courts should be able to adapt

\textsuperscript{149} Sinclair 566-568; Bennett "Equality Clause" 125-129; Kerr "Fundamental Rights" 725-729; Nhlapo "African Family" 138 144; Kaganas & Murray "Law" 122-123 129.

\textsuperscript{150} Bennett "Equality Clause" 128-129. Kerr "Fundamental Rights" 726 is also of the opinion that it is not for the courts to change the indigenous law of succession. The principle that the equality clause should not be interpreted to generate rights that did not previously exist, applies to all aspects of indigenous law which are in conflict with the Bill of Rights. He comments on 735: "Unless it can be shown that it was explained to the traditional leaders ... that 'indigenous law' meant a fundamentally changed indigenous law ... the only way to acknowledge the good faith of those who negotiated the present Constitution is to recognize that it contains direct conflicts".
indigenous law to changing social needs, as long as such adaption is in line with the postulates which underlie that law. The premise should not be to adapt the law to bring it in line with the Bill of Rights, but to bring it in line once more with its fundamental principles.

If it is therefore found that a widow and her children are destitute due to the particular circumstances of a given case, the court should intercede on their behalf. But there are some factors which need to be borne in mind. It should be determined who is in fact regarded as part of the extended family of which the deceased husband was the head. In terms of indigenous law, not only the widow and children but a variety of others may be dependent upon the family's assets. It may have far-reaching repercussions to impose the Western concept of inheritance of an estate by an individual, on indigenous law. Should a court determine that a widow be allowed to inherit from her husband, a specific amount should be indicated, taking into account other dependants in the family concerned. Alternatively, the court may determine that the widow and other dependants have a claim for maintenance against the estate. Again one should be very cautious to apply the Western principle to indigenous law. The whole concept of an estate which belongs to and individual is foreign to pre-colonial indigenous law. Over the years the idea of individual ownership by men has evolved. However, where the man is regarded as the owner of the family property, it should be determined whether indigenous law or Western law is applicable. One should guard against applying Western law merely because individual property is at stake. It may cause hardship for many people if the Western law is applied without having regard for the specific circumstances of the case. For this reason it may be dangerous to leave it to the legislature to introduce general reform which may not cater for individual needs and specific circumstances.

In pre-colonial law every household has a right to house property which is applied for the benefit of that house. Being subsistence communities, property is closely linked to the security, survival and maintenance of the family. A woman may add to her house property by for example practising divining and making craft articles. Once
house property is allocated, the property is regarded to be inviolable. Not even the head of the family can use such property without the consent of the wife; but this does not mean that she may use it in her own interest.\textsuperscript{151} Generally, both men and women have a very limited proprietary capacity and individual ownership extends only to personal property such as weapons, clothes and ornaments which have ritual value. However, in line with the new market economy indigenous law has been adapted to encompass the idea of individual ownership. This is especially the case in urban areas. If the idea had been developed in line with the underlying principles of indigenous law, where there is no substantial difference between men and women with regard to proprietary capacity, both men and women would now have been able to own property. Unfortunately indigenous law has been distorted. The fact that the head of the family represents the group in all legal spheres, has lead to the erroneous assumption that the husband is the owner of individual property and, therefore, that the wife has no proprietary capacity.

Furthermore, the legislature has interceded and declared women to be perpetual minors.\textsuperscript{152} Again this position does not accord with the underlying principles of pre-colonial law in which all members of the group are represented by the family head in legal and social matters. The fact that he represents them does not mean that he acts in his own interest. It is not in line with the postulates which underlie indigenous law, for women to be regarded as minors and for men to have full legal capacity. If indigenous postulates had directed the development of its law in this regard, there would have been no distinction between men and women with regard to proprietary capacity and the capacity to litigate.

\textsuperscript{151} Preston-Whyte 179-180.

\textsuperscript{152} S 11(3) of the Black Administration Act 38 of 1927 determines that all women (except those living in Natal) are deemed to be minors and are subject to the guardianship of their husbands. S 11A makes an exception and exempts women from the application of indigenous law with regard to matters relating to leasehold, sectional title and the ownership of immovable property.
(vi) Summary

It should be clear that the grounds upon which discrimination is forbidden in section 8(2) of the Constitution have different meanings and a different impact on human dignity and equality if interpreted in the indigenous cultural context. Some of these grounds (amongst others culture, race, colour, ethnicity) have no significant influence on equality in indigenous law. Others, (ethnic and social origin) have such diverse meanings in indigenous law that it seems illogical to group them together, as they presently are. And others, if taken out of their cultural context, may have disastrous consequences for the continued application of indigenous law. Nevertheless, this does not mean that they should not be regarded as elements which are constitutive of human identity, or that they do not have an important role to play in indigenous law. Moreover, from a Western perspective there has obviously been a need to include explicitly at least these grounds, because they have, in the past, played a significant role in the unfair discrimination against individuals. Therefore, it is important that section 8(2) be retained, but where circumstances demand, that the equality clause should be interpreted in its indigenous cultural context. If this is done, it may be found that although the indigenous and Western conceptions of equality differ, they are not completely irreconcilable.

4 INDIGENOUS LAW AND THE SANCTITY OF HUMAN LIFE

Certain rights in indigenous law may indeed be characterised as individual rights. These are the right to life and amongst the Lobedu apparently the right to privacy. It must always be borne in mind that the degree of individualism differs from tribe to tribe and there may well be other instances where individuals have individual rights that the group has no say in. However, and more importantly, in indigenous law the predominance of the group interest generally prevails.

153 The Western conception as expressed in s 8.
The constitutional protection of life has far-reaching implications, especially for social-policy issues such as the death penalty, mercy-killing and abortion. Protection of the right to life may also be interpreted to affect broader issues than merely life and death. Whether the protection of the right to life will have any significant influence on indigenous law depends on the value indigenous law attaches to life. On close observation of the indigenous attitude towards life (within the narrow interpretation of life versus death), it seems that this right is indeed treated as an individual right. Suicide, mercy-killing and abortion may serve as examples.

