

Chapter 1

ORIENTATION

1.1 INTRODUCTION

Very little has been written about the law of personality among the indigenous peoples of Southern Africa. Generally, the law of personality is not clearly distinguished in indigenous law, and, in fact, in some cases, it is even denied (Bekker 1989: 378). The observations of Myburgh (1985: 32), Vorster and Whelpton (1998: 4) concerning the dearth of literature existing on the law of personality have provided the motivation for this study.

1.2 STATEMENT OF THE PROBLEM

The problem to be investigated is whether rights of personality are known in indigenous legal systems, and the extent to which any such rights are applied, together with the consequences emanating therefrom.

Amongst the questions to be probed are whether indigenous peoples themselves recognise rights of personality, and if so, how they understand the nature and scope of such rights, how they classify such rights and whether they are identified amongst all indigenous peoples. Moreover, with there being no clear delimitation between criminal liability and delictual liability in indigenous legal systems, how rights of personality feature in the endeavour to distinguish between a crime (harmful to the interests of the community) and a delict (harmful to the interests of family groups).

Generally, indigenous peoples distinguish between patrimonial rights which concern the estate and personality rights which do not form part of the estate (Myburgh 1985: 14). Whilst the appropriate relief for infringement usually is damages in the case of the former and satisfaction in the latter, there are instances where, on the one hand, personal injury results from violation of patrimonial rights, and on the other, where patrimonial loss results from violation of rights of personality. Myburgh (1985: 47) illustrates the former with instances of ownership and guardianship and the latter with an award of medical expenses for bodily injury. The question therefore arises how such instances are to be viewed in both theory and practice.

Moreover, complex issues arise in endeavouring to establish what is the basis of liability arising from infringement of rights of personality. The final question to be examined is the extent to which and the manner in which rights of personality are to be shared.

In this study, the above issues are addressed by critically reviewing the existing literature and comparing it to research data obtained by way of a micro-study in a semi-rural area in the Kingdom of Swaziland. During the process of gathering information, the aims were not only to describe how the legal principles function, but also to take note of those processes which function outside of the law.

1.3 DEFINITION OF TERMS

The following terms are used in this study as defined below:

1.3.1 Indigenous law

1.3.1.1 General

Various terms are commonly utilised to denote the indigenous legal systems operating in Africa. Despite the diversity obtaining in such systems, there is sufficient similarity of structure, technique and ideology for the systems to be regarded as a single family of law (Allott 1965: 131). Thus the term “indigenous law” rather than “indigenous laws” is employed.

This term is to be preferred to other terminology, which inaccurately reflects the fundamental nature of such systems. The term “customary law” ignores the fact that indigenous law is partly customary and also partly statutory in origin, whilst “traditional law” does not reflect the true dynamic nature of indigenous law. Although often generically used, “tribal law” ignores the fact that such law is tribe or tribal-group specific and not of general application. In addition, “African law” has developed as a catch-all term for law on the African continent, and comprises not only indigenous law as still applied and laws having religious and cognate origins, but also judicial institutions introduced by colonial powers together with the laws and decrees of independent African states (van Niekerk 1995: 2). *Roget’s Thesaurus* (1987: 191) classifies the term “indigenous” under “native/inhabitant”, whilst the *Concise Oxford Dictionary* (1982: 510) defines “indigenous” as “produced naturally in a region: belonging naturally”. Accordingly, in

this study, it is proposed to use the term “indigenous law”.

1.3.1.2 *Classifications*

It is necessary to refine the concept of “indigenous law” into three further classifications to gain a comprehensive understanding thereof. “People’s law” is generated by the community through unofficial dispute-resolution mechanisms, displays many similarities with indigenous law and embraces many indigenous jural postulates. “Pre-colonial” law is the purest form of indigenous law, which has not yet been adapted, or distorted.

Although not officially recognised as a system, it is nevertheless applied by both unofficial indigenous institutions in the rural areas and also unofficially by State-recognised institutions such as the Courts of the traditional leaders. The final classification of indigenous law refers to “pre-colonial law”, which has been adapted according to its underlying postulates (van Niekerk 1995: 2). Thus, whilst all three classifications exhibit some similarities, it is important to bear in mind that fundamental differences do exist.

Whelpton (1992: 66) summarises the situation by stating that a study of indigenous law entails a study of and for the Black peoples of South Africa. The law “of” these peoples refers to the original law that they developed and adjusted to suit changing circumstances. The law “for” these peoples refers to that part of their law that is recognised and applied in the higher courts of the land, including law which the State recognises, creates and amends specifically for such peoples. The latter is sometimes referred to as modern indigenous law and may be regarded as official indigenous law.

With regard to the Swazi, they have a traditional system of law and custom which co-exists side-by-side with the modern system of Government – giving rise to duality in their legal system. The traditional system is based on an unwritten set of Swazi laws and customs, which sometimes results in uncertainties, ambiguities and inconsistencies in its interpretation. It is of a limited and restricted scope of application, however, since it applies only to people of Swazi origin. Thus, Swaziland is characterised by a dual court system, where the judiciary exists within the traditional structure in the form of Swazi National Courts (established by the Swazi Courts Act, 1950) applying Swazi law and custom.

1.3.1.3 *Non-specialised nature: public and private law*

Indigenous legal systems are essentially non-specialised systems (see chapter 5, section 5.1.2), which can further be distinguished into divisions of public and private law, despite occasional difficulties in recognising the phenomena belonging to each of the two respective divisions. Whilst public law is closely connected with political organisation, private law has much in common with social organisation. Private law governs the relations between the individual and communities, whilst public law governs relations between traditional authorities and subjects in indigenous legal systems. The Swazi do not distinguish between private and public law; however, they do distinguish between matters of the “home” or “family” and matters of the “chief” or “community”. Accordingly, it is possible to distinguish between indigenous private law and public law among the Swazi, although on occasions it may be extremely difficult to recognise the phenomena

belonging to and their proper place in each of the two divisions.

Indigenous private law may be separated into the divisions of the law of persons (defining and governing status); family law (including guardianship); the law of things (real rights in movable and immovable things); the law of succession (provisions concerning deceased estates) and the law of obligations (contract and delict).

With regard to the Swazi, the first category – the law of persons – has not been formerly defined (Whelpton 2004 Persons: 1).

Generally, the law of persons determines the status of a person, that is to say, his or her rights, duties, powers and capacities according to gender, age, marital status and legitimacy. It defines persons as legal subjects, and determines both who and what legal subjects are, and how legal subjects originate and lapse. These rules concerning the different classes of legal subjects, and the legal status of each of these classes of persons, play an important role in Swazi law and custom and may be safely dealt with as the “law of persons”.

It will be demonstrated in chapter 7, (see section 7.1) that the general concept of delict does exist amongst indigenous peoples (including the Swazi), although many group-specific variations are to be noted. It is under this latter category of delict that the unjustified violation of a right of personality would entail liability. The full spectrum of the scope of such rights will form the basis of this study.

1.3.2 Rights of personality

Myburgh (1985: 31) notes that in most jural systems there is a distinguishable division of private law, namely the law of personality, for the protection of the personality, with the rights in question being known as rights of personality. Neethling (1996: 3) defines the law of personality generally as rules and principles aimed at protecting an individual's personality, including the rules and principles which deal with the recognition, definition and protection of the various rights of personality. He states that the most important remedies for the protection of a person's personality are of a delictual nature; a delictual action will establish in what circumstances a person is liable for the damage or injury which that person has caused to another.

Myburgh (1985: 31) confirms that rights of personality are observable amongst the indigenous people of Southern Africa, and Whelpton (2004 Law of Persons : Abstract) confirms that rights of personality are observable in Swazi law and custom. The fundamental question to be determined in this study is the extent to which such concept is known, accepted and utilised in indigenous legal systems.

1.4 PARAMETERS OF THE PROBLEM

1.4.1 Infringements of rights of personality

Generally, the law of delict is a branch of the law of obligations: the legal obligation in question is between the one party who has suffered injury (and who has a right to compensation for the injury) and the other party who caused the injury (and who has a corresponding duty to compensate/make restitution for the injury).

By defining the concept of delict as an unlawful infringement of a right, one is able to broadly classify indigenous delicts using the objects of such rights. Accordingly, indigenous peoples distinguish between, on the one hand, infringement of the estate (including loss of property, obligatory rights to performance and guardianship over persons) and, on the other hand, infringement of the personality (including both the body and honour and good name).

Rights under the former are known as patrimonial rights and they fall within the aggregate of rights and duties known as the estate, and relief for the violation of such patrimonial rights (diminishing the estate) is damages. The latter rights are known as personality rights and do not form part of the estate; the appropriate relief for the violation thereof is satisfaction. Accordingly, a right in a person may fall within an estate as guardianship or be excluded therefrom as a right of personality.

Notwithstanding the above, the same unlawful act (for example, seduction or adultery) may result, in certain circumstances, in the infringement of both guardianship (right of estate) and infringement of honour and good name (right of personality), so that an award of both damages and satisfaction would be appropriate. For example, among some peoples, a beast which is seized following seduction is slaughtered immediately to provide satisfaction for violation of honour, whilst the claim for damages based on violation of guardianship follows later (Myburgh 1985: 33). Unlike in Western specialised systems, the indigenous law of delict and criminal law may both be applicable in certain

circumstances, such as theft and assault. Among the Swazi, many civil wrongs are on occasion also treated as crimes – the offender not only being forced to make amends to his victim, but suffering punishment as well. In cases of assault (*kushaya*) for example, the assailant may be punished by the court and may also be instructed to give the victim something to “heal the wounds”. Whilst this “offence” is tried in a single cause of action, its dual nature is recognised in the verdict of the court.

1.4.2 Objects of rights of personality

The objects of the rights of personality in indigenous law are the body and also honour and good name. It is characteristic of rights of personality that infringement thereof is often considered to be polluting (Vorster & Whelpton 1998: 5). With regard to the body, the injury may not only be physical (such as assault), but may encompass wider forms of causation such as anxiety, sorrow and fright. Honour and dignity, on the other hand, may be injured by various forms of insult, which also usually involve pollution. The killing of a group member injures not only the body but also the honour, because of the pollution brought about by death. It should be noted that “insult” has a wide definition, and includes *inter alia* cursing, swearing, neglect of avoidance taboos and witchcraft accusations (Myburgh 1985: 21). The definition of “honour” is similarly broad, and includes not only good name and reputation, but also privacy in the sense of peace in the home (Myburgh 1985: 39-47). Among the Swazi, the principal legal wrongs dealt with in public courts are against the person, against family rights and against property. These groupings, however, are based primarily on the nature of the offence committed (*vis* the right infringed) and

do not attempt to distinguish clearly between civil wrongs and criminal offences (see section 1.4.1 above).

1.4.3 Vestees of the rights of personality

Myburgh (1985: 47) poses the question whether rights to what is received in satisfaction (and kept) fall within the general estate of the household or within the estate of the individual family. In unspecialised legal systems, the emphasis falls strongly on the group rather than on the individual: the individual functions entirely within the context of the group. Myburgh (1985: 48) concludes that it is the comprehensive agnatic group which shares the rights of personality with the injured party. However, the fact that the vestee of these rights may be the group does not alter the nature of the rights (Vorster & Whelpton 1998: 8). The share of a member of the group in the contents of rights of personality will depend on his/her status. Whelpton (2004 Law of Persons: Abstract) confirms that among the Swazi, rights and duties vest in the family (*umndeni*): a family member's share in the rights of the family corresponds to his or her status. A person's status is determined by his or her position in respect of rights, competencies and duties as a member of the family. Although rights and duties vest in the family, among the Swazi, the individual certainly has fairly well-defined rights and duties within his or her family. Thus, for example, individuals have rights of personality (rights protecting the body and dignity) as well as the duty to obey those in lawful authority over them.

1.5 APPROACH TO THE PROBLEM

1.5.1 Holistic focus

Myburgh (1985: 49) contends that the indigenous law of personality should be studied using an approach by which jural phenomena can be seen in the context of the whole culture. A holistic (and, of necessity, a multi-disciplinary) approach is necessary to examine the full spectrum of the rights of personality. In this study, material of an anthropological and sociological nature is examined specifically to seek out the wider contexts within which the indigenous law of personality functions in the community as a whole.

Labuschagne (1994: 91) confirms that meaningful legal research cannot be conducted in isolation of reality; interdisciplinary and transdisciplinary legal research is of decisive importance for legal development – to view law in a more comprehensive context. Due to its flexible nature, indigenous law is able to develop or adapt to reflect the changing lifestyle of the community. Bennett (1999: 60) states that all forms of indigenous law find the basis of their validity in accepted social practice. “Living” indigenous law refers to the law actually observed by African communities, and is distilled directly from current social praxis. From his research on the indigenous law of contract, Whelpton (1991: 245) confirms that indigenous law and social change must be examined together to be incorporated into a “living” law in indigenous communities.

It is submitted that a similar approach is appropriate to the

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indigenous law of delict generally and to the law of personality in particular. Settlement of disputes concerning rights of personality also involves both the community and inter-personal relationships. The application of the indigenous law of personality in a flexible manner (in accordance with the basic tenets of indigenous law generally) ensures that expression is given to prevailing community values. Furthermore, any injury resulting from the infringement of a right of personality is a potential threat to the harmony of the community. Thus, the settlement of the resulting dispute may, in large measure, be based on “social” justice to ensure the restoration of cohesion and consequent stability of the community.

1.5.2 Rights and duties

The purpose of any legal system is to regulate the relations of its people: such relations create responsibilities and obligations. Unlike Western legal systems, indigenous legal systems emphasise duties rather than rights as being of paramount importance. In Africa, traditionally, a person’s rights are determined by his or her status. As illustrated by the Banjul Charter (on Human and Peoples’ rights), duty-consciousness is perhaps the greatest African customary law heritage (Sanders 1993: 23). Such emphasis on duties reflects the position that to stand by rights is regarded as anti-social: indigenous *mores* require that the individual compromises his or her interests for the good of all in the community. Thus, from an indigenous perspective, this topic could be approached from the standpoint of duties arising in the law of personality and the corresponding rights arising therefrom. What is important in indigenous law is the effect that disregard or neglect

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of such duties would have on relations between persons in the wider context of their community, and the corresponding need to reconcile people and restore harmony in that community.

Among the Swazi, the emphasis is also on duties (*imisebenti*) rather than on rights (*emalungelo*): an example is parents who care for their children and give them what they need without any reference to the “rights” of children. The emphasis is thus on the duties of parents (*umsebenti wamake/wababe*) rather than on the rights of the children. The Swazi prefer the terms duties/authority to rights/power.

1.5.3 The right to culture

This study will demonstrate that culture has a pivotal role in the application of indigenous law. Recognising cultural imperatives ensures that indigenous law remains “living” law for the peoples concerned and reflects their values. In the Republic of South Africa, culture receives recognition and protection in terms of sections 30 and 31 of the Constitution (Act 108 of 1996). The recognition and application of indigenous law in the Republic of South Africa, then, rests upon a constitutionally protected right to culture. Moreover, the Constitution also recognises certain rights of personality such as dignity (section 10), right to life (section 11), freedom and security of the person (section 12), privacy (section 14) and freedom of movement (section 21). Such constitutional recognition will be further examined in chapter 4, (see section 4.6).

With regard to the Swazi in the Kingdom of Swaziland, a harmonisation process is required to ensure that Swazi law and

custom remains fully recognised and operative. With the new Constitution envisaged for the Kingdom of Swaziland, it is essential that traditional cultural values embodied in Swazi law and custom are protected and retained to ensure that “the law” remains “living” law for the Swazi nation. Hence, any modernisation of Swazi law and custom should be directed solely at the elimination of certain specific inequalities. Such modernisation should not, however, be at the expense of traditional cultural values, which must be retained in any adaptation or harmonisation process (see chapter 3, section 3.5.3.4).

1.6 OUTLINE OF THE STUDY

Chapter 1 introduces the problem to be investigated in this study, defines terms related to the concept of indigenous law and discusses the distinctions obtaining between public and private law. With regard to the latter, law of persons is further specifically identified. The classification of rights in the indigenous law of delict is examined, following which both the objects and vestees of rights of personality are discussed. The researcher indicates that a holistic approach will be adopted and that the emphasis in indigenous legal systems is on duties rather than rights. Particular reference is made to the position of the Swazi in the Kingdom of Swaziland.

Chapter 2 highlights the importance of the socio-cultural environment to the topic being researched, and discusses the research methodology. Since for the indigenous people being studied, indigenous legal systems remain their “living” law, the methodology selected takes full account of the cultural background

in which such “living” law systems operate. The researcher undertook a comprehensive literature review of both anthropological and legal sources, including textbooks, legal journal articles and unpublished theses and reports. Field research in the Kingdom of Swaziland was conducted in accordance with Prinsloo’s (1991) guidelines to ensure that results obtained were both reliable and qualitatively acceptable. Extensive discussions were held with a panel of experts using a highly competent interpreter, and the information gathered was recorded and collated using accepted techniques and procedures.

Chapter 3 gives a brief overview of the boundaries, peoples and system of governance of the Kingdom of Swaziland. Swazi law and custom is examined in relation to the duality of the legal system existing in Swaziland. A brief commentary is given on the compatibility of Swazi law and custom with norms of national and international law – with particular reference to human rights.

Against a background of socio-economic change, Swazi law and custom is discussed in relation to the role it should play in the modernisation of the system of governance in the Kingdom. In this regard, the Report of Swazi law and custom (Whelpton 2004) is acknowledged and recognised as a basis for this purpose.

Chapter 4 examines the theoretical basis of the law of personality, traces its history and considers both the nature of rights of personality and the scope of application of the law of personality. Rights of personality are also discussed in the context of human rights. The chapter concludes by setting out a broad classification of rights of personality according to Neethling’s 1996 Law of

Personality and confirms that such rights are recognised as a separate class of subjective rights.

Chapter 5 focuses on the characteristics and nature of indigenous legal systems. The principal approaches to the study of indigenous legal systems (*vis* the jural and the anthropological) are examined together with a possible synthesis of the two. The problems engendered with an ethnocentric view of legal systems are reviewed. The differences between jural postulates in Western and indigenous legal systems and the effects thereof are discussed. The chapter concludes with the proposition that a combination of both the jural and anthropological approaches – with some own modifications – is the most appropriate methodology for the purposes of this study.

Chapter 6 examines the many differences existing between specialised and un-specialised legal systems, and considers the effect of change and development on indigenous legal systems (in the context of a dynamic social order) due to exposure to Western legal systems. It is postulated that indigenous legal systems will remain the “living” law of the communities they serve, and will retain their own specialised nature to remain relevant and meaningful to the way of life and world-view of the indigenous peoples concerned.

Chapter 7 confirms that both the law of delict in general and the law of personality in particular are observable in indigenous legal systems. The elements of indigenous delicts are examined generally as well as with particular reference to the Swazi. The

often-blurred distinction between delicts and crimes in indigenous legal systems is reviewed. This leads to the conclusion that no general guidelines can be deduced and that, especially with rights of personality, the problem is to be approached on a tribal-grouping basis.

Chapter 8 discusses infringements of rights of personality in indigenous legal systems. Both the limitation and the basis of liability are reviewed and it is inferred that the influence of Western legal systems has led to increasing focus on individualisation with a concurrent move away from strict group liability. Both extra-judicial and judicial remedies for the infringement of rights of personality are examined, and it is noted that in both the remedies of damages and satisfaction, a strong penal element remains evident.

