# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Acknowledgements</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>ii</td>
</tr>
<tr>
<td>Summary</td>
<td>iii</td>
</tr>
<tr>
<td>Key terms</td>
<td>iv</td>
</tr>
<tr>
<td>Contents</td>
<td>1</td>
</tr>
<tr>
<td>Chapter 1 ORIENTATION</td>
<td>10</td>
</tr>
<tr>
<td>1.1 Introduction</td>
<td>10</td>
</tr>
<tr>
<td>1.2 Statement of the problem</td>
<td>10</td>
</tr>
<tr>
<td>1.3 Definition of terms</td>
<td>12</td>
</tr>
<tr>
<td>1.3.1 Indigenous law</td>
<td>12</td>
</tr>
<tr>
<td>1.3.1.1 General</td>
<td>12</td>
</tr>
<tr>
<td>1.3.1.2 Classifications</td>
<td>13</td>
</tr>
<tr>
<td>1.3.1.3 Non-specialised nature: public and private law</td>
<td>14</td>
</tr>
<tr>
<td>1.3.2 Rights of personality</td>
<td>15</td>
</tr>
<tr>
<td>1.4 Parameters of the problem</td>
<td>16</td>
</tr>
<tr>
<td>1.4.1 Infringements of rights of personality</td>
<td>16</td>
</tr>
<tr>
<td>1.4.2 Objects of rights of personality</td>
<td>18</td>
</tr>
<tr>
<td>1.4.3 Vestees of rights of personality</td>
<td>19</td>
</tr>
<tr>
<td>1.5 Approach to the problem</td>
<td>20</td>
</tr>
<tr>
<td>1.5.1 Holistic focus</td>
<td>20</td>
</tr>
<tr>
<td>1.5.2 Rights and duties</td>
<td>21</td>
</tr>
<tr>
<td>1.5.3 The right to culture</td>
<td>22</td>
</tr>
<tr>
<td>1.6 Outline of the study</td>
<td>23</td>
</tr>
<tr>
<td>Chapter 2 RESEARCH METHODOLOGY</td>
<td>29</td>
</tr>
<tr>
<td>2.1 Introduction</td>
<td>29</td>
</tr>
<tr>
<td>2.2 Research methodology</td>
<td>30</td>
</tr>
<tr>
<td>2.2.1 Literature review</td>
<td>32</td>
</tr>
<tr>
<td>2.2.2 Field research</td>
<td>33</td>
</tr>
<tr>
<td>2.2.2.1 The Swazi in the Kingdom of</td>
<td>34</td>
</tr>
<tr>
<td>Swaziland</td>
<td></td>
</tr>
<tr>
<td>2.2.2.2 Interviews with informants</td>
<td>34</td>
</tr>
<tr>
<td>2.2.2.3 Other methods</td>
<td>35</td>
</tr>
<tr>
<td>2.2.2.4 Interview perspectives and techniques</td>
<td>35</td>
</tr>
</tbody>
</table>
Chapter 3  THE STUDIED GROUP: THE SWAZI IN THE KINGDOM OF SWAZILAND

3.1 Introduction 41
3.2 Boundaries of the Kingdom 42
3.3 The Swazi people 43
3.4 Governance 45
3.5 Swazi law and custom 46
   3.5.1 Background 46
   3.5.2 Practical effects of the dual system 47
   3.5.3 Compatibility of Swazi law and custom with norms of national and international law 48
      3.5.3.1 Introduction 48
      3.5.3.2 Human rights and human dignity 49
      3.5.3.3 Rights and duties 50
      3.5.3.4 Change 52
3.6 Conclusion 54

Chapter 4  THEORETICAL PERSPECTIVES ON THE LAW OF PERSONALITY

4.1 Introduction 57
4.2 Development of the law of personality 57
4.3 The nature of personality rights and the scope of application of the law of personality 58
4.4 Examination of personality rights and the general right to personality 60
4.5 Personality rights and human rights 61
4.6 Classification of personality rights 62
   4.6.1 General 62
   4.6.2 Right to the body (and right to life) 63
   4.6.3 Right to physical liberty 63
   4.6.4 Right to good name (reputation) 64
   4.6.5 Right to dignity or honour 64
Chapter 5  APPROACHES TO THE STUDY OF INDIGENOUS LEGAL SYSTEMS