In indigenous law suicide and attempted suicide are not regarded as offences: every person has the right to take his own life. However, this right to die is limited. A person is only allowed to take his own life. Should a person ask another to assist him because he is unable to kill himself, the assistant will be guilty of murder. Mercy-killing is regarded as an offence. Terminal illness and serious mental and or physical disability are not regarded as a justified limitation on the right to life. However, a person found guilty of mercy-killing would receive a reduced sentence.

It seems that the indigenous-law perceptions with regard to suicide and mercy-killing are similar to Western perceptions. However, it should be remembered that in indigenous law killing is seen to have a pollutionary effect on the community which has to be removed through certain rites. Therefore, although these acts are not always regarded as crimes, they have religious and magical consequences which have to be dealt with.

The concept of abortion must be seen within the context of the world view of

154 Du Plessis & De Ville 214-215 point out that the following issues may also be included: threats to and loss of life resulting from either armed conflict or environmental hazards; failure to meet survival needs; violation of human rights in situations of armed conflict and disregard for due process of law by law-enforcement, security and military personnel.

155 See generally Church "Murder" 78-80, Church "Necessity" 17-18, Myburgh & Prinsloo 98, Prinsloo Publiekreg 206-208.

156 This is also the position in the South African law: see Du Plessis & De Ville 323.
indigenous people. As explained above, the universe is regarded as one integrated whole. Not only the deceased but also those yet to be born form a natural part of the group. The question whether the fetus is "a constitutional subject" is not really relevant in indigenous law. It seems then only natural that abortion is, with some exceptions, regarded as a crime in indigenous law. Amongst most people, neither the mother nor the group may consent to abortion. Some groups regard the expulsion of the fetus at any stage of the pregnancy as the crime of abortion. Others regarded it as the crime of abortion when the fetus is not viable and murder when the fetus is aborted at a stage where the child is already viable. The fact that different Western crimes are used to describe the expulsion of the fetus at separate stages of gestation, does not make any difference to the fact that the unborn, and even those who have not yet been conceived form part of the group and are regarded to be an important component of it.

In the case of abortion, indigenous law presumably protects the group’s interest in its continuation through children and not necessarily, or only the sanctity of human life. A woman certainly has no right to procreative autonomy in indigenous law, seeing that it is her procreative capacity which is amongst others transferred to her husband’s group upon marriage. The group’s interest may outweigh certain of the mother’s rights, but not her right to life. Where the mother’s life is in danger, an abortion may be procured with impunity. It is also the relationship between the living

157 Du Plessis & De Ville 229 point out that one of the most vexing problems regarding abortion in Western jurisprudence is whether the fetus is a constitutional subject.

158 Gontsha mpa: to empty the stomach, to extract the belly, to take out the womb.

159 See generally Nathan “Abortion” 85-86.

160 Nathan “Abortion” 85-86.


162 In indigenous law human life may be sacrificed in the interest of the continued peaceful existence of the group. A witch or a thief of public resources has a polluting effect on the community and may be punished by death. Not only is the culprit killed, but lustration ceremonies are performed to purify the community and to restore the equilibrium.
and the superhuman which is protected. Abortion is regarded as a polluting act which disturbs the harmony in the group and with the superhuman. It creates heat which adversely affects rainfall. The pollution has to be cleansed through rites of lustration.

One has to agree with Sinclair’s\(^{163}\) warning that the purpose of indigenous marriage goes beyond the individual interests of the husband and wife and that it would consequently be dangerous to equate the position of the Anglo-American feminist with that of the African woman. To this one may add that the jural postulates which determine the indigenous-law attitude to life are so different from western law, that a conflict between Western and indigenous perceptions in this regard is inevitable.

It is interesting that the Lobedu regard an abortion performed by anybody other than the mother as a crime. The group has no say in this matter and the mother may lawfully cause the fetus to abort. It seems that the mother has an individual right analogous to the right to privacy or the right to security of the person. One may speculate that the mother’s procreative autonomy is but a reflection of wider rights for women in Lobedu society. The right to procreative autonomy in any event influences many related issues.\(^{164}\) Also among the Kgaga and the Pedi, abortion is not regarded as a crime. The Kgaga regard it as an incident that must be dealt with within the family, whilst the Pedi regard it as a natural termination of the pregnancy. Other tribes regard it to be lawful as long as the father also consents.\(^{165}\)

The group has no right of life and death over the members of that group unless the individual threatens the survival of the group. It is usually religious and magical factors which may induce the killing of an individual without due process. Examples are the

\(^{163}\) Sinclair 529.

\(^{164}\) In American jurisprudence a mother’s right to terminate a pregnancy is regarded as a right to privacy whilst in Canada it is regarded as a right to security of the person: see Cachalia 32 42-44. Lobedu women’s procreative autonomy may be explained by the fact that they have a most famous regentess, Modjaji. The sacred position of the ruler and her ancestors in indigenous law may well be the reason why Lobedu women have this exceptional right.

\(^{165}\) Prinsloo Publiekreg 213-214.
killing of deformed infants, one of twins, babies born from uninitiated parents and witches. Such occurrences within a group also have to be purified by rites of lustration. Capital punishment is a permissible punishment in indigenous law.

Finally, it should be borne in mind that the death of an individual may have detrimental consequences for the group. It causes patrimonial loss for the group which loses the reproductive capacity and labour potential of a female or a male's capacity to earn wages. The group is therefore entitled to compensation for patrimonial loss flowing from the death of one of its members. It may also obtain satisfaction for the sorrow caused by the death of one of the members, the dismay being regarded as bodily injury. Finally, the fact that the death of a member pollutes the group, affects the dignity of the group for which satisfaction could be awarded. 166

5 INDIGENOUS LAW AND FREEDOM

Ayittey 167 lists twenty "Fundamental Rights of the African People" which he condenses into five basic freedoms which "shall be enjoyed within the boundaries defined by the community as a whole, not by the chief or king". These basic freedoms are: freedom of choice, to live anywhere, to engage in any occupation, to trade goods at whatever prices; freedom of expression, to debate, criticize policies and participate in decision-making processes; freedom of association in social economic and political spheres; freedom of worship; and freedom of movement.