Chapter 9 covers the extent to which the theoretical basis of the law of personality (see chapter 4) is relevant to legal systems in indigenous cultures, bearing in mind that indigenous legal systems are basically of a concrete, real and visible nature – with abstract and theoretical concepts being foreign to their fundamental nature. The question is raised of whether the indigenous law of personality protects the same or similar interests to those in Western legal systems, and whether similar classifications of personality interests exist in indigenous legal systems. The nature of indigenous legal systems is again considered and the important elements of group orientation, communal harmony and status are highlighted to give perspective to cultural and social values that inform the protection of indigenous rights of personality. Specific personality interests

are discussed and the differing perspectives between indigenous law and South African law are reviewed – resulting primarily from differing world-views. It is concluded that elements particular to indigenous culture influence both the extent to which indigenous rights of personality are protected and the degree to which and the manner in which infringements thereof are compensated.

Chapter 10 emphasises that the violation of rights of personality requires appeasement not only to the living injured but also to the ever-present ancestral spirits. Infringements of the right to the body together with the body's wider contexts are examined. The spheres of homicide, rape, adultery and witchcraft are discussed, as are the violation of certain specific patrimonial rights, which also involve elements of personality rights. With regard to such sphere and to such specific patrimonial rights, the position obtaining among the Swazi specifically is examined. The right to physical integrity and bodily freedom is reviewed, including the effect of taboos and the attitudes of indigenous peoples towards imprisonment and banishment.

The researcher examines a possible conceptual separation and distinction between good name (reputation), on the one hand, and honour (subjective dignity), on the other as respective objects of rights of personality. Various types of insults are discussed in the context of differing tribal groupings to ascertain which insults might amount to defamation and/or to violation of personal dignity and/or crime.

Subjective honour/dignity is reviewed, and the often-blurred distinctions between delict and crime in this sphere are highlighted.

Seduction is used to illustrate such problems, with particular reference to the position obtaining in the Kingdom of Swaziland, where the concept of dignity also encompasses honour and good name. Indigenous peoples' approaches to rights to feelings, privacy and identity, and particularly the Swazi perspective of such rights, are briefly outlined.

Chapter 11 departs from the traditional format and incorporates a case study taken from a report in the June 29th 2004 edition of The Times of Swaziland newspaper. The report, entitled "Funeral stopped as corpse "disappears" ", covers a dispute between two families concerning the burial of a wife. The report was put to the panel of experts for an in-depth discussion of the socio-cultural, criminal and delictual elements involved. The prospective fines and compensation that might possibly be awarded in such cases in Swazi law and custom were also examined. A comparative Kenyan case is also analysed with regard to a burial and the rights attaching thereto.

Chapter 12 presents the findings from the literature review and the field research in the Kingdom of Swaziland. In addition, the separation of the concepts of good name and of honour in indigenous legal systems is examined in relation to the Swazi perspective on dignity. It is concluded that such conceptual separation is inappropriate and inapplicable in that the concept of dignity embodies the qualities of humanness (inherent *ubuntu*). Thus, it is this broad-based perception of dignity that is to be protected as an indigenous right of personality – in the context of an individual's membership of the community.

Chapter 2

RESEARCH METHODOLOGY

2.1 INTRODUCTION

As indicated in chapter 1 (see section 1.5.3), the researcher adopted a combined legal-anthropological approach, with his own adaptations, in order to maintain a holistic focus on the topic.

Rights of personality exist in the sphere of the law of persons. The socio-cultural context of this particular sphere of law is clearly important as is the fact that this sphere forms part of the “living” law of the community under study; in this case, particularly the Swazi.

Prinsloo (1991: 13) advocates a holistic approach, stating that a researcher must be equipped with knowledge of research methods, the culture of the peoples to be studied and the particular field of law to be studied. The present researcher has an academic background in anthropology as well as law. This is stated to ensure that the motives for adopting primarily an anthropological approach are not misconstrued. The researcher’s intention was not to produce an anthropological treatise, but rather to compile a legal study based upon an inter-disciplinary approach to obtain objective research results with a holistic focus on the topic. In order to produce practical results, a small degree of ethnocentric bias is perhaps inevitable in classification and categorisation. However, throughout the study, and particularly with reference to the Swazi, all concepts, categories and classifications were always carefully checked and evaluated to ensure that they did, indeed, exist in

similar form in the indigenous legal systems being studied. It was important to ascertain that they were not merely being “imported and transposed” from a Western viewpoint, which Dlamini (1999: 16) calls, “to superimpose white values on the black community”.

Any study of an indigenous legal system which underestimates the importance of communal values, informal dispute-settlement institutions, harmony of the collective and the role of the ancestral spirits is *ipso facto* seriously flawed. Thus, this study took as its point of departure an examination of the way of life and traditions of the peoples being studied, then social relationships and social actions/interactions in which the “living” law is nurtured and developed – eventually crystallising into an expression of community values to be upheld (to pre-empt conflict and strife within the community and to maintain harmony therein).

Understanding a system of “living” law thus requires understanding the socio-cultural background from which such system has developed. In a country such as the Kingdom of Swaziland, where a system of legal dualism has developed, regard for the social-cultural environment is even more essential in order to appreciate the full background and scope of the law and custom applicable.

2.2 RESEARCH METHODOLOGY

With indigenous legal systems being largely unrecorded and of a concrete, real, visible and customary nature, it is inevitable that a “one-size-fits-all” approach would not be appropriate to the topic being studied. Neuman (1997: 14) points out that quantitative research seeks to measure objective facts, has reliability as its key,

is value free, is suited to a macro-approach and employs statistical analysis. Qualitative research, on the other hand, constructs social reality and cultural meaning, focusing on interactive processes and events. Its key lies in authenticity, values are present and explicit, and the analysis is thematic.

While both approaches share the basic principles of science, they differ in significant ways. King, Keohane and Verba (1994: 5) state that the best research “often combines the features of each”. Moreover, they can both be used in complementary ways. Ragin (1994: 92) notes that while most quantitative data techniques are data condensers (to see the big picture), qualitative methods by contrast are best understood as data enhancers (to see key aspects of cases more clearly). Accordingly, the methodology most suited to the realities of the present study combined both quantitative and qualitative approaches, by means of a literature review and field research, respectively.

To some extent, then, the methodology of this study accords with the quantitative research approach of the human sciences, which comprises a scientific study and analysis of existing literature to reach reasoned conclusions. This general approach is modified, however, to incorporate qualitative information obtained from disciplined field research – to provide a personalised approach to the topic and to be supplemented by the objective to maintain a holistic focus by utilising an anthropological approach in the structured legal research.

2.2.1 Literature review

Bernard (1988: 126) states that “a thorough literature search is vital to the success of any research project”. To this end, the researcher undertook a comprehensive literature review. From the anthropological perspective, Caplan (1995), Gluckman (1965), Hoebel (1954), Moore (1978) and Roberts (1979) were consulted, whilst van Niekerk’s (1995) unpublished thesis was used to gain perspectives on jural postulates.

In the field of the South African law of delict, Neethling (1992) and van der Merwe and Olivier (1989) were studied. To narrow the focus to the law of personality, Neethling (1996) was utilised for both theory and practical application of the law of personality. In addition, recent court decisions on the topic together with relevant articles in legal periodicals and journals were also studied. Since decisions of indigenous courts are for the most part not recorded in writing, it was not possible to take account of such decisions other than those mentioned to the researcher by the panel of experts in Swaziland.

In so far as indigenous law in general is concerned, Myburgh (1985), Bennett (1985,1995), Bekker (1989), Olivier (1989) and Schapera (1937, 1938, 1953 and 1970) were also studied. In addition, unpublished theses by Whelpton (1991), van Niekerk (1995) and van der Merwe (2000) were consulted to obtain a wider perspective on the topic.

In preparation for the field research, Prinsloo (1990 and 1991), Bernard (1988) and Spradley (1979) were reviewed. With regard

to Swazi law and custom, extensive use was made of a comprehensive unpublished (at the time of writing) Report by Whelpton (2004). In addition, Marwick (1966), Kasenene (1993), Nhlapo (1982) and Vilakazi (1977) were consulted, whilst general background material on the Swazi was obtained from Kuper (1986).

2.2.2 Field research

Fieldwork involves learning directly from “real people and real life” Kruger (1993: 97). As the study of indigenous legal systems, to a large extent, involves the study of the “living” law of the peoples concerned, fieldwork was appropriate, particularly at the micro-level. In addition, since indigenous African law is mostly unwritten, field research again was the best method of investigation. However, Prinsloo (1991: 4) cautions that whilst the jurist should take cognisance of the anthropologist’s methods and techniques, the wholesale adoption of his methodology is not suitable, since the aims of these two disciplines are different.

Anthropologists view law as an integrated part of a group’s culture and the purpose of their field research is to record the law and related customs. For the jurist, the aim of a restatement is the compilation of an authoritative source of law to be used by the courts and other judicial bodies. Within the latter approach however, a contextual study nevertheless has merits. Indigenous legal systems can only be understood properly in the context of the related socio-economic environment and the ideological and cultural values of the peoples studied. Therefore Prinsloo (1991: 12-13) maintains that those aspects of culture which are necessary

for a proper understanding and explanation of its law, should also be recorded contemporaneously. Thus, in this study, whilst the theoretical approach was juridical, the researcher not only employed anthropological field research techniques, but also consulted anthropological literature to utilise and incorporate the required information on the culture of the peoples being studied.

2.2.2.1 *The Swazi in the Kingdom of Swaziland*

As published material on the “living” or “peoples” law is limited, it was necessary to supplement the literature review with information gathered from field research. This study makes particular reference to the Swazi in the Kingdom of Swaziland and the field research was conducted in the Kingdom of Swaziland. A micro-study in a semi-rural environment was carried out to establish the extent to which own value systems were influenced by exposure to Western values. The research was focused not only on ascertaining how the legal principles functioned, but also took account of those socio-cultural processes which functioned outside of the law.

2.2.2.2 *Interviews with informants*

For field research in indigenous law – particularly the collection of information through interviews – it is essential that the informants be members of the people being studied, well versed in their way of life and willing to share their knowledge with the researcher (Prinsloo 1991: 5). The objectivity and reliability of the field data will also depend on the way the informants obtain their knowledge (first-hand through experience in every-day life or indirectly from tradition), the scope of their knowledge and the extent to which

their information can be compared with published data on the same topic. Data that relates to an event not personally experienced by an informant, but which merely forms part of tradition, is not necessarily unreliable. In the past, tradition was always an important means by which knowledge was passed on from generation to generation. The strength of tradition in Africa is well established and verifiable (Prinsloo 1991: 5-6).

2.2.2.3 *Other methods*

The other two methods of obtaining information in field research, namely observing trials and collecting data from written reports or rulings of tribal and magistrates' courts were rejected in this current study. Firstly, observing trials is of limited value in that judgements of tribal courts are lacking in juridical reason and it is difficult to ascertain how decisions are reached. Secondly, the collection of data from written reports of tribal and magistrates courts is similarly also of restricted value. Not only are few cases actually recorded, but when they are, the records are seldom a verbatim report of the court proceedings and thus at best constitute only a useful but incomplete summary of proceedings (Prinsloo 1991: 7). Therefore, interviewing a panel of informants is generally accepted as the primary method of field research in indigenous law.

2.2.2.4 *Interview perspectives and techniques*

Neuman (1997: 377) states that field research is best where a researcher wants to study a small group of people interacting in the present. Thus, it is particularly valuable for micro-level or small group face-to-face interaction. The researcher becomes directly

involved with the people being studied and is immersed in the topic within a natural setting. A field researcher examines social meanings and grasps multiple perspectives in natural social settings. He or she gets inside the meaning system of members and then goes back to an outside or research viewpoint (Neuman 1997: 348). In the present study, the researcher was able to absorb, appreciate and understand the “multiple perspectives” presented by the panel of experts in the Kingdom of Swaziland. The interviews with the panel of experts were largely unstructured, non-directive and in-depth, and involved asking questions, listening, expressing interest and recording precisely what was said.

In interviewing a panel of informants, the collective knowledge of the full panel is obtained after the informants have checked and supplemented one another’s knowledge (Prinsloo 1991: 19). A small working group is to be preferred, so that not only is each and every informant able to contribute to the discussion, but also a relationship of trust and rapport is easily established between researcher and informants. In this way, the best research results are gathered from a panel of experts.

Prinsloo (1991: 21) points out that the interpreter is a very important member of the research team and, in many instances, may even act as a research assistant, facilitator of the local arrangements and be thoroughly familiar with local custom. Prinsloo’s (1991: 25) interview technique is to raise a specific point for discussion, and then to ask further questions based on the original responses of the informants. In this way, any earlier uncertainty, incompleteness or other deficiency in their responses is

rectified. This technique aids impartial interviewing and actually encourages informants to share their first-hand experience with the researcher.

2.2.2.5 *Panel of experts in the Kingdom of Swaziland*

The researcher conducted the interviews in Mbabane, the capital of the Kingdom of Swaziland, with the knowledge and approval of the Honourable Prince Mangaliso Dlamini, who is not only a member of the Constitutional Drafting Committee but also the project-coordinator of the project for recording of Swazi Law and Custom.

Mr Richard Dumisa Dlamini facilitated and arranged the interviews. His expertise was used in the compilation of the Report on Swazi Law and Custom (Whelpton 2004). In addition, Mr R D Dlamini acted as interpreter, being well qualified by many years in the Civil Service of Swaziland as well as serving with the Public Broadcaster in the Kingdom, and made a valuable contribution to the discussion. However, his contribution was only given after the experts' answers and in addition to or as commentary on such answers. The contributions of Ms Phindile Bongi Dlamini, the female informant, were also extremely valuable for two reasons. First, as a teacher, she was fully fluent in both Si-Swati and English, and in addition has a diploma in law. Hence, she was able to confirm and clarify any doubts over translation in order to ensure complete accuracy. Secondly, she was able to give the female perspective on several issues (some of which were gender-sensitive) raised in the discussions.

Local experts who served as informants were selected in consultation with the chiefs (*tikhulu*) of all the four regions of the

Kingdom in order to gain a fully representative insight into the topic. The experts were all knowledgeable, reliable and willing to share their knowledge with the researcher. They were aware of the project for the recording of Swazi Law and Custom and participated in the consensus-building exercises which were held in all four regions of the Kingdom. The various themes of the topic were thus not strange to them, and they enjoyed verifying some of the research data and adding more valuable information.

2.2.2.6 *Interviewing process*

The researcher used Prinsloo's (1991: 18–27) interviewing procedures and techniques, and instructed the interpreter on the purpose of the study several weeks before interviews commenced. Comprehensive memoranda or guidelines were prepared as a basis for semi-structured interviews with the informants. The purpose was to cover the research topic fully, to deal with the various elements/themes systematically without preventing the experts from giving information voluntarily, and to have sufficient examples available during the interview. The memoranda merely provided an outline or check-list of matters to be covered, but no specific sequence was prescribed. The aim was to stimulate the experts to furnish information on what they regarded as important.

The information gathered at these interviews was recorded verbatim in written notes, and the notes collated and revised immediately after the conclusion of each day's interviews. A tape recorder was not utilised, since it was thought that its use might inhibit the free flow of information and result in informants' reluctance to give forthright and comprehensive answers to the questions. The interviews were

informal and the researcher and the informants readily established rapport. The researcher endeavoured to display the necessary empathy to the discussions, and to formulate questions intuitively and succinctly with a view to obtaining valid and reliable information. Prinsloo's (1991: 28 – 29) control techniques were utilised to ensure the accuracy of the data collected. The information was verified by means of cross-questions, examples of hypothetical and real cases, and legal maxims and proverbs. The researcher endeavoured to maintain the highest degree of objectivity in the data collection, recording and evaluation.

2.3 CONCLUSION

This chapter described the research methodology employed in this study, which combined a legal-anthropological approach in order to maintain a holistic focus. The intention was to compile a legal study with an inter-disciplinary approach to indigenous law. The study complies with juristic requirements, but is carried out in the context of relevant cultural norms and values. Quantitative and qualitative approaches were used as complementary methods. With particular reference to the Swazi in the Kingdom of Swaziland, semi-structured interviews were conducted with a panel of experts in order to obtain data that can be considered both reliable and valid. As Prinsloo (1991: 6) recommends, all data so obtained was evaluated critically, and tested against the requirements of strict logic, the norms of juristic science in general and against the norms of Swazi law and custom in particular.

Chapter 3 discusses the Swazi people, their system of governance and the operation of Swazi law and custom.

Chapter 3

THE STUDIED GROUP: THE SWAZI IN THE KINGDOM OF SWAZILAND

3.1 INTRODUCTION

Since much of the focus of this study is to be on the Swazi, it is necessary to present a brief overview of the Kingdom of Swaziland, the Swazi people, the system of governance and the operation of Swazi law and custom.

The origin of the Swazi nation was shaped by the early leaders. The leading *Nkhsisi-Dlamini* family is said to have entered the present-day Swaziland about 250 years ago and established the Swazi nation – either by peaceful incorporation or forceful absorption (Whelpton 2004 Governance: 4).

A Swazi king is always a young man when he ascends to the throne, because, among the strict stipulations of kingship (many of which remain secret), tradition requires him to be the only child of his mother and unmarried. The present monarch of the Kingdom is Mswati III (*Makhosetive*), who was crowned king on the 25th April 1986, aged 18, and became the youngest ruling monarch in the world. He succeeded his father King Sobhuza II, a much respected and loved man, who was also the world's longest reigning monarch – ruling from 1921 to 1982.

3.2 BOUNDARIES OF THE KINGDOM

The boundaries (*imincele*) of the kingdom have always been, and still are, a controversial issue. Swaziland comprises some 17,363sq kilometres and is situated between Mozambique and the South African provinces of KwaZulu Natal and Mpumalanga, between the 26th and 27th latitudes south and the 31st and 32nd meridians east. The boundaries of Swaziland were formed in the late 1800's, when the land was surveyed by the colonial authorities. In 1880, the borders were formally defined by the British, Portuguese and the Transvaal Afrikaners, who decided that the Pongola Valley would form part of South Africa even though it was an area historically occupied by the Swazi people. As the Swazi were given little say in the demarcation of their country's boundaries, today they maintain that such boundaries are there mainly to control foot-and-mouth disease. The actual boundaries of the kingdom stretch beyond these (Whelpton 2004 Governance: 16-17).

The landlocked Kingdom of Swaziland is the smallest country in the southern hemisphere. It comprises four topographical and climatic areas, which vary from 400 to 1800 metres above sea level, each with its own climate and characteristics.

Swaziland became a protectorate in 1903, when British colonial rule was established, and retained this status until becoming a self-governing state in 1967, when Sobhuza II (previously regarded as a paramount chief) received international recognition as king, and the country acquired its own flag. The country celebrated independence in 1968, and the monarchy has retained its position

of strength since then.

3.3 THE SWAZI PEOPLE

The current total population of Swaziland is variously estimated at between 1,1 and 1,2 million people. Absorbed into the Swazi kingdom are three main language groups: *Nguni*, *Sotho* and *Tsonga*. This absorption provided the principal motivation for a micro-study focus on the Swazi. The integration of these three main groups would have brought with it into Swazi law and custom a distinct legal perspective from each of the respective groupings. These elements will have been incorporated into Swazi law and custom, thus making the Swazi an ideal focus for a holistic study of the topic.

Of the Swazi clans, approximately 70% are *Nguni*, 25% are *Sotho* and the remaining 5% are *Tsonga*. Kingship is hereditary in the pre-eminent *Nkosi-Dlamini* clan, and all other clans are ranked in decreasing rank thereafter. Kuper (1986: 18) notes that the clan is the furthest extension of kinship. When two Swazis first meet, they will ask “what is your *sibongo* (clan name)?” This is a major initial identification: every Swazi acquires by birth his father’s clan name. Although women retain their paternal clan name on marrying, they may never transmit it to their children.