5.1 Introduction
5.1.1 Characteristics of indigenous legal systems
  5.1.1.1 Unwritten nature
  5.1.1.2 Customary nature
  5.1.1.3 Expression of community values
  5.1.1.4 The importance of magico-religious concepts in indigenous African law
    5.1.1.4.1 Belief in ancestral spirits
    5.1.1.4.2 Belief in sorcery
  5.1.1.5 The observance of the rules for living in indigenous African law
5.1.2 Nature of indigenous legal systems
  5.1.2.1 Specialisation
  5.1.2.2 Unspecialised nature of indigenous law
  5.1.2.3 Specialisation in approaches to study and to theory
  5.1.2.4 Specialisation in distinction between delict and crime in indigenous legal systems

5.2 Approaches to the study of indigenous legal systems
  5.2.1 General
  5.2.2 Early views
  5.2.3 Jural approach
  5.2.4 “Conflict” in the anthropological approach
  5.2.5 Anthropological approach
  5.2.6 Socio-cultural dimension
  5.2.7 A possible synthesis of the two approaches
  5.2.8 An alternative approach

5.3 Ethnocentric view of legal systems
  5.3.1 Western legal systems (of the specialised type)
  5.3.2 Indigenous legal systems (of the non-specialised type)
5.3.4 Comparison of Western and indigenous legal systems 91
5.4 Jural postulates in Western and indigenous legal systems 92
  5.4.1 Definition of jural postulates 92
  5.4.2 Jural postulates in Western and indigenous legal systems 93
  5.4.3 The question of whether Western jural postulates are applicable to indigenous law 94
5.5 Conclusion 95

Chapter 6 RIGHTS OF PERSONALITY AND UNSPECIALISED LEGAL SYSTEMS 97

6.1 Introduction 97
6.2 Differences between specialised and unspecialised legal systems 97
  6.2.1 Concept of time 97
  6.2.2 Group as opposed to individual orientation 98
  6.2.3 Concrete as opposed to abstract approach 99
  6.2.4 Categorisation 100
  6.2.5 Legal procedure and authority 101
  6.2.6 Emphasis on rights as opposed to duties 103
  6.2.7 Status 104
  6.2.8 Legal subjectivity 105
    6.2.8.1 The beginning of legal subjectivity 105
    6.2.8.2 The end of legal subjectivity 107
6.3 Conclusion 109

Chapter 7 RIGHTS OF PERSONALITY AND THE LAW OF DELICT 111

7.1 Introduction 111
  7.1.1 General 111
  7.1.2 Rights 111
7.2 Elements of indigenous delicts 112
  7.2.1 The act 112
  7.2.2 Unlawfulness 113
    7.2.2.1 Grounds for justification 114
      7.2.2.1.1 Necessity, emergency, executing orders of duly empowered officials, spontaneous agency and truth of a statement 114
      7.2.2.1.2 Discipline 115
Chapter 8  INFRINGEMENTS OF RIGHTS OF PERSONALITY IN INDIGENOUS LEGAL SYSTEMS

8.1 Liability
8.1.1 Introduction
8.1.2 Limitation of liability
  8.1.2.1 Outside KwaZulu Natal
  8.1.2.2 Inside KwaZulu Natal
  8.1.2.3 The Kingdom of Swaziland
8.1.3 The basis of liability
  8.1.3.1 General
  8.1.3.2 Theories underlying the basis of liability
8.2 Remedies and relief
  8.2.1 Extra-judicial remedies
  8.2.2 Judicial remedies
    8.2.2.1 Damages
Chapter 9 THE LAW OF PERSONALITY AND INDIGENOUS LEGAL SYSTEMS

9.1 Introduction 146
9.2 Nature of indigenous legal systems 148
9.3 Specialisation 149
9.4 Group orientation 151
9.5 Harmony of the community 151
9.6 Status 152
9.7 Specific personality interests in indigenous legal systems 153
  9.7.1 Right to the body 153
  9.7.2 Right to physical liberty 154
  9.7.3 Right to good name, dignity or honour 154
  9.7.4 Right to feelings 155
  9.7.5 Right to privacy 156
9.8 Indigenous culture perspectives on indigenous rights of personality 156
  9.8.1 General 156
  9.8.2 Differences in perspective 157
    9.8.2.1 Guardianship 157
    9.8.2.2 Witchcraft 158
    9.8.2.3 Posela-ing 158
    9.8.2.4 Status 158
    9.8.2.5 Religious and spiritual elements 158
    9.8.2.6 Pollution 159
9.9 Conclusion 160