It should be remembered that not only the interests of the collectivity, but also the interests of superhuman forces give a very specific content to these freedoms. Here the difference in the jural postulates which underlie indigenous law and Western law makes it not only difficult but sometimes inappropriate to apply the Western concepts

166 See generally Myburgh Papers 34-39. See also Part II.4.b. for an exposition of the concept of rights in indigenous law.

167 Ayittey 264-266.
In an indigenous law context.\textsuperscript{168} In indigenous law individuals may sometimes be prohibited from expressing themselves in a certain way, from associating freely, from moving freely or from having access to information, because the exercise of such freedoms is regarded to disturb the relationship with the superhuman and because it may be visited by superhuman sanctions. The rules delimiting such freedoms are often associated with taboo.

Freedom of movement, for instance is curtailed by rules relating to taboo. A father is prohibited from entering the birth hut for a certain period and from taking part in the hunt for two moons after his child's birth. It is also forbidden to go into the field when a person dies. Women are forbidden to enter the kraal area or appear in court (which is adjacent to the kraal) when they are menstruating. However, individual freedom is so highly valued in indigenous law that it is rarely taken away from anyone, not even from a criminal. Imprisonment is regarded as a degrading punishment.\textsuperscript{169}

Rules regarding a taboo may also affect a person's freedom of expression and association, and right of access to certain information. It is a violation of a taboo to enquire about men's initiation lodges, to discuss these in public, and to disclose initiation secrets to people who have not been initiated. Because of the close relationship between language, religion and magic, and the concomitant language taboos, there are various restrictions upon the freedom of expression. Banishment is regarded as second in severity only to the death penalty and is ordered for crimes which bear superhuman consequences and threaten the co-existence of the group.\textsuperscript{170}

\textsuperscript{168} See for example sections 15, 17, 18, 19, 20 and 23 of the Constitution Act.

\textsuperscript{169} The fact that imprisonment is a competent (and popular) sentence in Western law may perhaps be one of the reasons why the indigenous population has so little trust in the Western system of justice.

\textsuperscript{170} For example treason, murder and the practising of black magic: see generally Vorster "Violating Taboo" 96-97 and Myburgh "Punishment" 48 49 52.
Land too has a sacred position in indigenous law and should be seen within the context of the postulate that superhuman forces are superior to man. The concept of ownership of land in the Western sense is indeed unknown in indigenous law. Land is not regarded as a negotiable commodity. It belongs to the community as a whole, the living, those yet to be born, and to the superhuman, and its use is controlled by tribal authorities. Yet all persons have the right to use land for various purposes. This individual right cannot arbitrarily be taken away by the authorities. Where a ruler orders an individual to move from the land without consulting the proper council and where the public's interest is not at stake, the order may lawfully be disobeyed. An order to vacate agricultural land for public use as a tribute field, without a suitable substitute being offered, may be disregarded lawfully. Contracts for the exchange of a field or of residential site for livestock or movable things and the selling or letting of a field are, for example, regarded to be unlawful.

6 CONCLUSION

Over the years, the State and State institutions have failed to eradicate indigenous law. State courts and State law are to a great extent ignored in the townships where an adapted indigenous law is applied by unofficial institutions. In rural areas indigenous courts apply indigenous law in a much purer form.

On the one hand it may be assumed that the new Interim Constitution, like all other legislation, will largely be ignored by unofficial dispute-resolution institutions, and that it will not affect the application of unofficial indigenous law by official institutions such as the Chiefs' Courts. Moreover, because the Constitution is framed in a Western perspective, it may be assumed that it will not have any effect on the indigenous

171 Vorster "Disobeying Orders" 74.
172 See Part II.II.2.c.ii, Prinsloo "Exchange" 29-30, Nyerere 166 167 and 53-58 on land and communal ownership.
173 See generally Part I.IV.4.a above.
community’s perception of State law and institutions, which will continue to be regarded at least as culturally illegitimate.

On the other hand, however, the Bill of Rights will have an effect on the application of indigenous law by the State courts. If horizontally applicable, it will provide a new dimension to the old debate surrounding the continued application or reform of indigenous law, and to the problems regarding internal-conflicts management. It is the equality clause which draws the attention once again to the conflict that exists between indigenous values and Western values as the latter are entrenched in the Bill of Rights.

Indigenous law is an adaptable legal system. Yet its adaptation should not be in accordance with the Bill of Rights as an instrument entrenching Western values. It should be adapted in harmony with its underlying postulates. This may be in accordance with the Bill of Rights, if, where circumstances demand, the Bill of Rights is interpreted in an indigenous cultural context. It has been pointed out above that the jural postulates of pre-colonial indigenous law are as a rule not inherently discriminatory. The conflict that exists is more often than not between a distorted indigenous law, as modified and applied by the State courts today, and Western law. Thus the overt forms of gender discrimination may, for example, be removed from indigenous law by adapting it in accordance with those fundamental postulates which underlie indigenous law and which are still accepted by the indigenous community. In the process of adapting indigenous law, the courts have the most important role to play. The courts should be aware of their law-making function which is performed by changing and extending the application of legal rules. This can be accomplished only if the courts engage in a program of indigenous legal education. In the meantime judges should be assisted by expert witnesses on the values that underlie indigenous legal orders in the same way they rely on the assistance of expert witnesses in other fields of expertise.