After the royal *Nkosi-Dlamini* clan, all clans are graded roughly according to the relationship they have with the kingship – the closer the blood ties with the kings, the higher the status of individuals. Thus, the second-ranking clans are the “Bearers of Kings”, that is, clans that have provided queen mothers (chosen to

rule because they were daughters of powerful chiefs). Third in rank are clans with their own local areas and hereditary chiefs. Following these are clans from which officials are selected for special ritual or administrative functions, and finally come the clans with no co-ordinating clan ceremonies, local centres or recognised national representatives. However, such grading of clans is neither as precise nor as static as caste systems. Clanship is of primary importance in regulating marriage and succession: in particular, with the exception of the king, marriage with a person of one's own clan is prohibited. Finally, each clan contains a number of lineages, which define legal rights and claims to various state positions.

The groups have inter-married and are all entitled to protection, to land, to bear the national mark (a slit in the lobes of the ears), to serve together in age-regiments and to speak in the council. Such privileges and responsibilities of citizenship are conferred on everyone owing allegiance to the twin-rulers – the King and the Queen Mother (Kuper 1986: 11).

The Swazis are a proud but peaceful people. Approximately 77% of them live in rural areas, and the remaining 23% reside in the towns and cities. The average population density is only 5.2 people per square kilometre. Traditionally, the Swazi are a polygamous society, although today monogamous marriages are becoming more common under increasing Western influence. However, the cultural heritage is deeply rooted and traditions are carefully protected and sustained.

In accordance with tradition, colourful ceremonies regularly take place to mark special occasions. There are two main rituals. The most important of these is the national *Incwala*, which reinforces the ties between the leaders and the people. It is a ceremony rich in Swazi symbolism and only understood in terms of the societal organisation and major values of Swazi life. The ceremony entails a series of rituals which centre on the King: it is meant to give praise to God for all the blessings of the previous year, and fresh produce is first eaten by the King before the nation does so.

Incwala signifies the life of the Swazi people: if there is a king, there is *Incwala*, and if there is no king, there is no *Incwala*.

Incwala is danced only by a king, and thus signifies the existence of a king. The other ritual is the *Umhlanga* (reed dance), which is performed in August or September by maidens honouring and paying homage to the Queen Mother (*Indlovukazi*) at the royal palace where traditional dances are performed.

3.4 GOVERNANCE

Swaziland has a centralised system of government characterised by centralised institutions of authority, administrative system and judicial institutions. The Swazi kingship (*Bukhosí*) consists of the King (*Ngwenyama*), the Queen Mother (*Ndlovukazi*), the members of the royal house, Chiefs (*Tikhulu*) and Headmen (*Tindvuna*). The system of local government, in other words, the system of local Chiefs (*Tikhulu*) and their inner councils (*bandlancane*), normally follows the pattern of central authority of the country. Each Chief (*Sikhulu*) has his inner council as well as his *Indvuna*. Each has its own *umphakatsi*. This latter word is derived from the stem *ekhatsi*

(inside or the core). *Umphakatsi* therefore symbolises the spiritual unity of the nation. All these bodies are pillars of *Bukhosi* (kingship). They share responsibilities with the King, who rules through them. A Swazi can thus say: “a king is king by his people” or “a king rules through his people” (*inkhosilbusa Ngebantfu*). The king is regarded as a mouthpiece of his people and is described as *umlomo longacali manga* (“the mouth that tells no lies”).

Certain modern administrative structures of government are integrated into the traditional Swazi system of governance. The structure incorporates the system known as *Tinkhundla* and provides for the people to elect candidates to be their parliamentary representatives for specific constituencies. The King stands at the apex of both the traditional and the modern systems. He is advised by his Cabinet and the Swazi National Council, which represents the full spectrum of the Swazi nation, including the country’s traditional leaders.

3.5 SWAZI LAW AND CUSTOM

3.5.1 Background

Prior to the colonisation of the Kingdom of Swaziland, Swazi law and custom was the only law applicable in the Kingdom.

However, following the British colonisation of Swaziland in 1903, and with subsequent Proclamations and Orders in Council enacted, a system of dualism resulted (Whelpton 1997: 146). Thus, whereas a colonially imposed hybrid system of Roman-Dutch and English law, as amended and supplemented by statutory law and case law constitutes the country’s general law, Swaziland law and custom –

applying only to Swazis – exists within the matrix of the general law. Nhlapo (1982: 67) points out that the Swazi is thus subject to two legal systems whilst his non-Swazi counterpart is not: the general law applies to the whole population whilst customary law applies to a large section of the same population. In accordance with Section 11 of the Swazi Courts Acts (80 of 1950), where one of the parties is not a Swazi, Swazi law and custom may not be applied by the High Court and the Court of Appeal when exercising their appellate jurisdiction over matters originating from the lower Swazi courts. Swazi law and custom is applied by the Swazi courts in as much as it is not repugnant to natural justice or morality and is also not inconsistent with the provisions of legislation in force in Swaziland.

This non-indigenous repugnancy clause (contained in Section 11 a of Act 80 of 1950) thus purports to limit the application of Swazi law and custom in the name of “natural justice and morality”. However, the ethical standards underlying this piece of colonial legislation are uniquely Western European standards. Since such Western values are often excessively individualistic, a Swazi court would generally not be expected to be influenced by them, whereas a general law court might well take such values into account. Thus, the views of the local people and culturally accepted norms may well be ignored in this process, which could result in the use of the repugnancy clause producing arbitrary decisions.

3.5.2 Practical effects of the dual system.

In practice, significant differences in the two systems are

observable. For example, a party to a dispute may be represented by a lawyer in a general court but not in a Swazi court; different procedures are used and different standards of proof also prevail.

Accordingly, since different laws are applied in the two court systems, cases with similar facts and circumstances may have different outcomes, depending on the court in which they are heard (Women and Law in Southern Africa [WLSA] 1994: 14).

Although the possible inequities resulting from this situation are to some extent tempered with legislation (*vis* Section 6 of the Subordinate Courts Act 66 of 1930), the discretion granted to the Clerk of the Court for the transfer of a case to the most appropriate court for handling the particular dispute is also undesirable. Given the complexities and difficulties involved in such a determination, it is an unfair burden on a single court official alone. Accordingly, such determination would be better made by the court itself, after proper presentation of all the facts and arguments by the parties (Whelpton 1997: 146).

3.5.3 Compatibility of Swazi law and custom with norms of national and international law.

3.5.3.1 *Introduction*

The question arises of whether the underlying aims and consequences of Swazi law and custom are incompatible with contemporary fundamental rights (embodied in both national and international law). The principal point of divergence is between the nineteenth-century European conception of individual rights and the collective approach characterising Swazi tradition. So, for example, the principle of patriarchy as reflected in Swazi law and

custom may well constitute an infringement of various fundamental rights: in particular, the rights of women may be in question with regard to equality, dignity and those rights associated with participation in the economic sphere, social mobility and justice (Whelpton 1997: 148).

3.5.3.2 *Human rights and human dignity*

In the Swazi and most indigenous peoples' world-view, the concept of human dignity is an integral part of *ubuntu* – a person's humanness. Rights of personality seek to protect many of the elements embodied in the *ubuntu* concept, and this will be discussed further in chapter 10, section 10.4.3.1. Accordingly, it should be understood that the Western concept of human rights and the African concept of human dignity stem from differing philosophical approaches. Whereas the African's concern for human dignity is central to his traditional view of life, the Westerner holds that human beings are “entitled” to human rights simply by being members of the human race. Howard (1986: 18-19) states that

the so-called African concept of human rights is therefore actually a concept of human dignity. The individual feels respect and worthiness as a result of his or her fulfilment of a socially approved role. Any rights that might be held are dependent on one's status or contingent on one's behaviour. Such society may well provide the individual with a great deal of security and protection..... one may even argue that people may value such dignity more than their freedom

to act as individuals.

With specific reference to rights of personality, the Swazi perspective on dignity (as a concept of wide scope and application) will be examined in chapter 10. Ethical systems indigenous to Africa (including laws and customs) were designed primarily to sustain human dignity. Among the Swazi, as among other African peoples, their philosophy of life is tempered by the principle of survival of the total community with an accompanying sense of co-operation, interdependence and collective responsibility. The appropriate Swazi maxim is *umuntfu ngumuntfu ngeabantfu* (“a person is a person in relation to other people”).

3.5.3.3 *Rights and duties*

Sudarkasa (1980: 44) identifies respect, commitment and responsibility as the three principles underlying the complexity of rights and duties in the Swazi community. Whelpton (1997: 149) states that the Swazi referred to these three principles as *inhlonipho*, *kutinikela* and *umtfalo*, respectively. Respect operates in a customary system embodying a form of class distinction: thus, a strict application of the principle of equality would be regarded as undermining not only the hierarchical social structures in rural communities but also the belief in ancestors which sanctions the principle of seniority in a community. A lack of respect could contribute to violations of rights of personality in the sphere of dignity (including the reputation, good name and honour) not only of the living but also of the ancestors.

Commitment makes it possible for communalism to exist within the context of the family and wider community: individuals are thus not separate from the group and individual rights must always be measured against group interests and needs. Thus, the family head is held liable for any infringement of a right of personality by family members. According to Marwick (1966: 281),

In Swazi society, the individual is moulded so that his behaviour in every-day life is determined by habits of mind and body and certain dispositions and sentiments which are the result of his training. The individual is taught certain norms of conduct towards members of his family and to the people outside of that family.

Rights are held mainly by agnatic groups – with each member sharing in these rights according to his or her status. Accordingly, no members (and, in particular, no women) are totally without rights, and all members are full, but not equal, participants in such group rights. Dlamini (1990: 84) cautions against confusing equality of treatment with the equality of people. Whereas people are not equally self-sufficient in many respects, equality of treatment merely implies that no person should be subject to invidious treatment on the ground of some involuntary attribute.

Eze (1984: 15) states that it is often argued that customary law is essentially a right of groups that limits individual rights. However, Whelpton (1997: 149) maintains that the correct approach should be that rights of individuals are often limited by rights of the community since the individual forms only part of the community.

Hence, while not ignoring individual rights, communal ethics are paramount, and rights are understood within the context of the group, with the family unit functioning mostly as a corporate legal entity (Howard 1986: 18). As noted earlier (see chapter 1, section 1.4.3), rights of personality are shared by the comprehensive agnatic group with the injured party.

The concept of responsibility is broad and not only offers African families a network of security, but also determines the extent of their obligations. With the family context founded on obligations, childcare for example, becomes a community matter. Moreover, the extended family guarantees assistance and support to the old and destitute, since all family members share the responsibility to care for the underprivileged (Cobbah 1987: 320-324).

With regard to the Swazi, Kasenene (1993: 35) notes that the clan is a special and important aspect of Swazi social and spiritual life, so that a man may claim support from other clan members when he needs to – with members of the same clan regarding each other as close relatives and sharing kinship obligations.

3.5.3.4 *Change*

Whereas previously African social and legal systems assured human dignity in all material respects, social order is dynamic. Rapid and disruptive change is clearly evident in many sectors with the result that the social and economic environment in which many indigenous legal systems developed is no longer relevant. Ferraro (1990: 3) states that even rural areas of Swaziland have not

remained static, and considerable pressure has been exerted on traditional Swazi structures by large agri-business, on the one hand, and the influence of medical and educational missionaries, on the other, modernising and transforming traditional rural populations. More specifically, industrialisation and urbanisation with the accompanying labour migration have eroded the ties of kinship, with the result that women alone have been obliged to rear families, with many modern Swazi households lacking the stabilising influence of a patriarchal head. Such truncated family units cannot provide the traditional support network on which Swazi social structure was founded (Rose 1992: 30).

Against this background, the question arises as to what role Swazi law and custom should play in the Kingdom of Swaziland. Given that law is an indispensable ingredient of organised society, it is essential that the importance of Swazi law and custom be recognised, since a substantial part of it is still “living” law.

Whelpton (1997: 150) points out that it is essential that “living” law and judicial values of the Swazis (embodied in Swazi law and custom) must be taken into consideration in any Constitution envisaged for the Kingdom of Swailand. It follows that the recording of Swazi law and custom is an essential precondition for the drafting of any Constitution. In this regard, the comprehensive Report on the Project for the Recording and Codification of Swazi Law and Custom (2004), commissioned by the United Nations Development Project (UNDP) and compiled by Whelpton, fulfils this precondition. In addition, it is hoped that this present study will also contribute to the achievement of the required objective.

Whilst Swazi law and custom has demonstrated its ability to adapt to social, economic and environmental changes, its adaptation should always be promoted in harmony with its underlying postulates with due regard for the cultural context of the Swazi nation. Accordingly, any substantive legal reform initiative must accommodate the community’s perception of what the law should be and should accomplish. It is essential that it remains “living” law and people’s law and does not degenerate into pure paper law, which does not express the people’s values.

Modernisation of Swazi law and custom can be interpreted as liberalisation, in that it should be specifically directed at the elimination of certain inequalities that people experience on the grounds of gender and other related factors. For example, the field research results (see chapter 10, section 10.3.2) demonstrate the current disadvantaged position of women in respect of the taboos to which they are subject under Swazi law and custom. Whelpton (1997: 150) proposes that the current duality of courts in the Kingdom of Swaziland should be integrated into a uniform system, accompanied by progressive professionalisation being introduced into the Swazi courts.

3.6 CONCLUSION

From the foregoing, it is clear that the interface between the traditional and modern systems of governance in general and the duality of the legal system in particular suffers many constraints. This was one of the central concerns highlighted by the Political *Tinkhundla* Review Commission (TRC), established by the Swazi

government in 1992 to review ways in which customary institutions and processes should and/or could be accommodated in the political system in the Kingdom of Swaziland – in view of their important constitutional and social role in terms of Swazi law and custom. To this end, one of the TRC's major initiatives was the commissioning of the Report (sponsored by the UNDP) to comprehensively record Swazi law and custom and cited in this study as “Whelpton 2004”. This Report will promote the recognition of the status of Swazi law and custom as people's law. In addition, certainty and consistency in both application and execution of the law will be enhanced. In turn, judicial cognisance of Swazi law and custom by the magistrates' courts and the High Court will be thereby simplified. This Report is intended to serve as a platform for the integration of Swazi law and custom into modern law in order to realise the desired and necessary transformation to achieve good governance and sustainable development in the Kingdom. (Whelpton 2004 Project Background).

In common with indigenous legal systems generally, Swazi law and custom has, as its principal characteristics, group orientation, a concrete approach and a lack of formalities and strict categorisation. For example, there exists no clear delimitation in Swazi law and custom between the criminal and delictual spheres. The nature of such unspecialised legal systems also includes strong elements of religion and of kinship, which are also particularly relevant to the Swazi situation. It is against this background that the desired transformation should be viewed and the difficulties inherent in the proposed integration of Swazi law and custom

acknowledged.

In her study of the Swazi, Kuper (1986: 173) notes that the “issues” to be addressed include the complex process of nation building and the limitations on hereditary leadership. The flexibility of tradition, the difference between praxis and ideology, and their intricate relationship in the processes of social change –are all factors which will inform such issues. These observations are still relevant and pertinent today.

Chapter 4

THEORETICAL PERSPECTIVES ON THE LAW OF PERSONALITY

4.1 INTRODUCTION

Myburgh (1985: 31) is of the opinion that a jurist should be able to explain the jural phenomena of all cultures jurisprudentially – however divergent they may be. Indigenous jural systems leave considerable room for the theoretician. It would thus be instructive to examine the theoretical basis of the South African law of personality, so that appropriate comparisons may be made with the indigenous law of personality.

4.2 DEVELOPMENT OF THE LAW OF PERSONALITY

Natural jurists did not develop a particular theory of the law of personality, but began to identify the difference between personality rights and traditional patrimonial rights (Joubert 1953: 14). In 1877 Gareis, generally regarded as the father of the modern law of personality, postulated the concept of a general right to personality (Joubert 1953: 18). Gareis distinguished three broad categories of personality rights: physical integrity/freedom, individuality/dignity, and the products of intellectual activity.

Gierke (Neethling 1996: 8) states that a general right to personality flows from the legal recognition of a human being (*vis his legal personality*) and from this general right, certain particular rights may develop as separate subjective rights. As a separate category of rights, Gierke emphasises that they were private rights of a non-

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patrimonial nature and connected to the personality of their holder.

Kohler (Neethling 1996: 10) states that a person's intellectual creation exists independently of his personality and falls outside the human personality forming a separate category of legal objects. Kohler defines the parameters of such objects in terms of personality. In identifying the object as the total physical/mental human personality itself, Kohler postulates a general right to personality - one inclusive right. He recognises physical integrity, freedom, honour and privacy as interests of personality. Since the general right to personality is one right, such personality interests are not legal objects but merely expressions of the personality, which cannot be infringed. Kohler maintains that it is only the human personality that can be infringed with regard to its body, honour and privacy. Accordingly, the theoretical basis became firmly established: every right, which is not inseparably associated with the personality, was thus placed outside the law of personality – thereby distinguishing rights of personality from other rights.

4.3 THE NATURE OF PERSONALITY RIGHTS AND THE SCOPE OF APPLICATION OF THE LAW OF PERSONALITY

The modern law of personality, as developed above, with the theory of rights to personality as a separate and independent category of rights, is now firmly established in both theory and practice in many legal systems (in Europe and elsewhere).

Neethling (1996: 12) notes that there is considerable difference of opinion, however, as to the scope of the law of personality. For example, Kohler proposes a general right to personality,

encompassing the total natural human personality (which is the approach adopted in German Law). Gierke maintains that the personality right – in addition to natural personality – includes legal personality (which is the approach of Swiss law), while French law denies the existence of a general right to personality.

Joubert (1958: 110-115) develops and clarifies the theory of subjective rights. According to Neethling (1996: 13), the basic characteristic of subjective rights is the legal relationship between a legal subject (as holder of a right) and a legal object. The content of such relationship includes all the powers (“entitlements”) which, according to law, a legal subject may exercise in respect of his legal object(s). Personality interests cannot exist independently of a person, since they are closely bound up with his personality: the highly personal nature of personality interests also implies their non-patrimonial nature (Joubert 1958: 121). It is possible to identify and define personality rights as a separate category of rights (distinguishable from other subjective rights) using Joubert’s (1953: 129) definition of personality interests as “die onlosmaaklik met die persoonlikheid van die reghebbende verbonde (nie vermoensregtelike) regsgoed” (“the [non-subjective] legal objects inseparable from the personality of the holder of the right” [own translation]). Other subjective rights – real rights, personal rights and immaterial property rights - are therefore all the province of patrimonial law: their objects exist outside the human being and are independent of the personality. Thus, the law of personality is, in fact, the opposite of patrimonial law.

Mention must also be made of the theoretical problem raised by

patrimonial loss resulting from the infringement of a personality right – does this mean that a personality right acquires a patrimonial character? Since the right to personality has only specified personality interests (by definition of a non-patrimonial nature) as its object, then logically, only non-patrimonial loss can occur if such objects are infringed. In such a case, a loss of a patrimonial nature can only be related to the infringement of a (yet to be identified) right or interest in respect of personality.

Neethling (1996: 15) concludes that such a premise is based on the acceptance of the theory that personality interests may also include certain patrimonial elements – although the matter is far from clear and requires further research.