Chapter 10 REVIEW OF RIGHTS OF PERSONALITY IN INDIGENOUS LEGAL SYSTEMS

10.1 Introduction 162
  10.1.1 General 162
  10.1.2 Classifications 162
10.1.3 General criteria 163
10.1.4 Format 163

10.2 Infringement of the body 163
10.2.1 Territorial implications 163
10.2.2 The right to the body 164
   10.2.2.1 General 164
   10.2.2.2 The Swazi 166
10.2.3 Wider contexts of the body 168
10.2.4 Homicide 169
10.2.5 Violation of patrimonial rights sometimes includes elements of personality rights 170
   10.2.5.1 Dismay caused by and associated with the theft of property 170
   10.2.5.2 Dismay caused by damage to property 174
   10.2.5.3 Dismay caused by and associated with the impregnation of a girl 175
10.2.6 Rape 178
10.2.7 Adultery 180
10.2.8 Witchcraft 182

10.3 The right of physical integrity and freedom of the body 183
10.3.1 General 183
10.3.2 The Swazi 184
10.3.3 Imprisonment 186
10.3.4 Banishment 187

10.4 The right to good name (reputation): defamation 190
10.4.1 Distinction between honour and good name 190
10.4.2 Types of insult amongst indigenous peoples 192
10.4.3 The Swazi in the Kingdom of Swaziland 198
   10.4.3.1 The Swazi view of dignity 198
   10.4.3.2 Scope of dignity 200
   10.4.3.3 Types of insult 201
      10.4.3.3.1 General 201
      10.4.3.3.2 Verbal insults 202
      10.4.3.3.3 Insulting actions 205
   10.4.3.4 Mitigation of insults 206

10.5 Right to dignity or honour 211
10.5.1 General 211
10.5.2 Forms of *iniuria* 212
10.5.3 The Swazi in the Kingdom of Swaziland 213
10.5.4 Blurred distinction 213

10.6 Right to feelings 214

10.7 Right to privacy 215
Chapter 11  CASE STUDY

11.1 Introduction
  11.1.1 Newspaper article
  11.1.2 Purpose of the study
  11.1.3 Lack of separation between civil and criminal proceedings in Swazi law and custom

11.2 Aspects of the socio-cultural background and the implications
  11.2.1 General
  11.2.2 Selection of burial site

11.3 Review of the facts

11.4 Criminal aspects
  11.4.1 The husband
  11.4.2 The deceased’s brothers

11.5 Delictual aspects
  11.5.1 Authority of the chief
  11.5.2 Implications for the deceased wife’s family
    11.5.2.1 The husband
    11.5.2.2 The brothers
    11.5.2.3 The second wife

11.6 Ancestral involvement

11.7 A comparative Kenyan case

Chapter 12  CONCLUSION

12.1 The phenomenon
12.2 The research
12.3 Objects of rights of personality
  12.3.1 General criteria
  12.3.2 Right to the body
  12.3.3 Right to good name/dignity
    12.3.3.1 Conceptual aspects
    12.3.3.2 Theoretical perspectives
    12.3.3.3 Scope of dignity
    12.3.3.4 Dignity and human rights
    12.3.3.5 Dignity in the context of the community
12.3.3.6 Separation of rights to good name and to honour is inappropriate in indigenous legal systems 251

12.3.3.7 Rights to privacy and to feelings 251

12.4 Holistic perspective on rights of personality 251

12.5 Adaptation of indigenous rights of personality as a result of exposure to Western values 253

12.6 Swazi perspective on rights of personality 253

12.7 The South African constitutional right to culture 254

Swazi maxims in relation to indigenous rights of personality 256

Tswana and other maxims in relation to indigenous rights of personality 258

Glossary of Swazi terms 259

Glossary of non-Swazi terms 262

Bibliography 263

Table of cases 272

Table of statutes 273