However, section 35(3) of the Constitution instructs the courts to interpret, apply and develop all law in the spirit of the Bill of Rights. The underlying ideals of equality and
freedom, aimed at the protection of a certain core of human nature and human dignity, and entrenched in the Bill of Rights, are not altogether unfamiliar to indigenous law. But the expression of these ideals in terms of exclusive individual human rights is, to some extent, foreign to that law. Presently the Constitution does not make provision that where indigenous law is concerned, equality, freedom and human dignity must be seen in the context of the communitarian ideals of indigenous society.¹⁷⁴

With regard to the application of indigenous law by the State courts and the possible resolution of conflicts (in cases where there are two legal systems which may possibly apply to the facts, and in cases where indigenous law is in conflict with Western values as entrenched in the Constitution) the following should then noted. In terms of the Constitution the courts are directed to interpret the Constitution and to apply its provisions in accordance with the standards and values it entrenches.¹⁷⁵ The Constitution does not give clear guidelines whether indigenous law or the Bill of Rights should prevail. It is usually assumed that should the Bill of Rights prevail, indigenous law would be eliminated and Western law would be applied in its stead. On the one hand guidelines for the resolution of conflicts between Western and indigenous values could be sought outside the Constitution.¹⁷⁶ On the other hand, if the Constitution accommodates indigenous values, it should provide those very guidelines to the courts to resolve conflicts. Moreover, it could direct the courts to take cognisance of indigenous-law values.

This may be accomplished by extending the interpretation clause, section 35, and by conferring upon indigenous law the same status as State law. In view of the fact that the Constitutional Principles cannot be changed, and because Constitutional Principle XIII recognises the application of indigenous law subject to existing legislation, the

¹⁷⁴ Bennett "Equality Clause" 123 points out that "existing institutions can cater for individual needs, in the short term at least, more effectively than a bill of rights can"; see also Whelpton "Inheemse Reg" 3-7.

¹⁷⁵ See Du Plessis & Corder 70.

¹⁷⁶ Bennett "Equality Clause" 123-124.
Constitution should revoke such legislation, or those parts of legislation which limit the application of indigenous law or affects its status in the South African legal order.\textsuperscript{177} It should further revoke such legislation or those parts of legislation which entrench distorted indigenous law.\textsuperscript{178} As in the case of State law, the application of indigenous law should be subject only to the Constitution.

Section 35(1) instructs the courts, where applicable, to have regard to public international law in as far as it is applicable to the protection of the human rights entrenched in Chapter 3 and allows the courts to have regard to comparable foreign case law. With regard to indigenous law, the interpretation clause should not only allow the courts to have regard to the values which underlie indigenous law, it should in fact direct the courts to do so. But how should this section be extended? In the introductory statement of the preliminary draft to the African Charter on Human and People's Rights,\textsuperscript{179} it was pointed out that the committee of experts for the preparation of the draft, was guided by the principle that the Charter should reflect the African conception of human rights. Thus, amongst others, it was decided that people's rights should be included because the concept of absolute individual freedom is opposed to the welfare of the society and not consonant with African values; it was decided to include duties towards the community in which the individual lives, but more specifically towards the family and the State; and it was decided to emphasise the importance of African values and morals.\textsuperscript{180}

\textsuperscript{177} For example the Law of Evidence Amendment Act 54 of 1988 which gives the courts a discretion to apply indigenous law and which makes its application subject to the repugnancy proviso.

\textsuperscript{178} For example section 11(3) of the Black Administration Act 38 of 1927 which determines that indigenous women are minors and subject to the guardianship of their husbands.

\textsuperscript{179} The memorandum of the "Meeting of Experts for the Preparation of the Draft African Charter of Human and Peoples' Rights" of 1979 was reprinted in Kunig Benedek & Mahalu 107ff.

\textsuperscript{180} Reprinted in Kunig Benedek & Mahalu 95-119. In the preamble of the African Charter on Human and People's Rights (Banjul Charter) it is stated that the concept of human and people's rights should reflect the virtues of their historical tradition and the values of African civilisation: see Mahalu 25; Benedek 60-62.
One should be careful that the measures included in the Constitution to accommodate indigenous values are not so phrased that they appear to be consonant with those values, whilst they are in fact hiding or repressing the ways in which the Constitution is in actual fact dissonant with them. In indigenous societies, duties which focus on the group are the expressions of social responsibility. Whereas the entrenchment of duties may be one way of establishing indigenous values and the concept of social solidarity in the Constitution, it may be dangerous to include the notion of duties, which, if not properly defined, and if misused, may in fact lead to the implicit neutralisation of those very rights the Constitution seeks to protect. The concept of duties is still a very vague one in international human-rights law and there is still speculation on its exact meaning in the African Charter. Likewise the concept of people’s rights is still ill-defined and its meaning as contained in the Banjul Charter has been subject to varied interpretations. With regard to the South African Constitution, the concepts of social responsibility and group solidarity, and with them the communitarian ideals of indigenous society, may all be encapsulated in the interpretation clause if it so amended that it instructs the courts to take cognisance of the values inherent in indigenous law. Such an extension of the interpretation clause would not only accommodate the cultural diversity, it would strengthen the protection of human rights, at the same time enhancing the legitimacy of the Bill of Rights and the Constitution.

If the interpretation clause is so amended, there would be less danger to the continued existence of indigenous law. However, a question which does arise is whether an indigenous-law rule which seems to be discriminatory will be found to be constitutionally invalid and struck down (that would be the case if section 35 were

181 See generally Benedek 85-94; Van der Westhuizen “Tiger in Africa” 27 37; D’Sa 77-78.
interpreted to mean that the Bill of Rights had unrestricted horizontal application), or whether the courts would still be able to adapt that rule by applying considerations of public policy. If section 35(2) were extended to apply to all law, and not only to statutory law, it would increase the opportunity of ensuring the continued existence of indigenous law whilst developing it in consonance with the values (which are interpreted in a cultural context) entrenched in the Constitution.

The Constitution will not eliminate the need for properly worked out rules for the resolution of internal conflicts of laws. The role of public policy could be expanded in internal conflict management, but then the conception of public policy as a colonial relic contained in the repugnancy clause should change to a conception of public policy underscored by communitarian ideals. Here, too, section 35 plays an important role.