Joubert (1953: 146-7) lists the main juridical characteristics of personality rights, emphasising their highly personal and non-patrimonial nature. He states that they cannot be transferred to others, inherited, attached or relinquished and that they come into existence with a person's birth and are terminated by his or her death.

4.4 EXAMINATION OF PERSONALITY RIGHTS AND THE GENERAL RIGHT TO PERSONALITY

Joubert (1953: 124) criticises Kohler's theory of the general right to personality as unacceptable on several counts. Firstly, such general right is no subjective right, since a person cannot be both the subject and object of the right at the same time. Secondly, a person in his or her entirety cannot be the object of a right, since this ignores the supernatural spirit (transcending temporary existence on earth), which cannot be seen as the object of a right.

This aspect is of particular concern from an indigenous law perspective, where the supernatural element is of paramount importance. According to Joubert (1953: 126), such concept is far too abstract to have any practical value and a concretisation (identification and recognition) of specific rights of personality is still necessary. This criticism concurs with the indigenous law perspective, which embodies a real and concrete approach.

Joubert (1953: 123) also criticises Gierke's general right to personality, stating that Gierke's view - that the capacity to be the bearer of rights and duties generally is a subjective right – is incorrect, since there are no legal objects to which such a subjective right may relate.

4.5 PERSONALITY RIGHTS AND HUMAN RIGHTS

Many human rights relate to interests of personality: life, liberty, dignity and privacy are among those generally protected. However, Neethling (1996: 19) points out that there are also other interests protected as human rights, which are not directly concerned with human personality as the object of subjective rights (such as equality, culture, language and education). Therefore, such rights and freedoms cannot be regarded as personality rights.

Neethling (1996: 19) also notes that, whilst personality rights enshrined in a bill of rights generally remain subjective rights, they receive stronger protection, since such rights may not be infringed or unreasonably limited by either the legislature or the state executive. Such constitutional guarantees and protection are superimposed on the normal delictual remedies available for the

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infringement of a personality right. Should the bill of rights also have horizontal application (*vis*, applying to the relationship between private individuals), personality protection between individuals is thereby further enhanced.

4.6 CLASSIFICATION OF PERSONALITY RIGHTS

4.6.1 General

Neethling (1996: 27) states that the qualities of personality interests are not determined by legal principles, but primarily by their nature in the sphere of factual reality. Although a jurisprudential definition and delineation of personality interests is essential to enable protective measures to be applied in practice, such a definition should not be in conflict with factual reality. It is unacceptable to equate patrimonial interests with personality interests, or even equate one kind of personality interest with another because it is not only in conflict with practical reality, but also generates legal uncertainty (Neethling 1996: 28).

In identifying and classifying the separate personality interests encountered in factual reality and qualifying as objects of legal protection, Joubert (1953: 130-131) postulates that there are only two sides to the personality which enjoy such protection, namely a person's physical/mental sphere and spiritual/moral value.

Although this theory is generally acceptable, in practice it becomes too vague. Further delineation of the specific personality interests falling within such two spheres is necessary, and a brief description of the principal classifications (which may also be applicable and relevant to indigenous law) is set out below, using Neethling

(1996: 29-38).

4.6.2 Right to the body (and right to life)

A person's bodily or physical aspect is clearly the legal object most intimately connected with his personality. According to Hoexter J.A. in *Min of Justice V. Hofmeyer* (1993 3 SA 131 (A) 145),

One of the individual's absolute rights of personality is his right to bodily integrity. The interest concerned is sometimes described as being one in *corpus*, but it has several aspects.... it comprehends also a mental element.

Two aspects of physical integrity should thus be distinguished, namely the body and physical liberty. Both of these can be the object of an independent personality right.

It is possible to infringe the human body in many ways: any conduct which has a detrimental effect on the physique, psyche or sensory feelings can be regarded as an infringement of the interest in bodily integrity. The right to life is not only an obvious prerequisite for all other personality rights, but is also specifically associated with the right to the body: the right to life may be described as the right to keep one's body alive. Special protection of the right to life is also granted in terms of section 11 of the South African Constitution (Act 108 of 1996).

4.6.3 Right to physical liberty

Physical freedom is of immense value to a person – so much so that it is also specifically recognised as a fundamental human right

by virtue of section 12 of the South African Constitution (Act 108 of 1996). It is essential that freedom of the body be distinguished from the body *per se* and acknowledged as a separate aspect of personality. Joubert (1953:131) notes that such a right is infringed not only by detention or total deprivation of liberty, but also by any interference with an individual's freedom to move or act.

4.6.4 Right to good name (reputation)

Since a person is part of a society and by nature a social creature, the esteem in which he or she is held by others in the community is of particular importance. Good name or reputation (*fama*) deserves protection as an independent aspect of personality (Joubert 1953: 134). Any action, which lowers a person's reputation within the community, infringes his good name and amounts to defamation. Whilst defamation is often associated with patrimonial loss suffered by the victim, it is essential to distinguish between reputation as an object of a personality right on the one hand and reputation as an element of patrimonial assets (for example, goodwill), on the other. It is only in the latter category that reputation may acquire a patrimonial character.

4.6.5 Right to dignity or honour

De Wet and Swanepoel (1960: 252) state that a general right to dignity is too broad and takes the matter no further than a general right to personality. As such, Joubert's (1953: 131) definition of dignity as the recognition of a person's spiritual/moral value as the foremost (physical) entity in creation is too vague, and further delimitation is necessary. Van der Merwe and Olivier (1989: 390) are of the opinion that dignity embraces only a subjective feeling of

honour or self-respect; infringement of a person's dignity involves insulting that person (and his pride in his own moral value). Such legal object should be clearly distinguished from other personality interests, and has no role to play in questions of defamation, infringement of the body or infringement of privacy. Human dignity is also recognised as a fundamental human right in terms of section 10 of the South African Constitution (Act 108 of 1996).

4.6.6 Right to feelings

In addition to feelings of dignity, a person has a wide variety of other spiritual/moral feelings or inherent perceptions about such diverse matters as love, faith, religion, sentiment and chastity. Any unlawful disregard for such feelings strikes a blow at a person's innermost being, consequently feelings deserve legal protection. It is important to distinguish between dignity and other feelings: insult plays no role in infringement of feelings other than dignity.

Neethling (1996: 33) disagrees with Joubert's (1953:131) view that human feelings are merely an aspect of physical integrity, stating that they are, in fact, directly related to a person's spiritual/moral value and are thus to be recognised as a separate legal object.

4.6.7 Right to privacy

Sociologists and psychologists agree that a person has a fundamental need for privacy. Individuals have an interest in the legal protection of their privacy; such a right is also recognised as a fundamental right in terms of section 14 of the South African Constitution (Act 108 of 1996). The main problem in the sphere of privacy, however, is the formulation of a proper definition.

Neethling (1996: 36) defines privacy as

an individual condition of life characterised by exclusion from publicity. This condition includes all those personal facts which the person himself at the relevant time determines to be excluded from the knowledge of outsiders and in respect of which he evidences a will for privacy.

Neethling (1996: 36 – 38) states that in many instances, privacy is incorrectly equated with other personality interests, and it is important to briefly distinguish from privacy such legal objects as set out below.

4.6.7.1 *Good name and dignity*

In the case of infringement of privacy, facts are disclosed contrary to the individual's determination and will; the question of whether someone's good name has also been infringed is irrelevant. An infringement of dignity or insult plays no role in deciding whether there has been a violation of privacy.

4.6.7.2 *Feelings*

Joubert (1953: 136) regards anything disturbing a person's peaceful life as an infringement of privacy. However, de Wet and Swanepoel (1960: 251) are of the view that, since there is no acquaintance with personal facts contrary to the determination and will of the persons involved, these instances should not be regarded as violations of privacy, but rather as infringements of the victims' feelings (either physical-sensory or spiritual-moral).

4.6.7.3 Body

Unauthorised medical examinations or tests, in addition to constituting infringement of physical integrity, also violate privacy. They involve an acquaintance with personal facts (mostly of a medical nature) which is contrary to the determination and will of the person involved.

4.6.8 Right to identity

People's uniqueness or individuality as particular persons distinguish them from others. Identity is manifested in various *indicia* by which a particular person can be recognised. A person's identity is infringed if any of these *indicia* are used without authorisation in ways which cannot be reconciled with his true image. A person has a definite interest in the uniqueness of his being and conduct being respected by others. Whereas privacy is infringed through an acquaintance with true personal facts regarding the holder of the right contrary to his determination and will, identity is infringed only by the untrue or false use of the *indicia* of identity.

4.7 CONCLUSION

This brief review of the theoretical basis of the law of personality is to be viewed against the recognition of the rights of personality as a separate class of subjective rights. According to Joubert (1953: 115 *et seq*), the correct approach is to recognise substantive rights of personality rather than to protect personality by means of prohibitions against certain forms of conduct directed against interests of personality. This approach is also of considerable

practical importance and firmly entrenches the protection of rights of personality in South African law.

Chapter 5

APPROACHES TO THE STUDY OF INDIGENOUS LEGAL SYSTEMS

5.1 INTRODUCTION

Before discussing the different approaches to the study of indigenous legal systems, it is necessary to examine the characteristics and nature of such systems.

5.1.1 Characteristics of indigenous legal systems

Allott (1965: 131) views the indigenous legal systems of Africa not as constituting a single system, but rather as “a family of systems which show no traceable common parent....But, more fundamentally, African laws reveal sufficient similarity of procedure, principles, institutions and techniques for a common account to be given of them”. Vorster and Whelpton (1999: 13-16) analyse the characteristics of this “family” of legal systems as indicated below.

5.1.1.1 *Unwritten nature*

Originally, indigenous law was not recorded in written legal sources and, with court procedures conducted orally, the law was transmitted orally from one generation to the next. As a result of public participation of adult men in the administration of justice, the community was endowed with a broad general knowledge of the law. The same unwritten nature is evident in Swazi law and custom, consequently the community was also endowed with a broad knowledge of the law (Marwick 1996: 280). Important legal

principles were generally expressed by means of legal maxims (for example, the Swazi maxim *umuntfu ngumutfu ngebantfu* – “a person is a person in relation to other people” – which expresses group orientation and humanness).

5.1.1.2 *Customary nature*

Most indigenous legal systems grew from age-old traditions and customs, which, in the course of time, came to be classified as “law”. In addition, laws were sometimes promulgated by the rulers and, as such, had to be followed. The courts in indigenous legal systems merely applied law but did not create it – with no system of precedent being known.

Marwick (1966: 280) found that among the Swazi “... the repository of these traditions is chiefly the old men, particularly those associated with the king’s village where they are continually in attendance listening to and taking part in cases and making use of the code which is to them a living body of precepts”. Vilakazi (1977: 227-228) states that when Swazis speak of “our way of life” and “our traditions”, they are referring to the social relationships and social actions which take, as their point of departure, age-old customs validated by the ideology of traditionalism and legitimised by the king. The king and the royal family are, in fact, the main custodians of Swazi law and custom. Announcements made by the king become Swazi law when they are made known to the nation, usually at the cattle byre where all national meetings are held (WLSA 1994: 24). Hence the Swazi refer to the King as *umlomo longacali manga* (“the mouth that never lies”) (Whelpton 1997:147).

5.1.1.3 *Expression of community values*

With public participation in the adjudication process, the prevalent values and moral behavioural code of the community are identified and expressed. As values change in the course of time, so does the law. With regard to the Swazi, Whelpton (1997: 147) points out that conflict between legal and moral values is thus unknown and the dynamic nature of Swazi law and custom is illustrated. This would appear to be applicable to indigenous legal systems generally. Indigenous legal systems focus primarily on reconciliation of people to ensure maintenance of communal harmony.

In such a community focus, the individual functions only within the context of either the family group or the community as a whole. Bennett (1999: 5) indicates that, because the family group (kin) is the focus of social concern, individual interests are inevitably submerged in the common weal. People are rather expected to compromise their own individual interests for the good of all. The legal relationships of most consequence in indigenous law are those that arise from a family's dealings with other families and not those flowing from one person's relations with another. Due to the powerful ethic of generosity towards kin, African social and legal systems both assure human dignity in all material respects.

Indigenous legal systems, in endeavouring to reconcile parties, seek a just decision, based on social (human) justice, so that harmonious relations may be maintained and stability restored to the community as a whole. Any conflict – in disrupting established social relationships – is seen as a potential threat to the stability of

the community. The aim of indigenous law is thus to reconcile people – not only with each other but (more importantly) also with the community at large (Anspach 2003: 78). Van der Merwe (2000: 69) illustrates this emphasis on reconciliation with a maxim from the *Bakwena ba Mogopa*: “*Bana ba motho ga re we re a amaomana*” (“family members quarrel with each other, they do not fight”).

Among the Swazi, (see chapter 10, section 10.4.3.4), the chief’s court often refers matters back to the families concerned for settlement and reconciliation, the applicable maxim being “*tibi tendhlu*” (“a dislike of family dirty linen being washed in public”). Moreover, one of the principal elements of the indigenous concept of *ubuntu* is forgiveness, and it is this value that is promoted to restore community harmony through reconciliation; the intensively litigious nature to be observed in many specialised Western societies is thus absent.

Among the Swazi, settlement of disputes also takes into account future relations between the people within the community. The administration of Swazi justice does not primarily concern legal justice as such, but rather reconciliation between people to this end. Whelpton (1997: 147) notes that there are many Swazi informal dispute-settling institutions, such as the family council (*lusendvo*) and regimental and age group institutions (*emabutfo*). Marwick (1966: 281) states that, since the interests of the community are considered so important in the eyes of Swazi law and custom, the individual alone has no special part to play. His role is played

within the confines of the group – both family and community.

5.1.1.4 *The importance of magico-religious concepts in indigenous African law.*

Africa abounds with conceptions and beliefs regarding the supernatural; each cultural grouping has its own particular view of these phenomena. However, for the purposes of this study, only two general concepts concerning supernatural beliefs and their consequences will be examined.

5.1.1.4.1 *Belief in ancestral spirits*

In indigenous cultures, it is believed that ancestral spirits maintain contact with their living relatives on earth and thus have an interest in the community. The rules for living, and thus also the law, are derived from the ancestors and enjoy the protection of ancestral spirits (Vorster & Whelpton 1999: 14). Such protection ensures that legal rules are obeyed and that any transgression is punished by such ancestral spirits, who will “send” misfortune (such as illness or drought). This clearly acts as a powerful sanction: since the law is of supernatural origin, it will thus seldom be questioned. Vilakazi (1977: 227 – 228) indicates that this is also the position among the Swazi: the social order derives from the sacredness of tradition, the validity of which is re-inforced both socially and psychologically by fears that if tradition is transgressed, the anger of ancestral spirits will bring with it magical evils.

Among the Swazi, infringement of a right of personality involving the ancestors is regarded in a much more serious light than one involving a living member of the community (see chapter 10,

section 10.4.3.3.2). The status of the ancestors is such that any insult against them carries with it the presumption that all subsequent living generations have come from “bad roots”.

However, this belief also gives rise to an apparent paradox: on the one hand, since any change in the law may be against the “conservative” wishes of ancestral spirits, the law remains relatively static, while on the other hand, clearly the “living” law has to adapt to be a true reflection of the lifestyle and changing mores of the community.

5.1.1.4.2 *Belief in sorcery*

It is also believed that there are supernatural powers at work in the universe, and that such powers may be harnessed to the advantage or disadvantage of people. Labuschagne (1990: 247-248) ascribes the embracing of such beliefs to the need to explain the cause of an illness or catastrophe (in a community with little medical or scientific knowledge), so that such “cause” can be removed.

Despite Westernising influences, this belief in sorcery remains strong (Labuschagne 1990: 256-257), and sorcery is still regarded in a very serious light. Comprehensive efforts are made (using supernatural means, if necessary) to identify and remove the sorcerer to dispel such a polluting element from the community. In indigenous law, even the mere allegation of sorcery against a person constitutes a serious insult (involving the infringement of a right of personality) to such person’s good name/dignity; it also carries with it certain criminal implications.

5.1.1.5 *The observance of the rules for living in indigenous African law*

Vorster and Whelpton (1999: 15) note that in most communities, people voluntarily observe legal rules and rules for living, often without the necessity of intervention by law enforcement agencies. Of fundamental importance is the religious or sacral element of law and in this respect, Coertze (1971: 5) found that in indigenous communities, the traditional religious elements are always aligned to the worship of the ancestral spirits.

With the emphasis on the importance of the community rather than the individual, people's behaviour is largely prescribed by public opinion and sensitivity to how others might view such behaviour (together with what repercussions it might have for the community as a whole). In addition, the fear of punishment (particularly of supernatural origin) operates as a powerful sanction to ensure adherence to legal rules. Sorcery, too, acts as a powerful sanction, namely the knowledge that people may use "magic" medicines or means in an effort to protect themselves from harm. Yet another important factor in the voluntary observance of the rules for living is that everybody in the community has a broad general knowledge of the law (see section 5.1.1.1 above). Everybody is able to ascertain how the law operates in their community and what the consequences of the acts or transgressions will be.

Finally the influence of the indigenous leaders in the community is also fundamentally important (Vorster & Whelpton 1999: 16). Since they are the living representatives of the ancestors, the authority of the leaders is *ipso facto* not questioned. Since the

leaders and their councils are also bearers of the community's traditions, their position of authority within the community is thereby reinforced and upheld.

With regard to the Swazi, Marwick (1966: 283) states that public opinion is the primary means of enforcing compliance with Swazi law and custom. Breach of customary norms may result in deliberate ostracism and derisive songs being sung about the offender. Marwick also mentions what he calls a "moulding" force, which is spiritual and ritual in nature, as opposed to a sanction, which demands or prohibits. A Swazi person needs the assistance of his or her family to ensure that good rains come, that crops are produced, that illnesses are treated and that his or her spirit rests peacefully after death. These beliefs ensure that family members are reluctant to oppose the larger family and clan in their actions (WLSA 1994: 27). Ritual sanctions also play a role. There is, for example, a taboo against going to the kings' burial place: it is believed that any one who does so will suffer immediate and permanent blindness (Marwick 1996: 284).

5.1.2 Nature of indigenous legal systems

5.1.2.1 *Specialisation*

The purpose of any legal system is to regulate the relations of its people. When such relations are regulated by law, rights and duties are created. As mentioned earlier (see chapter 1, section 1.5.2), indigenous legal systems place greater emphasis on people's duties than on rights, thereby reflecting the importance of community values.

The legal systems of the world differ from one another in their degree of specialisation. Myburgh (1985: 3) states that specialisation is connected with population; the circumstance that indigenous peoples are numerically small (with lack of “surplus accomplishment”) raises the presumption that their cultures are of the non-specialised types. With law being one of the many aspects of culture, it may be deduced that indigenous legal systems are thus unspecialised.

5.1.2.2 *Unspecialised nature of indigenous law*

Myburgh (1985: 9) maintains that the private law of indigenous peoples, no less than their public law, is essentially of the non-specialised kind. The indigenous legal systems of Africa may be described as unspecialised when compared with Western legal systems, which are more specialised. Myburgh (1985: 2) describes specialisation as implying the separation, differentiation, division, distinction, classification, delimitation, definition or individualisation in respect of time, activity, functions, interests, duties, knowledge and concepts including the isolation or abstraction of ideas and concepts.

Notwithstanding the distinction between specialised and non-specialised systems, Vorster and Whelpton (1999: 20) suggest that some similarities do exist between the two systems. Relations governed by law are broadly the same for all legal systems: they comprise relations between organs of authority and subjects, on the one hand, and relations among groups and individuals themselves, on the other. Moreover, the means by which law is transferred from one generation to another is also basically the same in all legal

systems. It commences with education in the family context, develops in the wider context of the community, and (in specialised legal systems) is further enhanced by formal instruction. Finally, in all legal systems, transgression of the law and legal rules implies certain consequences for the transgressors.