Kahn-Freund emphasises that a court should decide whether the outcome of the application of a foreign rule is against the principles of public policy, not whether the rule itself is desirable or moral. This would mean that in the sphere of private international law, public policy should be limited to desirable goals of collective societal welfare and that values of ethics and morality that are valuable in themselves, should

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183 According to Bennett "Equality Clause" 130 the problems relating to the horizontal application of the equality clause may be avoided by the application of Western law instead of indigenous law in accordance with "revitalised" conflict-of-laws rules. This would ensure that indigenous law is not eliminated through the application of the equality clause, but merely avoided when its application would result in a discriminatory result. Relief would be afforded on an ad-hoc basis by making use of the equality clause and other constitutional norms as "standards to direct the choice-of-law process". On the other hand, according to him, the horizontal application of the equality clause and the possible elimination of indigenous law could also be sidestepped by making use of the repugnancy proviso. The courts' hesitance to invoke the repugnancy clause thus far may be ascribed either to a general reluctance to keep indigenous law in step with changing social norms, or a general reluctance to apply unfamiliar laws. "Public policy" and "natural justice" as contained in the repugnancy proviso are but expressions of fundamental human rights and could as such be used as independent and subsidiary criteria to determine the possible application of indigenous law.

184 Sanders "Internal Conflict of Laws" 59-60.

185 Kahn-Freund 282-283.
not be considered. With regard to the internal conflict of laws, and in light of the Bill of Rights, it seems desirable that the actual rules be tested against policy considerations, as long as reference is had to their cultural context.

The rule that a foreign norm must be tested against the principles of public policy is universally applicable. In the internal conflict of laws, it may have a salutary effect on indigenous law if public policy were to play a more important role. This is not to say that indigenous law should be treated as foreign law. Policy considerations are important in judicial legal development. If indigenous law is accorded full recognition in this country and if it receives the same status as Western common law, public policy and section 35 may be used to adapt and reform indigenous law and not as a means to avoid its application in favour of Western law.

Public policy as it is presently employed in private international law and as it has been applied by the State courts as a criterion to determine the repugnancy of indigenous law, will have a detrimental effect on the application of indigenous law. One has to agree with Sanders that if public policy is to be used in internal conflicts management, conceptions of policy considerations should move away from a strict Western interpretation and incorporate indigenous values. In the State courts in South Africa, policy considerations (and the repugnancy clause) are as a rule determined and interpreted within a Western frame of reference. It must be remembered that the study of the structures inherent in Western legal discourse may follow a system of logic which differs from the system of logic of indigenous legal discourse. Therefore, the conceptions of public policy and natural justice should, as is the case with the Bill of Rights, be interpreted within the cultural framework of the specific community whose law is applied. 186

Policy considerations play an important role in legal development generally and as a

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186 See generally Part I.II.2.
mechanism in judicial law-making specifically. Van Aswegen\textsuperscript{187} defines policy considerations as "substantive reasons for judgments reflecting values accepted by society". These values comprise moral or ethical values which are valuable in themselves, or they comprise desirable goals of collective societal welfare, or both. Presently, the most fundamental of these values are entrenched in the Constitution and the courts are directed to have regard to them in applying all law.

Four instances have been highlighted in which the courts make use of policy considerations to adapt existing legal norms. These are: (i) where a legal rule is so formulated that it expressly or by implication incorporates considerations of policy in its application (open-ended standards are incorporated in the rule); (ii) where the area of application of existing rules is extended to cover new situations; (iii) where legal rules are altered to accommodate new situations; and (iv) where contradictory legal rules have diverse consequences.\textsuperscript{188} It seems that the courts are as a rule not unwilling to make use of this mechanism to develop our legal system.

With regard to (i), if one considers the fact that the repugnancy proviso is statutorily entrenched, it follows naturally that the norms which regulate the application of indigenous law are open-ended standards which incorporate considerations of public policy in their application. Thus, within an indigenous-law context, public policy is used to determine whether indigenous law is valid. The repugnancy proviso is used also as a limitation on the application of indigenous law where there is a conflict between indigenous law and Western law. However, there is no direct indication in section 1 of the Law of Evidence Amendment Act\textsuperscript{189} that Western law should be applied in a case where there is no conflict in hand, but where indigenous law is found to be opposed to the principles of natural justice and public policy. It is contended that in

\begin{itemize}
\item Van Aswegen "Delict" 174; see also Payen Components CC v Bovic Gaskets CC 1994 2 SA 464 (W) 474-476 in which the Court refers to Van Aswegen with approval.
\item Van Aswegen "Delict" 180-188.
\item Act 54 of 1988; see Part I.IV.3.
\end{itemize}
such a case indigenous law should be adapted to bring it line with indigenous principles of public policy and that it should not serve as an indication that Western law should be applied.

In *Argus Printing and Publishing Do Ltd v Inkatha Freedom Party*\(^{190}\) the Appellate Division observed that policy considerations differ from one community to the next, and that in South Africa the courts should heed "juridical convictions in this country and not elsewhere". Grosskopf JA further pointed out that "[a]s Judges we are expected to know and understand our own society and its institutions, particularly its legal ones". Indeed, it is expected that our judges would know or take note of indigenous legal institutions and juridical convictions and be alive to the fact that different policy considerations apply in the different communities in this country.

With regard to (ii), the application of existing norms of both indigenous law and Western law may be extended to cover new situations. There are two possibilities of importance here. A rule may either be extended because changed circumstances created new situations which demand its extension, or because perceptions have changed as to the propriety of applying the rule.\(^{191}\)

The polygynous marriage\(^{192}\) and the consequences of such marriages may serve as an example of a case where changed perceptions may influence the continued existence of the institution. There are different views with regard to polygyny.\(^{193}\) On

\(^{190}\) 1992 3 SA 579 (A) 593.

\(^{191}\) See Van Aswegen "Delict" 182-186.

\(^{192}\) Polygyny is declining due to economic and religious factors.