5.1.2.3 *Specialisation in approaches to study and to theory*

Being an integral part of generally non-specialised cultures, the indigenous legal systems of Southern Africa are of the non-specialised type. However, Myburgh (1985: 12), states that the distinction between specialised and non- specialised systems is entirely free from judgement based on values, and should be utilised purely as a conceptual and terminological device. Specialised and non-specialised jural systems do not differ in nature, since law is one of the aspects of the cultures of all peoples (Myburgh 1985: 98). Indigenous legal systems cover the same ground and comprise the same divisions as other jural systems, so that the former systems must be as capable of explanation in terms of jural theory as the latter systems, with adaptation of the theory, if necessary.

Jural theory is and will always remain an abstraction that can be tested only against the background of social reality (Church 1991: 33). Bohannan (1970: 133) and others assert that some societies are so unique that it may be impossible to explain any aspect of their culture in terms of conceptions and principles (and by implication, the language) applicable in other societies – more specifically, more Western societies. At the same time, Pospisil (1971: 341) contends that there is “no basic qualitative difference

between tribal and civilised law” and Gluckman (1974) (quoted in Church 1991: 34) denies the “uniqueness” of indigenous law.

Myburgh (1985: 98) holds that recognising the nature of each of the phenomena requires a multi-disciplinary approach, coupled with both a comprehensive knowledge of the culture of the peoples concerned and the will to overcome enculturative handicaps.

Indigenous legal systems must be studied holistically against the background of the whole culture and the way of life of particular societies. According to Myburgh (1985: 115), by utilising a jural framework, it is possible to identify broad divisions in indigenous legal systems similar to the specialised Western systems. The results thus identified are presented in jural terms applicable to both specialised and non-specialised systems. Myburgh (1985: 98) argues that such terms are not solely the province of specialised systems, because law is a cultural universal: law is law everywhere and there is, indeed, coherence in jural theory. Myburgh (1985: 1) indicates that indigenous law (in the sense of the traditional law of indigenous peoples as adapted to change by themselves) falls within the sphere of juristic anthropology. Although the theoretical approach is juristic, the factual basis of indigenous law is to be found mainly in anthropological literature. He concludes that indigenous law is, in fact, bound up with four disciplines: law, anthropology, linguistics and government (administration).

5.1.2.4 *Specialisation in distinction between delict and crime in indigenous legal systems.*

Labuschagne (2002: 90) observes that, with indigenous legal

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systems being generally of the unspecialised type, there is no clear distinction between criminal law and private law sanctions and procedures. He adds that general principles and conditions for delictual as well as criminal liability have not clearly crystallised in indigenous law: there is no sharp delimitation or definition.

Criminal and civil cases are often heard in a single hearing, and there is no clear division between either the case and procedure or between the case and the court. Such lack of delimitation is principally due to the problem of endeavouring to distinguish between a transgression harmful to the interests of the community (a crime), and harmful to the interests of the family groups (a delict); in certain instances, the same act may be harmful to both interests simultaneously. This will be discussed in detail in chapter 7, section 7.3.

In Swazi law and custom, civil and criminal proceedings are not kept separate, although the distinction between a civil wrong and a crime is recognised (Whelpton 2004 *Emacala*: 1-2). Many civil wrongs are on occasion treated as crimes, with the offender not only being forced to make amends to his victim, but suffering punishment as well (particularly in cases of assault). Whilst the offence is tried in a single cause of action, it is only in the verdict of the court that its dual nature is explicitly recognised.

5.2 APPROACHES TO THE STUDY OF INDIGENOUS LEGAL SYSTEMS

5.2.1 General

Roberts (1979: 9) states that there are two possible approaches to the study of indigenous legal systems in Africa, namely “one explicitly concerned with law, and another with broader questions of order in society”. The former is regarded as the jurisprudential approach, in terms of which the law on a local level is distinguished from other rules and then confined to those rules enforced by the judicial bodies recognised by the state. The latter approach implies the rejection of the “legal mould” (Roberts 1979: 198), and is generally known as legal anthropology. This anthropological approach centres on the problems of order and conflict in society and emphasises the dispute settlement process. The pivotal role of the mediation and of other informal agencies in the dispute settlement process is fully recognised (Whelpton 1991: 35 – 51), whilst national *de jure* law and official state-recognised judicial bodies are considered relevant only with respect to the role they might play in the mediation process.

5.2.2 Early views

In his seminal work, *Ancient Law*, Maine (1861) traced the growth of law and legal systems in an evolutionary context. To him, a normative basis for decision-making was the key attribute of law. However, this view took no account of the fact that socially accepted rules existed, which people generally followed in everyday life – with no one in a position of authority to enforce rules. In *Crime and Punishment in Savage Society*, Malinowski

(1926), adopted a wider perspective, studying order and conflict in society away from the constricting influence of Western jurisprudence. In his view, such research needed to get away from a preoccupation with Western institutional forms to establish the means by which order and continuity are maintained in society.

5.2.3 Jural approach

Despite Malinowski's advocacy of a more holistic approach, legal theory continued to provide the framework within which most studies of indigenous legal systems were conducted. In the 1930's and 1940's, much of this research was geared to the administration of a colonial empire, and often comprised no more than inventories of recorded rules (classified in terms of the Western-law hallmarks of rules, courts and enforcement agencies).

According to Roberts (1979: 193), such empirical research suffered from two major pitfalls emanating from an obtrusive grounding in Western legal theory. The first is the unsatisfactory attempt to extract differentiated legal material from an undifferentiated mass of data found in the society being studied. Secondly, there is a gross distortion, which takes place when material that is selected is compressed into the “legal” mould. Undifferentiated normative data are thereby invested with the attributes of legal rules, and a firmly judicial character is impressed upon all forms of third party intervention (Roberts 1979: 194).

Furthermore, in the pre-independence period in Africa (following the Second World War), the efforts to “record” customary law for use in the newly integrated courts were also still centred on

compiling inventories of rules. Such “restatements” naively embodied the fundamental assumption that, without any explanation of how they actually worked in society, they would operate in the same way as rules of English law. Herein lies a serious presumptive flaw, namely that material found in African societies can safely be submitted to the same forms of analysis which lawyers use on English law (Roberts 1979: 195). Some anthropologists even remained caught up in the Western jurisprudential snare in the post-war period: For example, Pospisil (1971: 39-96) views law as “principles abstracted from legal decisions” whilst Bohannan (1965: 33-34) portrays law as rules which have become institutionalised through their presence in social forms and “re-institutionalised” through their enforcement by legal institutions.

Roberts (1979: 197) points out that not all works in the legal tradition were so restricted in their perspectives. Despite their legal concern with how legal rules are formulated and changed, and how disputes are “judged”, two works did propel the subject forward in important and enlightened directions. Llewellyn and Hoebel (1941) directed their attention to the intensive study and analysis of disputes, whilst Gluckman (1955) explored the character of the rules in the dispute process and the manner in which these might be used in decision making.

5.2.4 “Conflict” in the anthropological approach

In studying the problems of order and conflict in society, the anthropological approach escapes the constraints of legal scholarship (Roberts 1979: 198). In rejecting the legal mould, such

studies seek a suitable framework for comprehending alien institutions of social control while being aware of the inherent dangers of ethnocentric bias. The primary focus of this approach is on processes rather than on analysis of institutions or the formulation of rules – utilising the participant-observation research method.

An entirely different perspective of “conflict” is utilised to that of the law-centred approach (Roberts 1979: 200). Instead of it being limited to the narrow slice represented by proceedings before courtlike agencies, the concept of conflict is broadened to include the whole social ambit of such conflict – the sequence of events and relations between the conflicting parties in the community environment.

In this approach, rules are no longer seen as crisply determining outcome (as in the law-centred studies). Instead, they are viewed as merely a resource that may be drawn on in a conflict situation. The rigid judicial model of third-party intervention is abandoned in favour of the mediation process in the settlement of disputes. In addition, the strong element of compromise comes to the fore – giving the dispute settlement process a “bargaining” flavour, markedly different from the win-or-lose adjudication model under the common law system (Roberts 1979: 201).

5.2.5 Anthropological approach

Caplan (1995: 1-2) states that anthropology of law should not be viewed as apart from social anthropology: disputes lead to key anthropological issues, which enable one to observe social relations

in action and understand cultural systems. To focus on law purely as a set of rules is incorrect, in that it completely ignores the total socio-cultural context in the settlement of disputes. Moore (1978: 244) questions whether law directs or reflects. While lawyers generally view law as an instrument for controlling society and directing social change, most anthropologists view law as a reflection of a particular social order.

5.2.6 Socio-cultural dimension

Moore (1978: 14) cites Vinogradoff, who states that “rules of conduct are generally established ... by gradual consolidation of opinions and habit. The historical development of law starts with custom. Rules are not imposed from above by (legislative) authorities, but rise from below from the society which comes to recognise them”. This broader perspective was eventually embraced by the realist school of jurisprudence, who focused on the role of society and the influence of society on law.

To fully understand and appreciate the meaning of law requires a holistic approach. Whereas theoretical lawyers only state general principles underlying a particular branch of law, the social anthropologist analyses the relation of such principles to other elements in the socio-cultural system to gain a comprehensive understanding of law.

Nader and Todd (1978: 10) place law “in the context of broader patterns of social control” and state that this social control is to be viewed in the broader framework of the cultural and social organisation of society. Disputes are viewed as social processes

embedded in social relations, with the focus shifting from the dispute itself to the social process of which the dispute is part (Nader & Todd (1978: 16). Disputes are thus part of a dynamic social process with individuals obliged to make choices in the social interaction of such dispute processes.

Moore (1978: 30) develops the concept of “reglementary process” to examine the way partial orders and controls operate in social contexts. According to Moore (1978: 1), the same social processes that prevent total regulation of a society also reshape and transform efforts at partial regulation. In the reality of social life as a whole, law and legal institutions affect only a degree of intentional control over society. When disputes occur, “laws rules ... customs are regarded as part of the explicit cultural framework through which the attempt is made to fix social life to keep it from slipping into the sea of indeterminacy” (Moore 1978: 4). Hoebel (1954) and Gluckman (1965) highlight the cultural dimension, pointing out that the cultural component of a dispute determines how far the individual/group may stray from socially accepted norms (*vis* deviance is thus culturally prescribed).

Pospisil (quoted in Moore 1978: 17) maintains that “law as a category of social phenomena (rather than a professional lawyer’s term) exists in every society”. Hoebel (quoted in Moore 1978: 54) states that “we must have a look at society and culture at large in order to find the place of law within the total structure”. Moore (1978: 55) concludes that, in seeking an answer to the question of whether law controls society or society controls law, law and the social context in which it operates must be inspected together

within the total framework of ongoing social life. To superimpose the cultural component of accepted norms and community-based *mores* on this model produces a comprehensive picture enabling the required holistic focus on this topic (see chapter 1, section 1.5.1).

5.2.7 A possible synthesis of the two approaches

The question of whether these two approaches are mutually exclusive or whether there can be a future meeting point between them is hotly debated. The law-centred approach is criticised for concentrating on only one particular mode of social action – investigating the nature and operation of a special category of rules and decision-making processes. Attempts to segregate mechanisms of control can only lead to distortion, whilst an overriding concern with “legal” can too easily lead to damaging attempts to fit indigenous data into alien categories (Roberts 1979: 203).

At the same time, the anthropological approach is criticised for its vagueness: in casting its net too wide, the rigour of the study is lost. In focusing on behaviour, particularly the way in which people pursue interests, the anthropological approach is judged as overlooking the essential normative character of control mechanisms found in all societies.

In the final analysis, the fundamental question is what is gained by insisting that particular arrangements should be characterised as “legal” and others not? The “legal” label does not in any way assist in understanding what particular institutions look like, how

particular processes work, or how these are to be distinguished analytically from those in other contexts.

Roberts (1979: 204) proposes three areas where some common ground might be found. Firstly, the jural approach's interest in rules and institutions can complement the anthropological approach's concern with processes and with what individuals are actually doing. Secondly, understanding how rules operate and their relationship to the pursuit of interests and the exercise of power can involve some commonality. Whilst the jural approach focuses on ways in which rules delimit the shape of institutions, prescribe courses of conduct and determine outcomes, the anthropological approach tends to neglect rules to a large extent in considering the way people order their affairs and endeavour to secure their interests. Thus, the focus should rather be on what people say and how they say it in the conduct of disputes. The importance of talking to achieve settlement of disputes informally in indigenous cultures should never be underestimated, and it represents an integral part of the "living" law of a community. Finally, the way rules are perceived and manipulated is crucial in dealing with such questions as why people obey rules and under what circumstances rules acquire, retain or lose social acceptance. Such concerns are of paramount importance to the lawyer and the anthropologist alike, and Roberts (1979: 205) concludes that, in any society, statutory innovation and creative judicial activity must remain uncertain exercises until these two questions are more comprehensively answered.

5.2.8 An alternative approach

The so-called “case method”, comprising observation of trials and collecting data from court records, is an alternative approach to those outlined above. However, with few cases being recorded, this approach has severe limitations. Where cases are, in fact, recorded, the records are seldom a verbatim rendering of court proceedings and may contain little information on which to base research or test theories. Prinsloo (1991: 9) states that, with judgements of tribal courts lacking in judicial reasoning, it is difficult to ascertain how the decisions are reached. Cases do not provide adequate coverage of all the different aspects of the law and no series of cases on its own can provide a complete system of law.

Prinsloo (1991: 10) views the case method as allied to the theory of legal realism – with law being viewed as a complicated system of social phenomena. The emphasis is thus on investigation by the courts (and other institutions) and on procedures and techniques used in settling disputes.

The limitations of this method do not render it a sustainable approach *per se* to the study of indigenous legal systems. Its principal merit would be as a complementary method to other approaches. However, its efficient utilisation also requires that those aspects of culture which are necessary for proper understanding and explanation of a people’s law should be recorded and taken into account. Thus, the case method is best suited as a complementary investigative tool to the legal anthropological approach.

5.3 ETHNOCENTRIC VIEW OF LEGAL SYSTEMS

Roberts (1979: 13) questions whether our own ideas about law can provide a satisfactory framework for understanding and describing the control mechanisms we find elsewhere. Is our legal theory entirely parochial, or does it constitute a safe base from which to commence cross-cultural studies? In contrast to Myburgh, he concludes that our ideas about law, in fact, provide a very insecure starting point for examining other people's institutions of social control. Roberts (1979: 14) proposes that the focus of attention should no longer be on "have they got law?" and "how closely do their legal institutions match our own?" but on "how is order maintained and by what means are quarrels dealt with?"

According to Roberts (1979: 17), bearing in mind that law represents but a specific feature of a particular society, how can an understanding of the vocabulary, concepts and institutional arrangements which we associate with "law" be of value when investigating the ways in which order is maintained elsewhere? The central problem of the social sciences in examining features of alien cultures is the tendency to endeavour to fit "concepts" (consciously or unconsciously) into Western frameworks thus distorting such concepts and rendering conclusions based on their examination either unreliable or invalid.

5.3.1 Western legal systems (of the specialised type)

Roberts (1979: 20) notes that in Western legal systems, the basic premise is that "rule determines outcome". Generally in such a rule-based adjudication system, the element of compromise is not

encouraged: one party wins and the other party loses. Once the dispute is in the hands of legal specialists, they dictate both the form and the course that the dispute takes. Once a decision has been reached, official enforcement agencies will ensure that the parties fully comply with such decision. Due to the specialised nature of Western legal rules and courts, “the law” has an apparently differentiated character as a discrete sub-system, cut off from the rest of society (Roberts 1979: 22). The law enjoys pre-eminent authority and, with all other normative systems giving way to legal rules, the courts are the ultimate and authoritative agencies of dispute settlement. Thus, the Western view of what is law embodies the above attributes of rules, courts and sanctions in some form of centralised state organisation.

5.3.2 Indigenous legal systems (of the non-specialised type)

The above Western model is in stark contrast to the position obtaining in what Roberts (1979: 25) describes as the “small, face-to-face acephalous communities, which hold together without the apparatus of the State”. People in such communities do not always think in terms of rules or obligations. While there are patterns of habitual conduct followed by members of the community (enabling one member to predict how another is likely to behave in certain circumstances), a normative base for such regularities is not clearly conceptualised or articulated. A clearly-defined *corpus* of rules presents an inappropriate basis for attempting to ascertain the basis of such community’s “law”.

5.3.3 Comparison of Western and indigenous legal systems

The Western legal system’s adjudicatory model completely ignores

the importance attached in both indigenous law and culture to mediation. Meeting and talking are regarded as important means of resolving disputes and thereby restoring harmony in the community.

The differentiated character of Western legal systems is at complete variance with the indigenous mechanisms for maintaining continuity and handling disputes. The latter are firmly embedded in everyday life – unsupported by a differentiated legal system (Roberts 1979: 27). There is clearly a lack of fit between Western legal arrangements and control mechanisms in indigenous societies. Much of Western legal theory would appear inapplicable, so much so that it might even be regarded as inappropriate to use the term ‘law’ at all in this respect.

5.4 JURAL POSTULATES IN WESTERN AND INDIGENOUS LEGAL SYSTEMS

Jural postulates in Western legal systems are essentially of a specialised character, based on legal and cultural traditions which emphasise individualism. In contrast, in indigenous legal systems, jural postulates are non-specialised in nature; their basis rests on African cultural traditions which emphasise social solidarity and communal harmony.

5.4.1 Definition of jural postulates

Law and its underlying jural postulates represents an important aspect of a community’s culture and, as such, should reflect a society’s value systems. According to Pound, (1968: 112), jural postulates include the fundamental purposes of law and constitute

the starting points for legal reasoning. Hoebel (1954: 13) describes them as self-evident truths based on societal values of what is desirable and what is undesirable. According to van Niekerk (1995: 160), jural postulates are the basic axioms underlying law; they focus on values (which are culturally acquired) and form an integral part of the structure of law.

Van Niekerk (1995: 161) states that jural postulates are “fundamentally applicable”, which means that, without being incorporated into specific legal norms, they are respected in judicial and administrative decisions together with legislation. In addition, they underlie specific legal norms and form the basis of the interpretation of such norms.

5.4.2 Jural postulates in Western and indigenous legal systems

Van Niekerk (1995: 161) distinguishes between jural postulates applicable to Western and indigenous law. The former comprise the principles of natural law, justice and equity, whilst in the latter systems, social and cultural precepts concerned with clan unity, bilineal descent and seniority are the relevant postulates.

Van Niekerk (1995: 196-212) identifies harmony of the collectivity, super human forces as being superior to man, and the identity postulate as diffuse postulates (*vis general postulates* which support specific postulates as well as law and social norms in general) in indigenous legal systems. The identity postulate enables indigenous law to develop and adapt to changing circumstances while retaining the former two fundamental premises. The characteristic accommodating nature of indigenous

culture is demonstrated, which is responsive to change by integrating such change without displacing its existing structures (van Niekerk 1995: 209). Amongst the specific postulates (postulates with specific relevance to specific legal rules) identified by van Niekerk (1995: 212-228) are status order, family/group orientation and the common-kin principle.