\(^{193}\) Kaganas & Murray "Law" 130 point out that polygyny may afford wives some autonomy in that they have more freedom to engage in economic activities because the burden is shared by do-wives. It provides women with companionship, often in the form of a sister, it reduces sexual demands and allows a woman to space her children. Nevertheless the majority of women interviewed in surveys favour its abolition. Even men do not favour it anymore because it entails additional financial burdens, made impractical by changed economic and social conditions, and because they find it emotionally too demanding.
the one hand it is has become too expensive to maintain a multiple household, and on the other hand Christianity dictates against its practice. Even in former times, large polygynous households were confined to the wealthy and the ruling class. Nevertheless, indigenous moral and ethical values still do not dictate against the institution, and it should therefore be considered against the principles of public policy to deny the indigenous union the full status of marriage. The consequences of polygynous or potentially polygynous unions which are not in line with indigenous jural postulates should, however, be adapted to bring them once again in line with the values which underlie that law.

An example of a case in which a court may extend the application of a legal rule to bring it in line with changed circumstances is that of women's proprietary capacity. In pre-colonial indigenous law, both men and women have a limited proprietary capacity. The head of the family represents the family and administers its property for the family as a whole. The fact that an adult man, other than the family head, represents the family, still does not affect his proprietary capacity which remains as limited as that of a woman. However, what happened in practice was that the courts extended the indigenous-law rule with regard to men, granting them full proprietary capacity. Yet they did not grant women the same capacity. The rules regulating proprietary capacity in indigenous law are currently therefore no longer in line with the indigenous postulates. The courts should extend women's proprietary capacity to bring it on a par with that of men. This would bring the indigenous-law rule which is applied in an adapted form in line with the prevailing market-economy and changed circumstances and with the jural postulates which underlie that law.

The extension of the proprietary rights of women may also serve as an example of (iii), namely the alteration of a legal norm to accommodate new situations. The

194 Church Marriage 59-60.
195 Granted, it must be a man.
196 Van Aswegen "Delict" 186.
extension of proprietary rights may be interpreted as an alteration of the rule that the family head has reasonable control over the assets of family members. This will occur when it is found that a family head's control over salaries and wages, for example, falls outside the conception of "reasonable management of family assets", in other words, that with reference to prevailing circumstances such control is not in line with public policy. 197 Again it should be borne in mind that an open-ended legal rule, where a judge has to make a value judgment, 198 is regarded as express justification for the use of public policy and thus for judicial legal development by the extension or alteration of an existing rule. A further example of the alteration of an indigenous law rule in accordance with indigenous policy considerations and at the same time in accordance with indigenous jural postulates, is the granting of an enforceable right for maintenance to a child against her father or his estate.

The fourth instance in which a court may base its decision on policy considerations is where contradictory legal rules which have conflicting consequences are potentially applicable. 199 Contradictory legal norms and diverse consequences for different rules are of course inherent in cases where Western and indigenous law are both potentially applicable in the same set of facts.

In an internal conflict situation, two legal systems, underscored by different values, are

197 Bennett "Equality Clause" 126-127 approaches the problem from another angle. According to him the application of section 28(1) of the Constitution (which provides that all persons should have the right to acquire and hold proprietary rights in property and to dispose of it) read in conjunction with the equality clause (which provides for gender equality) may be employed to protect existing proprietary rights. However, it is not certain whether the courts may extend women's existing capacity to the acquisition and control of wages. But, by making use of the German principle of the indirect horizontal application of human rights, the courts could use the principles of constitutional law to determine whether wages and salaries fall within a family head's power to manage family assets reasonably. The same result could probably be obtained by simply treating this rule of customary law as an open-ended norm which demands the use of policy considerations to extend or even to alter its application in line with changed circumstances.

198 In this example the court will have to determine whether the family head's control over family assets is reasonable.

199 See generally Van Aswegen "Delict" 186-188.
potentially applicable. The problem in such a case is that different results may be obtained depending on the cultural context in which policy considerations are applied. Considerations of the principles of public policy in an indigenous-cultural context may induce the court to apply indigenous law, whilst the principles of public policy in a Western context may induce the court to make a finding in favour of Western law. Therefore, considerations of public policy should not be regarded as a guideline in determining which legal system should be applied. It should not be applied to determine the validity of indigenous law. At present Western principles are regarded as universally applicable and are thus used to limit the application of indigenous law. Once a court has decided, in terms of conflict-of-law rules, which system of law is most closely connected to the facts, it should have regard to section 35 of the Constitution and to the principles of public policy (in the cultural context of the chosen or designated legal system) to determine whether it should be applied as it is, or whether it should be adapted or whether it should be altered. It may well be found that when indigenous law is again brought in line with its underlying postulates, the original source of conflict has been eliminated at the same time.

The fact that a claim for maintenance within the same agnatic group is unknown in indigenous law may serve as an illustration. The principle which underlies this specific rule is that everything the group owns belongs to all its members communally and that the group should provide for the needs of everyone in the group. The principle is not inherently discriminatory against children and the rule was not designed so that children would be destitute when their father died. Other mechanisms existed to protect the interests of the children. But in light of changed circumstances and the development of individual ownership (at least for men), a strict application of the rule would indeed be discriminatory against children. The rule should therefore be changed to give a child an enforceable claim against his father's estate. That would bring the rule once more in line with the underlying indigenous-law principles, at the same time removing the source of conflict between Western and indigenous norms. In this instance the court should therefore not determine that the indigenous-law rule is against public policy and that Western law should therefore be applied.
Fifteen years ago Visser\textsuperscript{200} wrote:

"Hierbo is daarop gewys dat alhoewel talle kenmerke van die outochoone reg selfs as voorbeeld vir die landsreg kan dien, sommige kenmerke weer onaanvaarbaar is in 'n Westerse gemeenskap. As gevolg van laasgenoemde is dit dan nodig dat die toepassing van die outochoone reg ingevolge die interne aanwysingsreg, onderhewig gemaak word aan 'n beperking wat sal verseker dat hierdie onaanvaarbare kenmerke uitgeweer word. Die regverdiging vir hierdie voorkeurverlening aan die landsreg is geleë in die natuurlike akkulturasieproses (waarby ingesluit is die regsakkulturasieproses). Vanweë die feit dat die landsreg die grootste stukrag in hierdie proses vertoon, neig die outochoone reg in die rigting van die landsregmodel."