5.4.3 The question of whether Western jural postulates are applicable to indigenous law

Van Niekerk (1995: 228) concludes that there are, indeed, cases where, *prima facie*, the Western jural postulates appear to find application in indigenous law. However, she (1995: 229) cautions that indigenous perceptions of such postulates usually differ from Western concepts, thereby leading to different results being obtained. Citing instances of public policy *boni mores*, public interest, equity, reasonableness and good faith, van Niekerk emphasises that the distortion of indigenous law to conform it to underlying postulates of Western law should be guarded against. Western terminology should merely be used as a device to explain or understand indigenous law. She illustrates that the most basic differences between Western and indigenous law lie in the diffuse postulates of the two legal cultures: these diffuse postulates determine the content of the specific postulates and direct legal development. Like Roberts (1979), van Niekerk emphasises the folly of endeavouring to analyse indigenous legal concepts in Western terms.

Indigenous legal norms have changed in line with underlying postulates, but such norms have been distorted through judicial

application, legislation and inadequate knowledge of the Western legal specialists who endeavour to apply indigenous law. Official indigenous law has been further distorted by adaptations incorporating some Western concepts – causing indigenous law to fall out of step with its underlying jural values as expressed in its jural postulates.

Western concepts of individual freedom and equality (reflected in the modern liberal perceptions of justice) find no resonance with the indigenous diffuse postulates outlined above. In line with the non-specialised nature of indigenous law, diffuse and specific postulates should be regarded as an integrated whole. There is a fundamental conflict between indigenous and Western perceptions of the basic values pertaining to authority, justice, order and morality.

5.5 CONCLUSION

This study maintains a holistic focus on the topic. A possible synthesis of the jural and anthropological approaches was examined in section 5.2.7 above. Legalism seeks to separate law and other norms and indeed separate law from social values. In indigenous legal systems, the law is moulded by and reflects social values and community *mores*, thus a close relationship is maintained between law and other norms. Taking cognisance of this distinction, this study embraces the anthropological approach in the examination of indigenous legal systems, but guards against examining too broad a spectrum of social life. The rationale for this method is to follow Malinowski's definition of law by function and not by form, and to adopt the American realist approach of

what law does rather than what it is.

Acknowledging that a degree of regularity is essential for group survival and that disputes are, indeed, inevitable, there would appear to be little justification for adhering to a jural approach focusing on rules, which emphasise distinctions having little meaning, relevance or currency in most indigenous societies. In studying indigenous legal systems (which form part of the lifestyle of the peoples governed by them), it is essential that the focus on concepts that are regarded both as relevant by and acceptable to the peoples concerned be maintained.

Chapter 6

RIGHTS OF PERSONALITY AND UNSPECIALISED LEGAL SYSTEMS

6.1 INTRODUCTION

This chapter examines indigenous legal systems and the fundamental differences between specialised and unspecialised legal systems, together with the practical consequences for rights of personality flowing therefrom. The unspecialised legal environment has far reaching effects on the way in which rights of personality are both perceived and applied by indigenous communities.

6.2 DIFFERENCES BETWEEN SPECIALISED AND UNSPECIFIED LEGAL SYSTEMS.

6.2.1 Concept of time

The element of time is an important point of distinction between specialised and unspecialised legal systems. In the former, specific moments in time are often important, so that, for example, an action has to be instituted before a certain time. Also precise moments in time often determine when rights and duties come into existence. In unspecialised systems, however, prescription is unknown. Moreover, precise moments in time are often not as important as the fact that the event did actually occur (usually as part of a process). This demonstrates the real and concrete nature of unspecialised legal systems.

Among the Swazi, in cases of seduction, the girl’s family should notify the seducer’s family of the defloration without delay (“*kubika sisu*”). While the action should be instituted as soon as the defloration is noticed, delay in instituting the action does not, however, deprive the girl’s family of their claim; a claim cannot be extinguished by prescription. The Swazi say “*licala aliboli*”, meaning a “debt does not decay”.

There is no specific age in terms of years when someone is recognised as a “major” amongst the Swazi (Whelpton 2004 Persons: 6). However, age is not entirely without legal significance. A person is only recognised as “grown up” when he or she has reached puberty; a person cannot marry until attaining puberty. This demonstrates that a specific fixed age in terms of years is not as important as the fact that the young person has reached puberty. It is thus physical development that serves as an indicator for age grouping among the Swazi.

6.2.2 Group as opposed to individual orientation

Group as opposed to individual orientation is another significant difference. Specialised systems emphasise the individual and, in many instances, the individual may even uphold his or her rights against the interests of the State or community. Unspecialised systems emphasise the group – the individual only functions within the context of the group. This orientation is clearly discernible in the sphere of education: specialised systems stress a person’s individuality and own achievements, whilst unspecialised systems ensure that the individual is adapted and subordinated to the interests of the group, with the individual (as part of the

acculturation process) accepting a particular place and rank within the community (Vorster & Whelpton 1999: 21).

In original indigenous law, the strong individualisation of rights was almost absent, so that the group and not one individual was the owner or creditor. In modern indigenous law, the position is changing somewhat, however, in favour of greater individualisation (Myburgh 1985: 10). In specialised systems, a girl who has been seduced can institute a delictual action herself, but in indigenous legal systems, such a girl cannot institute an action for defloration, since the rights belong to the group as a whole and not to her as an individual. Only the group can institute proceedings, and, as indicated earlier (see chapter 1, section 1.4.3), among the Swazi all rights and duties vest in the family (*umndeni*).

Myburgh (1985: 7) points out the lack of individualistic specialisation (typical of Western systems), stating that no equivalent of the notion of a “juridic person” exists: groups are seen as people belonging together.

6.2.3 Concrete as opposed to abstract approach

Whereas specialised legal systems adopt an abstract approach, unspecialised legal systems follow a more concrete, real and visible approach (Vorster & Whelpton 1999: 22). In indigenous legal systems, where a wife committed adultery, the husband, in instituting a claim against the lover, required only proof of improper intimacy (and not of actual sexual intercourse). Such proof was best obtained in catching the person in the act, when the husband would usually take possession of some of the adulterer’s

personal belongings such as a “kierie” (a staff or walking stick). This evidence is generally known as *ntlonze* among the *Xhosa* – and particular value is attached to such evidence by the courts.

Vorster and Whelpton (1999: 22) also use the law of marriage to illustrate this distinction – showing that abstract consent and abstract expression of intent (characteristic of specialised systems) are largely replaced by apparent, observable and visible acts from which consent becomes readily clear to all in a concrete way.

With regard to contractual liability, specialised systems adopt the concept of a consensual contract giving rise to a relation of mutual obligation once validity requirements have been met. However, in unspecialised systems, their concrete and real nature demands performance or part-performance to establish contractual liability (Anspach 2003: 71). Van der Merwe (2000: 72–73) uses the maxim of the *Bakwena ba Mogopa*, “*diphoko di matlhong*” (“words are in the eyes”) to illustrate this approach; the Swazi say “*inkhuhumo ibonakala emehlwani akho*”.

6.2.4 Categorisation

In unspecialised systems there exists no clear distinction between categories, institutions and concepts. Vorster and Whelpton (1999: 23) state that it is often difficult to determine whether authority in a family group (with many members) concerns private law only or whether it also includes elements of public law as well. The distinction between categories of transgressions is sometimes vague, so that it is not always possible to distinguish whether a transgression is harmful to the interests of the community as a

whole or to the narrower interests of family groups only (*vis*, the distinction between crime and delict). Thus, in indigenous legal systems, theft of another person's property is merely a delict, while stock theft (with stock, particularly cattle, playing a prominent role in indigenous life and in the community) is always regarded as a crime. As mentioned earlier (see chapter 5, section 5.1.2.4), there is also no clear distinction between civil and criminal cases and no separate court procedures therefor.

As indicated in chapter 1 (see section 1.4.1), civil and criminal proceedings are not kept separate in Swazi law and custom – although the distinction between a civil wrong and crime is recognised. The “law of persons” has not been formally defined in Swazi law and custom. In practice, it comprises rules concerning the different classes of legal subjects and the legal status of each of these classes.

6.2.5 Legal procedure and authority

In original indigenous law, in the case of seduction, it was a strict custom that the girl's group should notify the seducer's agnatic group of the defloration without delay. This is still the position among the Swazi – “*kubika sisu*” (“reporting the pregnancy”): this notification commences the formal institution of the action for defloration. Any unreasonable delay in notification, however, can prejudice the claimant's case in that the defence is prejudiced, since the seducer's group is deprived of the opportunity of examining the girl. However, as mentioned in section 6.2.1 above, for the Swazi, delay in instituting the action does not deprive the girl's family of their claim. The nature of restitution varies

between the different groupings. Some recognise only damages (for infringements of rights of guardianship), others only satisfaction (infringing personality rights of honour and good name), both sets of rights being vested in the girl's agnatic group. A few groups recognise both damages and satisfaction.

Non-specialised activity among the indigenous peoples is demonstrated by the fact that they have no professional jurists or legal practitioners (Myburg 1985: 5). In keeping with their constitutional law, every adult male is recognised as a person fit to appear in court, and whether he is specially versed in the law of his people is immaterial. The typically Western separation of the legislative, judicial and executive organs of authority does not obtain in indigenous law. The chief, advised by his council, is at once the lawgiver, the judicial head and the highest executive officer of the tribe.

With regard to the Swazi, once the King has been installed, he takes complete responsibility for ruling the nation (Whelpton 2004 Governance: 23). He is head of the nation and is taught all the laws and regulations that govern his office. His powers are very wide and, in fact, in former times, he alone had the power of life and death over his people. However, in practice, the King's powers are restrained by a hierarchy of officials whose positions depend on maintaining kinship rather than on supporting a particular king and also by a developed system of local government.

The King (*Ngwenyama*) is regarded as the "father of the Swazi

“nation”, while his mother, the Queen Mother (*Ndlovukazi*), is referred to as the “mother of the nation”. In reality, the King is chosen indirectly, for it is his mother who is actually selected. Thus, the status of the woman chosen to be Queen Mother is of the utmost importance.

Myburgh (1985: 6) states further that there is no vast body of administrative law as found in specialised Western systems. The powers and duties of and procedures for the indigenous functionary are prescribed by no more than a few principles. In small indigenous tribal communities, “every person is his brother’s keeper” consequently there is no need for a police force to maintain law and order.

6.2.6 Emphasis on rights as opposed to duties

In attempting to regulate the relations of its people, indigenous law emphasises duties rather than rights. This emphasis, in turn, gives rise to a strong group orientation, in which the individual’s duties toward the group are paramount. Great importance is attached to the maintenance of harmonious relations within the group: reconciliation of people in the group context is a pivotal concept in indigenous legal systems.

The Swazi also prefer the word “duties/authority” to “power/rights” (see chapter 1, section 1.4.2). In Swazi law and custom, the emphasis is on duties (*imisebenti*) rather than on rights (*emalungelo*). The Swazi hold that every human being has rights and duties (Whelpton 2004 Persons: abstract). A person’s status is determined by his position in respect of rights, competencies and

duties as a member of a family. A family member's share in the rights of the family corresponds, as do such member's duties, to his or her competencies.

6.2.7 Status

In Western terminology, the concept of status implies an individualistically attained position in society which carries with it certain prestige and recognition. In Western specialised legal systems, no particular significance is attached to this concept of status whereas in unspecialised indigenous legal systems, it plays a pivotal role in the law of persons. Status in indigenous cultures is inherited or acquired by such varied factors as gender, mental and physical maturity, mental state, married/unmarried state and legitimacy.

In indigenous cultures, the concept is viewed from a group perspective. Gluckman (1965: 39-40) emphasises the significance of status in the indigenous perspective by referring to the Barotse of Zambia, whose society is dominated by status. As a jurisprudential concept of general application to the indigenous environment, Gluckman points out that status is located “within the matrix of social relationships”.

Allott, Epstein and Gluckman (1969: 46) describe status as “a coherent agglomeration of a variety of specified rights and duties or capacities or incapacities”. Status relates to either a particular social function or social functions generally of its possessor, whose incidence is determined and imposed by law as a result of a given social or legal event, and which marks out a category within the

community of similar status of holders.

Among the Swazi, status (known as *sigaba* or *sitfunti*) is the condition of belonging to a family of people, to which is ascribed a set of rights, duties, powers, liabilities, privileges and disabilities (Whelpton 2004 Persons: 5 - 6). Rights and duties thus associated with duties are imposed (*ex lege*), unlike contractual rights and duties, which, in principle, are voluntarily chosen. While a person may, by an act of volition (such as marriage), acquire a status, the rights and duties attached to it are ascribed and not variable.

A person's status flows from membership of a category of people, with the most common criteria for constituting these categories being age, gender and marriage. One status is always related to another: the status of the father is relative to that of the child, a woman is relative to a man, minor is relative to major *et cetera*. As a result hereof, the rights attributed to status must find their correlative duties expressed in a complementary category. In Swazi law and custom, a woman's status determines house rank (*kudla umuti*); family and house rank is generally of particular significance in influencing a person's status.

6.2.8 Legal subjectivity

Generally, every human being has rights and duties. A person is a human being from either conception or birth and continues as a human being until either death or even after death.

6.2.8.1 *The beginning of legal subjectivity*

Specialised and unspecialised legal systems also differ on the

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beginning of legal subjectivity. Specialised Western legal systems enter into involved legal and ethical debates about specific moments in time when a foetus is viable and thus may have rights attached to it (particularly in respect of termination of pregnancy). For the most part, however, the beginning of legal subjectivity is the actual moment of birth in specialised systems. Before birth, the foetus is not a legal subject, but merely forms part of the mother or her viscera (Cronje 1993: 13-14). The birth must be fully completed and the child has to be alive after separation from the mother (even if only for a short period) for legal subjectivity to be obtained. The concept of viability of the child is thus not a requirement for the commencement of legal subjectivity in specialised legal systems, due to it being a vague concept of uncertain content.

In unspecialised legal systems, the position varies. Myburgh (1965: 10) shows that, generally, the device of deeming a natural person to have been born at a time preceding his actual birth (a fictitious individualistic time-fixing notion) is unknown in indigenous legal systems. This precludes claims for maintenance or inheritance being lodged. Most indigenous legal systems view the real, concrete and visible moment of birth as the beginning of legal subjectivity.

Among the Swazi, however, a person's legal subjectivity begins at conception (and for this reason, abortion is a criminal offence). As soon as the wife informs her husband that she has missed her period, the pregnancy is announced (*ungumuntfu bani*) and rituals for the unborn baby are performed. Should a miscarriage threaten

a pregnancy, the woman is given medicine to prevent the threatened miscarriage. In the case of seduction, damages are paid even while the young woman is pregnant, because a human being is expected who has already assumed his/her legal rights to the father's name (Whelpton 2004 Persons : 3).

6.2.8.2 *The end of legal subjectivity*

In specialised Western legal systems, a person's legal personality is terminated by death: a dead person can have neither rights nor duties (Cronje 1993: 29). To establish death and to determine the exact moment of death, the courts rely exclusively on medical evidence. The law of succession in Western legal systems determines what is to be done with the deceased's estate (assets and debts) after death (*vis inheritance of property*). In unspecialised legal systems, however, the focus is on succession: questions of what happens to the deceased's status and how the agnatic group's property is to be controlled after death are paramount. Strictly speaking, there is no division of property: the successor takes the place of the deceased and gains control over the property and people over which the deceased had control. The successor also succeeds not only to the assets but also the liabilities in the estate.

Owing to the practice of ancestral worship, for indigenous peoples, death does not terminate legal subjectivity. Mbiti (1990: 74) distinguishes between the "living dead" (dependants remembered up to four to five generations) and those ancestors who are no longer remembered (and thus no longer human beings) and who have moved on to the stage of becoming full spirits. It is clear that,

in indigenous cultures, the event of death does not terminate legal subjectivity: ancestors are still very much “human beings” (albeit beings in the spiritual world) and they remain guardians of family affairs and traditions. The spirit of the deceased person lives on and is invoked to provide guardianship of and ancestral guidance to the living family. As such, ancestors remain part of the community and have to be respected and obeyed by the living family members. The levirate, ghost marriages, and the *ukungena* custom (by which a successor for a deceased man is procreated by his widows) are all concrete illustrations that death does not terminate legal subjectivity. Also, the death of the family head does not terminate family headship, and claims are thus not extinguished.

The same principles apply among the Swazi (Whelpton 2004 Persons: 5): even a deceased person will still receive his/her marriage gifts (*umhlambiso*) if he/she were eligible for them alive; *emalobolo* is also delivered even after the death of a married woman. The wife and any children (*ngena*) she may have borne are always regarded as belonging to the deceased husband and not to the *umngeni*. Finally, whilst a bride may not necessarily be smeared with red ochre on joining her husband’s family, upon her death, it is imperative that she be so smeared in order for the ancestors to accept her.

From the foregoing, it is clear that the concept of legal subjectivity in unspecialised legal systems can and does extend far beyond the accepted birth-to-death scenario adopted in more specialised legal systems.

6.3 CONCLUSION

Strong group orientation, reconciliation of people and the seeking of the truth (irrespective of time or formalities) are the hallmarks of indigenous legal systems. Adherence to the law in the community and promotion of community values generally are ensured primarily by means of non-legal sanctions.

Van der Merwe (2000: 73) contends that the essential distinction between specialised and unspecialised legal systems is not one of substance but rather differentiation. She cites the difference (specialised systems) and lack of difference (unspecialised systems), respectively, between crime and delict as an example thereof.

It should be borne in mind that indigenous law (in the context of a dynamic social order) is involved in a constant process of change and development due to exposure to Western legal systems (Vorster & Whelpton 1999: 19). Although over time this will gradually lead to a greater degree of specialisation, it is unlikely to cause African legal systems to lose their own indigenous nature altogether. The peoples observing indigenous law will continue to regard their law as being both meaningful and relevant to their own particular way of life and world-view.

Their world-view colours indigenous peoples' approach to rights of personality. This world-view attaches specific meanings and values to such diverse concepts as dignity, status, value judgements, community harmony and duties: this will clearly affect the degree of protection afforded to rights of personality.

While it is not entirely appropriate to refer to theoretical approaches in indigenous legal systems, which are essentially concrete, real and visible in nature, nevertheless, indigenous peoples basically view the infringement of rights of personality from the standpoint of the effect both on and in the community. If individual personality rights are violated, the appropriate relief (generally satisfaction) will be framed first in terms of the effect on the injured person's standing (status) in the community together with any concurrent effect on the integrity of the community as a whole. People are thus not viewed as abstract bearers of abstract rights of personality, but as real and concrete persons with corresponding duties (to the community as a whole), which are aimed at maintaining harmony within such community.

Indigenous legal systems incorporate rules for living for the ultimate benefit of the community and as such, must always be viewed against the backdrop of the relevant social settings and cultures in which such rules are to apply.

Chapter 7

RIGHTS OF PERSONALITY AND THE LAW OF DELICT

7.1 INTRODUCTION

7.1.1 General

The question arises whether the concept of delict is known in indigenous legal systems. Whilst the focus is to be on the indigenous law of personality, an overview of the general elements of delict is both relevant and necessary in any comprehensive examination of the rights of personality.

In her study of the *Bakwena ba Mogopa*, van der Merwe (2000: 94) found that the concept of delict is known in the sense of “om inbreek te maak op ‘n reg” (“to breach/violate a right” [own translation]). Whilst the general concept of delict exists among indigenous peoples, there are many variations to be found in the various groups, and the examination of the elements to be discussed in this chapter would have to be tested against the customs of each people (as proposed by Vorster & Whelpton 1998: 32).

7.1.2 Rights

Using the generally accepted definition of delict as the unlawful infringement of a subjective right in private law, Myburgh (1985: 14) distinguishes in indigenous legal systems two principal classes of rights, namely rights of patrimony and rights of personality. The

former comprise those rights and duties which fall within a person's estate and include real rights (over material things), obligatory rights (to performance) and rights of authority or guardianship (over persons). The latter rights of personality include both body and honour and also good name. Myburgh (1985: 31) confirms that the concept of rights of personality is known among indigenous peoples and that the body and honour (including good name) are accepted as the true objects of rights of personality (Myburgh 1985: 33). As mentioned earlier (see chapter 1, section 1.4), certain types of delictual acts may involve both patrimonial loss as well as personal injury. These types of delicts are all concerned with man as a person. Accordingly, it is not possible to make a simple classification of delicts in indigenous law (Vorster & Whelpton 1998: 43). In practice, both the law of delict and criminal law may be applicable in certain instances (such as theft and assault): this will be examined in section 7.3.

Van den Heever (1984: 226) notes that, although the problem of unlawful infliction of damage is usually approached casuistically in indigenous law, general principles are however discernable. Using the generally accepted concept of delict in indigenous law as the unlawful infringement of a right, this chapter will examine the elements of an unlawful act *vis* the act, unlawfulness, guilt, causality and damage or personal injury.

7.2 ELEMENTS OF INDIGENOUS DELICTS

7.2.1 The act

Myburgh (1985: 16) states that there is evidence leading to the conclusion that purely accidental occurrences do not entail

liability: a delict requires a human act of commission or omission. In her study of the *Bakwena ba Mogopa*, van der Merwe (2000: 96) obtained examples of both types of acts. With reference to commission, they mentioned “an adulterer who intrudes upon the guardianship rights of the injured husband”, whilst for omission they used the example of “the owner of a savage dog who neglects to take proper precautions to keep it under control”, with this owner being delictually liable to a person bitten by such dog, since he neglected to take the necessary precautions to control the dog. Whelpton (2004 *Emacala*: 12) confirms that among the Swazi, purely accidental damage is almost invariably excused: intent (*inhloso*) or negligence (*budlabha*) is a requirement for liability.

There is also the instance of the so-called *omissio per commissionem*, where a person’s act creates a dangerous situation and he fails to ensure that no-one is injured. Van den Heever (1984: 231-233) refers to the example of a veld fire being started as a result of a fire in a cooking place. Among the Swazi, the fire is regarded as accidental only provided that the person in charge takes reasonable steps to douse the fire. The *Bakwena ba Mogopa* have a saying, “*mosadi fa a inama o ikanya moseso o kwa morago*” (“if a woman bends, she trusts that the back of her dress will cover her”) (van der Merwe 2000: 97).

7.2.2 Unlawfulness

Myburgh (1985: 14) states that unlawfulness lies in the infringement of a right. This principle was judicially recognised in *Zulu v Ntetwa* (1954 NAC 162 S), where it was held that unless

rights are infringed, there can be no cause of action.

7.2.2.1 *Grounds for justification*

An apparently unlawful act may, however, have its unlawfulness excluded on certain grounds. Van den Heever (1984: 235-276) examines the following grounds of justification (which he indicates are not fixed in number).

7.2.2.1.1 *Necessity, emergency, executing orders of duly empowered officials, spontaneous agency and truth of a statement.*

These grounds largely agree with the general law (Vorster & Whelpton 1998: 33), but the technical distinctions of modern law are absent from indigenous law. In particular, among the Swazi, orders in a chiefdom are made by *sikhulu* (chief in council), and these must be obeyed by the whole community.

Among the Swazi, attacking and killing adulterers caught in the act were regarded as lawful acts. This practice has accorded with tradition since time immemorial, not only to defend rights but also to attain satisfaction. The husband had to stab the adulterers with a spear until it touched the ground (“*afake sikhali size sidle umhlabatsi*”) (Whelpton 2004 *Emacala* 3-4). The taking of food by a starving person to stay alive is also generally considered to be lawful. The panel of experts confirmed that such a person, having taken and eaten maize cobs from a field, would thereafter hang some *imfe* grass on the maize to indicate that he had not “stolen”. In addition, he would also cut off the whole stem (and not just break off cobs) as further indication of his intentions – taking only

sufficient to feed himself.

7.2.2.1.2 *Discipline*

In private law, this power extends to children, women and their persons under guardianship and includes a husband's power to moderately chastise his wife. In public law, the initiation supervisor at an initiation school also has the power to discipline the initiates – such power being derived from the initiates' participation in a community institution (and not from the initiate's father's consent)(Vorster & Whelpton 1998: 34). The same analogy holds good also for injuries sustained in boy's kierie (stick) fights: it is the participation of the boys in a recognised community institution well established by custom (and again not the father's consent) that acts as a ground of justification thereby excluding liability.

Among the Swazi, Whelpton (2004 *Emacala*: 5) confirms that it is lawful for an adult to give a misbehaving child a beating – even though the two belong to different families, because such disciplinary action is recognised in public law. In addition, stick fighting – if played according to the rules – excludes unlawfulness because the injury was sustained during institutional action.

7.2.2.1.3 *Defence/Self defence*

What can be injured, can be protected, however, and where a threat occurs, violence to avert that danger is lawful (Myburgh 1985:29). Myburgh thus confirms that this applies to the use of force in self-defence or in defence of others or to protect the property of one's

group. Injuries to personality may be lawfully met by violence on the additional ground of obtaining satisfaction as a summary remedy.

7.2.2.1.4 *Consent*

Vorster and Whelpton (1998: 34) conclude that it is doubtful whether consent to injury was a ground for justification in original indigenous law. The father's consent in respect of initiation schools and stick fights has already been mentioned; but, can consent exclude unlawfulness in cases of seduction, rape or adultery in indigenous law? In original indigenous law, with rights being vested in the agnatic group, it was not possible for an individual to consent to the injury of the group. The same also holds good for modern indigenous law, but in this instance, it is due to the fact that consent of the female to intercourse would not be viewed as justification, since it is the guardian's rights (and not those of the female), which are infringed. In Swazi law and custom, seduction also infringes the rights of guardianship of the father or guardian of the girl (as well as the family's honour and good name) (Whelpton 2004: *Emacala* 8).

In respect of the doctor-patient relationship, it is also unlikely that consent would serve as a ground of justification. Since sickness and misfortune are perceived in indigenous cultures to have a supernatural cause, the doctor's inability to heal is not blamed on the doctor, since the supernatural cause is regarded as stronger than the doctor's power and medicines. In such cases, the blame is placed upon the person causing the sickness, which precludes the

possibility of consent in this doctor-patient relationship.

7.2.3 Guilt

The perpetrator should be legally blameable for the act. As indicated in section 7.2.1 above, accidental events do not appear to lead to liability.

7.2.3.1 *Forms of guilt*

The two forms of guilt, namely intent (*dolus*) and negligence (*culpa*), do apply to indigenous law generally, but it is not clear whether they also apply specifically to the indigenous law of delict (van den Heever 1984: 318). It is also unclear what criteria are used in indigenous law to determine negligence and whether the test is subjective or objective. Van den Heever (1984: 323-326) concludes that the available sources indicate that the test of a reasonable man is known and that such test is applied objectively.

Among the Swazi, there exists a generic term *inhloso*, which includes both responsibility and intent. The head of each family is responsible for all his dependants. Every adult person is presumed to know the law and to have intended the results following an act he/she has committed. Although motive is generally not taken into account, allowance is made for provocation (*kuchukuluteka*). Negligence (*budlabha*) as a rule does involve liability for any resulting damage.

7.2.3.2 *Accountability*

The perpetrator is liable only if the act can be imputed to him: thus, he must be accountable. Van den Heever (1984: 295-310)

examines four factors which might affect accountability: youth, mental illness, provocation and drunkenness.

7.2.3.2.1 *Youth*

Youth is taken into account amongst all groups to determine guilt, but there is no particular age at which a child becomes accountable. Generally, in indigenous culture, certain competencies are associated with progression from early to late childhood. Among the Swazi, Whelpton (2004: Persons 8) confirms the progression from the third stage (*umfana/sidzandzane*) to the fourth stage of development (*libhungu/litjiti*): for a boy, the responsibility for herding sheep and goats later increases to that of herding cattle, whilst for a girl, it takes the form of assisting her mother in a series of increasingly responsible household tasks. Guilt is thus determined in accordance with the child's stage of development (as measured by the degree of responsibility achieved).

Among the Swazi, a person would be recognised as "grown up" when he or she has reached puberty. Although there is no particular age in terms of years, there is age differentiation. Different stages for the various ages are associated with different statuses, and different clusters of rights, duties and authority are associated with them. The creation of age regiments (*kujuba emabutfo*), in addition to being a tool for socialisation, is utilised to determine the developmental stages of an individual and the significance (including accountability) that is carried therewith (Whelpton 2004 Persons: 9).

7.2.3.2.2 *Mental illness*

The little data available indicates that mental illness does exclude guilt (van den Heever 1984: 295 – 298); it should also be noted that a mentally ill person is not qualified to appear in court (Dhlamini v Dhlamini 1950 NAC 253 NE). Among the Swazi, someone who is mentally disabled (*lokubatekile*) does not enjoy the same status as the other members of the family (Whelpton 2004 Persons: 13) and, by extension, presumably not the same degree of accountability.

In this study, the panel of Swazi experts indicated that the condition of feeble-mindedness arouses much sympathy in the community, and consequently such a retarded person would not be held responsible for his or her action or words. Any proceedings against such a person would constitute unacceptable action, in that the community would be seen to be looking down on the person, and this, in itself, would be regarded as an insult to the retarded person. In these circumstances involving mental illness, an apology for any action or insult is always accepted, with no liability attaching to the retarded person, since the Swazi hold that it is not the person who so acts but the “condition” that acts: this necessitates both patience and understanding.

7.2.3.2.3 *Provocation*

The available data does not conclusively show whether provocation is a ground for justification or exclusion of liability (van den Heever 1984: 304-310). In indigenous law, when a husband has caught his wife in an act of adultery, he may assault both his wife and adulterer. However, Myburg (1985: 28)

indicates that, in certain circumstances, provocation constitutes a mitigating factor only.

The Swazi make allowance for provocation (*kuchukuluteka*), so that assault (and formerly even homicide) is held to be justifiable in certain cases and is so excused. Attacking and killing adulterers in the act were lawful acts and not regarded as taking the law into one's own hands (see section 7.2.2.1.1).

7.2.3.2.4 *Drunkenness*

Van den Heever (1984: 303) states that drunkenness does not exclude guilt, but it is not clear what effect (aggravating or mitigating) drunkenness has on delictual liability.

In this study, the experts were of the view that, for the Swazi, drunkenness would generally mitigate the insult or action, in that it is not the normal conduct of the guilty person. The Swazi often say that such a person first has to get drunk to gain the courage to make the insult or carry out the act and, as such, sympathy will be shown by the court – especially if the guilty party demonstrates remorse.

If, within a family, a member is a habitual drunkard, despite warnings from senior members of the family about his conduct, the experts stated that the family head has the power to "fine" him a goat for his disgraceful conduct affecting the family's dignity. In this instance, the guilty party must himself provide, slaughter, skin and cook the goat which is then eaten at a

reconciliatory family meal with a view to restoring family unity.

7.2.4 Causality

Although there is a paucity of data on causality, van den Heever (1984: 336) concludes that for there to be delictual liability, indigenous law requires a causal connection between the act and its consequences. This would appear to be similar to the approach adopted in indigenous criminal law, where causality is approached intuitively – with signs of applying different known tests, of involving intent or negligence in the reasoning, and of considering intervening causes (Nathan 1980: 10-12). To illustrate this point, van der Merwe (2000: 129) uses the *Bakwena ba Mogopa* maxim, “*maru gasepula mosi kemolelo*” (“clouds do not necessarily signify rain but smoke does signify fire”).

7.2.5 Damage or personal injury

For delictual liability in indigenous law, there must be either damage or personal injury. Damage refers to patrimonial loss: if a patrimony is reduced in an unlawful manner, damages are awarded. Personal injury relates to infringement of the rights of personality, which are made good by the granting of satisfaction (Vorster & Whelpton 1998: 36). Though indigenous peoples do not have different terms for damages and satisfaction, there are nevertheless indications that a distinction is made between the two forms of injury. For example, Monnig (1967: 324) states that the Pedi distinguish between damage to property, *crimen iniuria* and the violation of a girl.

As noted earlier (see chapter 1, section 1.4.1), in certain cases, the

consequences of a delictual act result in both patrimonial loss and personal injury. In such cases, it is often not possible to distinguish whether damages or satisfaction are in question (Myburgh 1985: 93). Van den Heever (1984: 338-340) notes further that, in certain cases, the award made to a delictually wronged person can also include an element of punishment.

Among the Swazi, in cases of assault (*kushaya*), in addition to punishment for the offence, the court might also order the assailant to give the victim something to “heal the wounds”.

7.3 DELICTS AND CRIMES IN INDIGENOUS LEGAL SYSTEMS

7.3.1 General

Neethling (1994: 7) confirms that the principal difference in common law between delict and crime relates to the distinction between private and public law. Whereas private law is directed at the protection of individual (private) interests, public law is directed at the preservation of the public interest. Thus, whilst delictual remedies are compensatory in character (compensating or indemnifying the aggrieved party for the harm done by the wrongdoer), criminal sanctions are of a penal nature and intended to punish the criminal for his transgression against the public interest. The same act may found both delictual and criminal liability: the difference between delict and crime is emphasised by the fact that each delict is not necessarily a crime and *vice-versa*. In tightly-knit unspecialised societies, an individual’s action may well impact on social life in the community generally: thus, the

same act may at once have delictual and criminal dimensions in disturbing communal harmony.

Myburgh (1985: 6) states that in indigenous law, civil and criminal proceedings are not kept separate, although the distinction between delict and crime is known. If the basis of litigation is an allegation of an act constituting a delict as well as a crime, Schapera (1937: 199) demonstrates that the matter is dealt with as a whole. If such an allegation is upheld, the sentence is framed to include both an order in favour of the plaintiff and the imposition of a penalty.

Whelpton (2004 *Emacala*: 2) also confirms this to be the position with the Swazi. He comments further that, in Swazi law and custom, there exists no such distinction as is drawn in specialised systems between the rules of adjective law applicable to civil cases and those applicable to criminal cases.

7.3.2 Distinction between crime and delict

As stated earlier (see chapter 5, section 5.1.2.4), Labuschagne (2002: 90) emphasises that, unlike in Western legal systems, there is no clear distinction between criminal and private law sanctions and procedures. The lack of clear delimitation between criminal and delictual liability in indigenous legal systems stems principally from the difficulty of trying to distinguish between a transgression harmful to the interests of the community (a crime) and one harmful to the interests of family groups (a delict). The position is complicated by the fact that an infringement against an individual affects his whole group as well as that all fines are not paid to the injured party but to the chief (acting in his capacity as head of the

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group). Van der Merwe (2000: 78) found that the *Bakwena ba Mogopa* do recognise a distinction between criminal and delictual law and, in fact, employ different words for the concepts – *tshenyo* for a crime and *thsenyeletso* for a delict. Procedural elements also highlight differences between crimes and delicts (van der Merwe 2000: 81). Labuschagne (1973: 7-8) and Prinsloo (1978: 4 – 15) both found the existence of such a distinction between indigenous criminal and delictual law.

In this study, the panel of experts confirmed that the Swazi also recognised the distinction – using separate words for “fine” (*inhlawulo*) and for “satisfaction” (for which they prefer the term “compensation”) – (*sicetelo/sincemphelo*). However, no separate procedures are involved, and both criminal and delictual aspects are dealt with in the same hearing. It follows that in Swazi law and custom, there is no such distinction (as drawn in specialised systems) between rules of adjective law applicable to civil cases and those applicable to criminal cases. Many civil wrongs are on occasion also treated as crimes, with the offender not only being forced to make amends to his victim, but also himself suffering punishment as well (Whelpton 2004 *Emacala*: 2). The offender is tried in a single action and it is only in the verdict of the court that its dual nature is given explicit recognition. This duality is particularly demonstrated in cases of assault where the assailant may be punished by the court and may also be instructed to give the victim something “to heal the wounds”. Such “healing the wounds” is often in the form of a cow or goat, which is slaughtered and eaten by all the parties (and court members) to restore relations between the parties, in particular, and amongst the community, in

general.

When a civil wrong is committed, the victim may and, indeed, should first attempt to obtain satisfaction by direct negotiation with the wrongdoer. Only if this fails, will he then proceed to sue him. However, a criminal offence can never be settled out of court and must always be reported to *Sikhulu* (the chief). Any fine imposed by the chief's court is not paid to the victim, but goes to the court (*vis Sikhulu* acting in his official capacity).

7.3.3 Delicts with criminal dimension

7.3.3.1 *Assault*

Myburgh and Prinsloo (1985: 100) confirm that among the *Ndebele*, assault is considered an offence of the blood (*ingazi*): the public “pollution” caused thereby has to be removed by sacrificing the animal (exacted by way of a fine) at a ritual meal of lustration. To the extent that assault infringes a right of personality in the body (as a delict), a settlement may be reached entailing delivery of livestock by the assailant’s family to the victim’s family.

Whelpton (2004 *Emacala*: 5) confirms this to be the position among the Swazi. If the matter is brought to court, the assailant may be fined and the victim awarded an animal as consolation for his or her injuries. Criminality does not depend on the severity of the attack or the means, although these two factors may affect the degree of punishment imposed.

7.3.3.2 *Theft*

With regard to theft, a distinction is generally made between theft of cattle or community goods (regarded as a crime) and theft of

other movables (regarded as a delict) (Vorster & Whelpton 1998: 43). Among the Swazi, stock theft is also punishable as a crime: the thief must return the stolen item(s), and has to pay a beast as a fine to the chief (*sikhulu*).

7.3.3.3 *Other delicts*

7.3.3.3.1 *General*

Certain delicts are seen as a violation of a prohibition which requires punishment (Myburgh 1985: 67). Should the parties settle the matter between themselves, the infringement remains purely delictual. If the matter is reported to the headman or chief for a hearing, however, then official cognisance is taken of the criminal aspect of the matter and its consequent repercussions within the community. Thus, the co-operation of the complainant's group is necessary for prosecution under criminal law (Myburgh & Prinsloo 1985: 107). In such instances, the court may order a fine in addition to the award of compensation and satisfaction. The scope of other specific delicts is examined next to ascertain the extent to which such acts also have criminal dimensions.

7.3.3.3.2 *Adultery*

Among the *Ndzundza* and the *Zulu*, adultery is considered to be both a crime and a delict (Myburgh & Prinsloo 1985: 108). If the matter is brought to court, the adulterer may be ordered to pay up to four head of cattle – of which one half are regarded as a fine for the criminal element of adultery. Among the Swazi, the injured husband had the right to kill both the adulterer and his wife if caught red-handed. Cases of adultery are often settled out of court, with the adulterer (realising he is wrong) paying what the husband

demands for the delictual infringement under Swazi law and custom.

7.3.3.3.3 *Abduction of a married woman*

In their study of the *Ndebele*, Myburgh and Prinsloo (1985: 108-109) found that, as a serious form of adultery, it is regarded as a crime amongst all four of the *Ndebele* chiefdoms. Myburgh and Prinsloo also note that the *Manala* regard abduction as a delict, because the parties can settle the matter between themselves.

Where a fine is imposed among the other chiefdoms, Myburgh and Prinsloo submit that such a fine can be seen to serve both as punishment and satisfaction. Schapera (1938: 268) found that among the *Tswana*, depriving a man of his wife (the delict of abduction) may entail forfeiture of all the cattle of those liable. Formerly, the stock was lawfully seized by looting, indicating the degree of seriousness with which such an act is regarded.