History has shown that the process of acculturation did not have such a drastic effect on indigenous law and culture as anticipated. The continued application of unofficial indigenous law bears witness to the fact that in stead of a movement towards, there was a reaction against Western legal ideas, principles and institutions. The indigenous law which is upheld in unofficial institutions is not a Westernised indigenous law. The entrenchment of traditional leadership in the Constitution is an indication that great score is still set by traditional institutions. However, this does not mean that indigenous law is static. Nor does it mean that it has not changed over the years or that it has not been influenced by Western ideas and values. Its development at grass roots level has taken place within the framework of the basic axioms which underlie indigenous legal orders. It is where development lost track of these basic axioms that indigenous law became discriminatory.

Indeed, an attitude of eurocentricism is a sure recipe for failure in the resolution of internal conflicts of laws. The underlying values and basic axioms of both legal systems should be taken into account in a conflict situation. What should the ultimate goal of internal conflicts management be? Is it possible to attain legal unity where the two applicable systems are so different with regard to norms, values and process?

\textsuperscript{200} Visser Interne Aanwysingsreg 418.
Should the goal be to integrate the Western law and indigenous law, or should these systems be harmonised?

Integration has the effect that a new legal system is created which replaces the pre-existing systems. In the case of integration the new unified law may still draw its rules from one of the component systems which it replaced. Should there be an integrated system, policy considerations should reflect the integrated values of all. Then again, the aim may be to harmonise the Western law and indigenous law. Harmonisation is the removal of discord and the reconciliation of the contradictory elements, in the rules, postulates and effects of the two legal systems which will nevertheless continue in force as self-sufficient bodies of law.201 Both systems will continue as independent systems, underscored, as they presently are, by their own jural postulates. Certain and well worked-out rules to regulate the internal conflict of Western and indigenous law should then regulate the legal pluralism in this country and these rules should be applied by legal personnel who also have a thorough knowledge of indigenous law.

201 See Church Marriage 191.
SUMMARY OF CONCLUSIONS

"Are you civilised? Have you been civilised recently?"

A plurality of laws is the result of cultural differences and often reflects a largely irreconcilable plurality of legal values. In South Africa dissatisfaction with the administration of justice and the crisis of legitimacy of State law are the result not only of the existing legal pluralism in this country. They have in part been caused by the fact that from the time that Western law was first introduced at the Cape of Good Hope, an attitude of superiority or cultural chauvinism has prevailed. According to this attitude, all Western cultural aspects were characterised as progressive and civilised, and those of Africa as primitive and uncivilised. The monopolistic control of the legal order by the Western or European component of the population resulted in the creation of a legal order primarily suited to the needs of that section of the community whose traditions and way of life my be classified as Western, capitalist. This perceived superiority of the State law, "which is called in orthodox jurisprudence simply 'law' without any adjective attached because of its believed-in nature as the only genuine law in human society," today still directs the practical relationship between that law and indigenous law. This perception is reflected also in the Interim Constitution and Bill of Rights which were drafted within a typical Western conceptual framework.

Judicial application of indigenous law by State courts and State legislation regulating the application of indigenous law, forced that law to move away from the jural postulates which underlie it. An unjust indigenous legal system has evolved, far removed from the pre-colonial system and its institutions, and far removed from the true indigenous law adapted in accordance with its underlying postulates. This distorted system is the indigenous law which is often presented as authentic.
indigenous law; it is this distorted indigenous law which is perceived as inherently discriminatory by those who struggle for equality between male and female and old and young; and it is also this law, together with the official Western law, which are perceived to be illegitimate and which gave rise to the emergence of an alternative people's law and alternative dispute-resolution institutions. If this law is brought in step with its underlying postulates and interpreted in its cultural context, it may be found to be just and non-discriminatory, even in Western terms.

Against all odds indigenous law has proved to be resilient. Despite the State regulation of its application, and despite the fact that internal conflicts are unfairly resolved in favour of Western law, indigenous law has survived. In the rural areas, where State legislation has been largely ignored, it is still applied in a reasonably pure form.

Indigenous law is also an adaptable legal system. In the metropolitan areas it has grown to meet the needs of the urban community. And even in the rural areas it has not remained static. But where legal development was relatively free from Western influence, indigenous law developed naturally in accordance with its underlying postulates, and is in fact still undergoing a continuing process of development. This process should nevertheless not be regarded as a shift in emphasis towards Western values.

Also in the urban areas, where there is a much stronger Western influence, adaption of indigenous law seems to have taken place within the framework of indigenous jural postulates, although there has been some movement away from traditional indigenous legal institutions. But this does not imply that there has necessarily been a radical change in the jural postulates that underpin the law and social ordering. People's courts, resembling pre-colonial indigenous institutions in structure, are today still in operation. These courts are witness to the fact that although, for the vast majority of the urban population, the notion of tribalism is abating, indigenous practices in domestic relations are still of importance. Moreover, although political, economic and social circumstances may have forced a change in familial structures, it is not
necessarily true that the need for the indigenous way of family organisation has also disappeared. The need for a familiar, traditional organisation of the family and family relations is witnessed by the informal dispute-resolution institutions which have been established in urban areas. Many domestic customs are not incompatible with the conditions of urban life and urban dwellers as a rule still regulate their domestic relations according to indigenous norms and values.

The difference in the values of Western and indigenous legal cultures is reflected in a fundamental conflict between the jural postulates which underscore Western and indigenous law. Also, the foundations of the jural postulates underlying Western and indigenous law are different. Accordingly the so-called invariable characteristics of the legal systems are different. Where there is legal pluralism but the legal systems which are observed do not enjoy the same status, disparity in the fundamental values gives rise to a crisis of, at least, cultural legitimacy in the dominant legal system. More importantly, it may threaten the very existence and continued application of the indigenous system of law.

The question arises how legal pluralism should be accommodated in this country? There is no doubt that the interaction of indigenous law and Western law is in dire need of proper regulation, but how should this be accomplished? The following may be noted:

Unofficial dispute-resolution institutions, people's law and unofficial indigenous law have proved that where the postulates that underscore indigenous law are ignored and where indigenous law is distorted, the newly developed system is, like the official law, disregarded; true indigenous law is applied and the legitimacy of the official law is called into question.

South African law is at present dominated by Western law, and requires the imput of Africa to create a truly South African legal system. However, it is just too idealistic to expect that an integrated legal system can be created without surrendering some of
Part II.IV.6 Summary of Conclusions

the values which buttress the just and equitable Western legal system, or without sacrificing some of the communitarian ideals which sustain the humanistic indigenous legal system. It is also too idealistic to expect that the law could be South Africanised by taking the best of both systems and creating a single unified system which is neither Eurocentric nor Afrocentric. The jural postulates of Western law and of indigenous law bear out the fact that these systems of law can be unified only with the greatest of difficulty and only by sacrificing values which are inherent in the two different cultures involved.

The only way in which the law can be South Africanised is by accepting that two disparate legal systems are observed in this country, by recognising their parallel application, and by appreciating the different values which underscore both systems of law. Indigenous law should receive full recognition and enjoy the same status as Western law. This system of law should exist alongside the Western component of South African law. If the South African legal system is to be legitimised it should be brought closer to reality and closer to the needs of the community. In short, effect should be given to the norms, the processes and the values of both systems of law.

Individuals should have the freedom to choose which system of law they prefer to follow. The system of law chosen will naturally reflect the values to which the individual adheres. The choice should not be influenced by the fact that one system of law is treated as inferior, or by the fact that its application is limited to the extent that it is regarded as being or has become unjust, or by the fact that it has been distorted to the extent that it does not reflect the basic axioms which underscore its tradition.

It cannot be denied that the co-existence of legal systems as different as the imposed Western and the indigenous system, creates a certain measure of tension and even conflict - if not where both systems are potentially applicable, then at least in the precepts which underscore them and to which effect is given through application. Therefore, certain and detailed rules for the internal conflict between indigenous law and Western law should be legislated. These rules should take cognisance of
indigenous mechanisms to resolve internal conflicts. These mechanisms should not
be ignored, regardless of whether they are legal rules or mere conflict sensitivities.
Only when these indigenous premises are accommodated in the internal-conflict rules
and conflict-resolution process, will internal conflicts management find general
acceptance.

Courts should be denied a discretion not to apply indigenous law where it is the
designated or chosen legal system. Judicial officers should be thoroughly trained in
indigenous law and should be sensitive to the basic axioms of that law. They should
be able to develop indigenous law in accordance with these basic precepts where
public policy so demands and they should be directed by the Constitution to do so.

An integrated court system should exist. The fundamentally Western court system
should be reformed to allow a culture of community participation in dispute resolution.
Forums for dispute resolution in which the community may participate collectively and
openly should be established: this is the legacy of pre-colonial institutions and is a
reaffirmation and perpetuation of the spirit of communitarianism and collectivity
underlying indigenous African law and social ordering. The hiatus between "ours" and
"theirs" should be eliminated. Both indigenous law and Western law should be ours,
both should form part of the South African legal system. The present court structure
which reflects first-class Western justice as opposed to second-class community
justice should be eliminated. In legal process there should not be different principles
for different people. Indigenous courts and community courts should operate within
a formal structure which reveals a delicate balance between formal and informal
justice. The key issues which should be addressed are access to justice and equal
justice. Legislation should provide for due process and the protection of human rights,
provided that human rights are perceived in a South African framework which also
gives effect to African conceptions of fundamental rights.

Finally, a study Western and indigenous law and their jural postulates reveals that
although they are incongruent, the application of their legal norms surprisingly often
leads to the same results. Even in a multicultural society such as that of South Africa, there is a common nucleus of core values that are shared by the whole society. The existence of these values is often overlooked in indigenous law. These values are, for example, values of life, human dignity and equal protection of the law. But different cultures have different conceptions of these basic values and their role in legal, political and social ordering. The Bill of Rights should give due recognition to the postulates which underscore both Western and indigenous law, by providing that the values it entrenches are interpreted in their proper cultural perspective where circumstances demand. It is ignorance of indigenous law and its basic axioms which spawned a spirit of intolerance towards that law. If that law is again brought in step with its fundamental precepts, and if it is interpreted within the context of these precepts, it will be in harmony with the core values shared by indigenous and Western communities. But this will be possible only if the level of knowledge of indigenous law and its fundamental precepts is drastically improved.

The following was once said with regard to American society,

"Ours is a late-twentieth-century world profoundly fissured by nationality, ethnicity, race, class, and gender. And the only way to transcend those divisions ... is through education that seeks to comprehend the diversity of human culture. Beyond the hype and the high-flown rhetoric is a pretty homely truth: There is no tolerance without respect - and no respect without knowledge." (my emphasis)³

This fundamental truth applies no less to South African society.

The new South African legal system should be inclusive, rather than exclusionary. It should reflect respect for the South African cultural heritage which includes the traditions, laws, values, language, and beliefs of the Western as well as the indigenous African component of this society.

³ Ong Hing 910.
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### TABLE OF CASES

<table>
<thead>
<tr>
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<th>Year</th>
<th>Volume</th>
<th>Page</th>
</tr>
</thead>
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<tr>
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<td>SLR 25</td>
<td></td>
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<tr>
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</tbody>
</table>
TABLE OF STATUTES

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