Among the Swazi, when a woman is proved to have committed adultery, her parents have to pay the husband's parents a "fine" of two beasts, whilst the adulterer has to pay a "fine" (*siti*) to the chief.

7.3.3.3.4 *Insult*

Myburgh and Prinsloo (1985: 108 - 109) state that among three of the *Ndzundza* chiefdoms, insult is considered to be both a criminal offence and a delict. Public law thus protects a person's body against assault as well as people's honour against insult.

As in the case of assault, the parties may settle the insult between themselves without the intervention of the tribal officials. In the

Mabhoko (chiefdom), should the matter come before the court, a monetary fine is divided equally between the complainant and the chiefdom. If the fine is in the form of an animal, it is slaughtered, and the complainant invited to share in the reconciliatory meal with the court members, as is the culprit. The *Manala*, however, regard insult as a delict only, and the appropriate remedy is a payment to “cleanse” the injured party.

With regard to the Swazi, various forms of insult can adversely affect a person’s dignity and, as such, require that the injured party be compensated. These insults, together with the corresponding awards of compensation, are examined in more detail in chapter 10 (sections 10.4 and 10.5).

7.3.3.3.5 *Defamation*

In their study, Myburgh and Prinsloo (1985: 108 – 109) found that defamation is treated in the same way as insult. Among the *Ndzundza*, it is regarded as a criminal offence because spreading a story may also harm the chiefdom. The *Manala*, however, do not regard defamation as a crime.

Among the Swazi, it is regarded as “spoiling one’s name” to allege that a person is a thief, sorcerer or seducer. In such a case, the insult has to be “washed” away: *inhlamba iyagezwa*. It is the weight of the insult and not the status of the person insulted that determines the amount of damages. Generally, the compensation is three beasts, of which two go to the defamed party and the other to the court (Whelpton 2004 *Emacala*: 5).

7.3.4 Summary

In a group orientated society, where the maintenance of communal harmony is seen as the paramount objective, both the vehicles of crime and delict are used to ensure that such communal harmony is respected. Different actions are instigated in the same court and with the same procedures. While criminal offences are handled by the court with punishment, delictual infringements (if not resolved by the parties and their respective groups themselves through mediation and conciliation) are dealt with by the courts to include an award of satisfaction for the infringement of the rights of personality.

Van der Merwe (2000: 216) found this lack of strict delimitation or categorisation among the *Bakwena ba Magopa*, stating that, “....die inheemse regsreels nie ‘n waterdigte afdelings gekompartementaliseer kan word nie. Hierdie regsreels maak deel uit van die geheel van die lewende gewoonte reëls van ‘n bepaalde gemeenskap en is in die kultuur van die groep geanker” (“the indigenous laws cannot be compartmentalised in watertight sections. These laws form part of the whole of the living customary rules of a particular community and are anchored in the group’s culture” [own translation]).

7.4 CONCLUSION

This chapter examined elements of indigenous delicts and found them to correspond in large measure with the principles of the general law of delict. The sometimes-blurred lines of distinction between delict and crime were also discussed together with some resultant problem areas. However, there is no given uniformity in

either the general concept or elements of delict amongst the various indigenous peoples. Van der Merwe's (2000: 136) conclusions in respect of the *Bakwena ba Mogopa* could well serve as a *caveat* against a perceived consistency concerning any fixed elements of indigenous delicts generally and, by extension, of rights of personality in particular:

Die elemente van a delik naamlik 'n handeling, onregmatigheid, skuld, kousaliteit en skade of persoonlikheidsnadeel, vind in 'n mindere of meedere mate erkenning in die praktyk, in die inheemse deliktereg van die bestudeerde groep. 'n Groot verskeidenheid van onregmatige dade kan aan die hand van bovermelde elemente onderskei en beskryf word.

Veranderde lewensomstandighede, byvoorbeeld die feit dat 'n individu nou die draer van regte en verpligtinge kan wees, het egter 'n merkbare invloed op die deliktueleregspleging van die bestudeerde groep gehad.

(The elements of a delict, namely an act, unlawfulness, guilt, causality and damage or personal injury, are recognised in practice in the indigenous law of delict of the group studied. A wide variety of unlawful acts/deeds can be distinguished and described in terms of these elements.

Changed life circumstances, for instance, the fact that an individual can now be the holder of rights and duties, however, had a marked influence on the delictual laws of the group studied [own translation]).

Rather than generalisation, examining rights of personality in indigenous legal systems should be approached on a tribe-by-tribe basis to discover differences in the scope and practical application thereof. The Swazi, in particular, make no attempt in their law and custom to distinguish clearly between delicts and crimes: the focus is always on the nature of the act/offence committed; that is, the nature of the right infringed.

Chapter 8

INFRINGEMENTS OF RIGHTS OF PERSONALITY IN INDIGENOUS LEGAL SYSTEMS

8.1 LIABILITY

8.1.1 Introduction

In the event that rights of personality are infringed, it is necessary to establish to whom liability would attach for such infringement.

Vorster and Whelpton (1998: 37) indicate that there is no general agreement on the basis of the family head's liability for delicts of family members or kraal residents. The position obtaining in original indigenous law has been modified considerably in modern indigenous law, largely due to the attainment of majority by certain members of the agnatic group.

8.1.2 Limitation of liability

Bekker (1989: 83) states that it is difficult to formulate a concise statement regarding the family head's liability for delicts which effectively covers the law in all tribes, but proposes the following general principle:

a family head is responsible for the delicts of any unemancipated (in the sense of minor unmarried males or females) person residing at his family home, whether related to him or not, whether a permanent inmate or merely resident there for the time being, and whether or not the family head was a party to the

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delict, or knew of it at the time of its commission.... it is, generally speaking, essential to the family head's liability that the delict shall have been committed while the wrongdoer was resident at his family home.

Certain exceptions and modifications to this general principle (emphasising differences existing in particular tribes) are subsequently noted by Bekker (1989: 84-88). Taking into account this material, Vorster and Whelpton (1998: 38) have formulated conclusions on the liability of the family head (which would apply to infringement of rights of personality); in presenting these conclusions, the position in KwaZulu Natal is distinguished from that in other areas.

8.1.2.1 *Outside KwaZulu Natal*

A family head is liable for the delicts of all unmarried sons while they reside in the family dwelling (kraal) or are temporarily absent, whether they are minors or majors. In addition, the family head is also liable for all other unmarried residents, whether minors or majors, as long as they reside in the family dwelling (and are not merely casual visitors). Thus, it follows that outside of KwaZulu Natal, a family head is not liable for the delicts of any married son or married resident (beside his own wife/wives); nor for any unmarried son who has left the family dwelling permanently (or who has been disinherited or driven out); nor for any temporary visitor.

8.1.2.2 *Inside KwaZulu Natal*

Inside KwaZulu Natal, the position is governed by Section 102(3)

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of the Code of Zulu Law, which reads “a family head shall be liable in respect of delicts committed by any minor inmate of his family home while in residence at the same family home as himself”. It appears that in this territorial area, the liability of the family head is limited to delicts of minor residents of the family dwelling committed whilst they reside in the same family dwelling.

8.1.2.3 *The Kingdom of Swaziland*

From the present researcher’s discussions with the panel of experts in Swaziland, it would appear that liability attaches to the family head representing the group. The Swazi have two sayings: the first is *ubashayele tinyoni* (literally meaning “he hit the birds for them”); the second is *inkhomo ayihlinzelwa phansi* (literally meaning “a beast is slaughtered on its skin”). Both of these maxims refer to the fact that the family head is responsible for the conduct of his family members.

The family head’s wife and unmarried children cannot generally take action against other people unless assisted and represented by him, nor can they themselves be sued except through him. The family head is responsible for the payment of their debts as well as any fines imposed on them or damages awarded against them. Furthermore, since families share their rights, they also share duties and an obligation incurred by one person is thus binding upon the whole family (Whelpton 2004 *Emacala*: 3).

8.1.3 The basis of liability

8.1.3.1 *General*

Myburgh (1985: 15) states that the articulate factors in indigenous private law are groups. Since they are joint bearers and sharers of various rights, they also share the corresponding duties. In original indigenous law, the group was represented by its head and thus sued through its head. As mentioned in section 8.1.1 above, in modern indigenous law, the attainment of majority by some members of the family group (in terms of Act 57 of 1972) has resulted in several persons other than the family head having contractual capacity. Nevertheless, the principle of liability of the family head has been retained – with him even being held liable for delicts of majors.

It should be noted, however, that liability is excluded if the claim is instituted in common law (*vis* if the delict is not known in indigenous law). Whereas, in original indigenous law, the family head was always sued, in modern indigenous law, it is the plaintiff that now sues the wrongdoer. If he also wishes to sue the family head, he must join the family head as co-defendant in any action.

8.1.3.2 *Theories underlying the basis of liability*

In Myburgh's (1985: 17) view, the family head is sued because he happens to represent the group. The person committing the delict incurs the liability and, once incurred, the liability is automatically shared by the group. The family head is liable as a sharer: "The truth about group liability lies in the distinction between incurring

and sharing”.

Vorster and Whelpton (1998: 40-41) examine several theories: does the family head control the joint estate; does the group accept liability; does the family head exercise control over residents; or is the family head vicariously liable or jointly liable? They (1998: 42) conclude, however, that none of these explanations is totally satisfactory, citing the isolation of the family head’s position in original indigenous law as an immutable principle. Whilst amendments to the status of residents have readily been recognised, the steadfast adherence to the principle of liability of the family head has led to inequities.

Vorster and Whelpton (1998: 42) propose that the family’s head liability should be limited to delicts of his own minor children and dependants. This approach is consistent with the provisions of Section 102 of the Code of Zulu Law – although the residence requirement is still maintained. By extension, this approach would apply to all infringements of rights of personality.

In her study of the *Bakwena ba Mogopa*, van der Merwe (2000: 86) distinguishes between delicts committed by group members and by strangers and indicates that the latter are viewed in a more serious light, since they are indicative of lack of respect towards the family head. Van der Merwe (1000: 92) concurs with Vorster and Whelpton (1998) on the changes occurring in modern indigenous law, and concludes:

Wanneer die grondslag van die familiehoof se
aanspreekliheid vir die delikte van sy lede onder

die loep geneem word, is dit duidelik dat die stedelike konteks waarbinne hierdie mense lewe slegs ‘n geringe verandering teweeggebring het.

Die Westerse invloed het daar toe bygedra dat ‘n ongetroude kind van 21 jaar of ouer nou direk aangespreek kan word of self ‘n aksie kan instel indien die kind onafhanklik woon en ‘n eie inkomste het. ‘n Handelingsbevoegde persoon kan ‘n aksie of in die inheemse hof instel of in ‘n Westerse hof, maar nie in albei nie.

Labuschagne et al (1992: 137) het na ‘n deeglike studie van die inheemse gewoonteregstelsels van die inheemse volke in Suid Afrika tereg tot die gevolg trekking gekom dat groepaanspreeklikheid universeel in rudimentere regstelsels voorkom, maar dat daar ‘n proses van geleidelike individualisering van die deliktereg bestaan.

(When the basis of the family head’s liability for the delicts of his family members is closely examined, it is clear that the urban context in which these people live has only brought about a minor change. The Western influence has contributed thereto that an unmarried child of 21 years or older can now be held directly responsible or can litigate an action himself if the child lives independently and has his own income. A competent person can institute an action either in the indigenous court or in a Western Court, but not in both.

After a thorough study of the indigenous customary law systems of

the indigenous peoples in South Africa, Labuschagne *et al* (1992; 137) rightly came to the conclusion that group responsibility is found universally in rudimentary law systems, but that there is a process of gradual individualisation of the law of delict [own translation].)

8.2. REMEDIES AND RELIEF

There are various remedies by which aggrieved persons can obtain relief for such infringement. The recognised forms of remedies in delict are either extra-judicial (by way of self-help) or judicial (by way of court action)(McKerron 1971: 112; Labuschagne and van den Heever 1993: 561).

8.2.1 Extra-judicial remedies

Self-help generally takes the form of collective hostile and violent retribution (termed a “feud action”) as a means of obtaining satisfaction by revenge. Myburgh (1985: 18-19) cites examples of such action, (employed typically when personal injury has been inflicted), with the killing of the animal/animals captured pointing to the wronged group’s desire to obtain satisfaction for personal injury rather than compensation for patrimonial loss.

Alternatively, such action may combine appeasement with reconciliation. Thrashing is also recognised as a form of self-help, and is often employed in cases of seduction, adultery, damage to crops by livestock, and thieves caught stealing (Myburgh 1985: 19-20). The use of self-help to obtain satisfaction will be examined further in chapter 10.

Labuschagne and van den Heever (1993:561) state that, while a

distinction can be deduced between delict and crime,

“speel die beginsel van eierigting en persoonlike wraakneming as gevolg van die kultuurontwikkeling van veral die swartes in die landelike gebiede, nog ‘n baie groot rol. In alle rudimentere regstelsels is enige onreg wat gelpleeg is deur die benadeelde party of sy familie gewreek; die wraak wat deur die middel van eierigting geneem is, het as vergoeding *en* as straf gedien”.

(“the principle of self-help and personal revenge as a result of the cultural development of the Blacks in rural areas especially still plays a very big role. In all rudimentary systems, any injustice committed is avenged by the aggrieved/injured party or his family; the revenge taken by means of self-help served as compensation *and* as punishment” [own translation]).

Labuschagne and van den Heever (1993: 563) concur with Myburgh (1985: 20) that “a much commoner way of obtaining satisfaction is to demand it and, failing compliance, sue for it in court”, but state that self-help is still practised amongst the black people (especially in rural areas).

8.2.2 Judicial remedies

As noted earlier (see chapter 7, section 7.2.5), the relief for infringement of rights of personality takes the form of satisfaction, while for patrimonial rights, damages are usually awarded. Such a

distinction is observable throughout the law of delict amongst the indigenous peoples (Myburgh 1985: 18), and according to Labuschagne and van den Heever (1993: 563) is “nie net belangrik nie, maar ook een wat dikwels oor die hoof gesien word” (“not only important, but also one that is often ignored” [own translation]).

8.2.2.1 *Damages*

Labuschagne and van den Heever (1993: 567) question whether damages are recoverable purely for infringement of patrimonial rights or whether a fine (indicating a criminal element) is also an integral part of the award, noting that

“ ‘n proses van generalisering van deliktuele aanspreeklikheid in die inheemse reg te bespeur”.

(“a process of generalisation of delictual liability”[own translation]) can be detected in indigenous law.

They go on to say that the fact

“Dat die bedrag wat die verweerde moet betaal in die vorm van ‘n “boete” is en gevvolglik dikwels meer is as die werklike skade van die eiser en dat die betrokke bedrag ook beïnvloed word deur die graad van skuld en die status en vermoensposisie van die verweerde, is ‘n duidelike aanduiding dat die inheemsregtelike aksie vir skadevergoeding beslis nog ‘n aksie met ‘n straffunksie is”.

(“that the amount that the defendant has to pay is in the form of a “fine” and is consequently often more than the claimant’s actual damage and that the amount involved is also influenced by the

degree of guilt and the status and the ability of the defendant, is a clear indication that the indigenous action for compensation is definitely still an action with a punitive function” [own translation]).

Labuschagne and van den Heever (1993: 568) conclude that the principal feature of an award of damages is

“...om aan die benadeelde skadeherstel te verskaf eerder as om die delikpleger te straf of te beboet” (“to provide compensation for damage to the injured party rather than to punish or fine the party guilty of delict” [own translation]).

8.2.2.2 *Satisfaction*

There is also a measure of uncertainty as to the precise parameters of this remedy. Visser (quoted in Labuschagne and van den Heever 1993: 568) states that satisfaction

“dui eintlik net op die goedmaking van nadeel (deur die psigiese bevrediging van die benadeelde en die gerusstelling van die regsgemeenskap) wanneer kompensasie nie moontlik is nie”. (“actually only indicates restitution for damage [through the psychological satisfaction of the injured party and the appeasement of the legal community] when compensation is not possible” [own translation]).

Whilst the action for damages for protection of patrimonial rights has long been recognised and distinguished in indigenous law, the same does not obtain for the action for satisfaction to protect the

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rights of personality: the question revolves around
“die erkenning van ‘n aksie wat bestaan” (“the
recognition of an action that exists” [own translation])
(Labuschagne and van den Heever 1993: 572).

There is also uncertainty over whether intent or negligence found an action for satisfaction in indigenous law. Since most academic writers do not distinguish terminologically between damages and satisfaction, Labuschagne and van den Heever (1993: 568) point out that it is thus necessary

“... om na die aard en doel van die spesifieke delikte
in die inheemse reg te kyk ten einde vas te stel in
welke gevalle die aksie gerig is op die verhaal van
genoegdoening as troos (*solatium*) vir die aantasting
van persoonlikheidsregte” (“to look at the nature and
intent of the specific delicts in indigenous law in order
to determine in what cases the action is aimed at
obtaining satisfaction as comfort or solace (*solatium*)
for the violation of personality rights” [own
translation]).

According to Labuschagne and van den Heever (1993: 573), there are clear penal elements observable in the action for satisfaction:

Die aksie vir genoegdoening in die inheemse reg is nog steeds ‘n “strafaksie”, waarin die elemente van leedtoevoeging en genoegdoening beide ‘n rol speel.
By sommige swart volke word die diere wat ter genoegdoening gelewer word, geslag. Dit dui daarop dat die oogmerk nie vermoensvoordeel is nie, maar

“straf” en veral ritueel-religieuse reiniging. By verskeie swart volke is genoegdoening (ook) gelee in die mate van troos wat vermoensvoordeel kan bring.

(the action for satisfaction in indigenous law still remains a “penal action”, in which the elements of suffering and satisfaction both play a role. Among some Black people, the animal given as satisfaction is slaughtered. This indicates that the aim is not gain, but “punishment” and especially the ritual-religious purification. Among various Black people, satisfaction is (also) found in the degree of comfort that gain can bring [own translation].)

8.2.2.3 The Swazi in the Kingdom of Swaziland

8.2.2.3.1 *Responsibility and intent*

Under Swazi law and custom, every adult person is presumed to know the law, and to have intended the results following an act he or she has committed. Whereas motive is not generally taken into account, allowance is made for provocation (see chapter 7, section 7.2.3.2.3). Negligence (*budlabha*) generally involves liability for any resulting damage. On the other hand, purely accidental offences are almost always excused or less heavily punished; an unsuccessful attempt is not often brought to trial.

8.2.2.3.2 *Restitution, compensation and fines*

Among the Swazi, Whelpton (2004 *Emacala*: 2) confirms that the two most frequent remedies available to the victim of a civil wrong are restitution and compensation. Both can be obtained either through agreement by the parties concerned or through the verdicts of the court. In restitution, the effect of the remedy is to cancel, as far as possible, the wrongful act: thus, a trespasser will be

removed, stolen property restored, and an unfulfilled contract carried out. In compensation, the victim receives damages for an offence, which cannot be undone – such as seduction, defamation and also damage to property. Sometimes, the amount of compensation is traditionally standardised.

The most common form of punishment is the imposition of a fine, which, like most forms of compensation, usually consists of livestock. This similarity between awards of compensation and fines further serves to increase the already blurred lines of distinction between delict and crime.

8.3 CONCLUSION

In both the remedies of damages and satisfaction, a strong penal element is evident. Thus, in damages generally, the award is not based solely on compensation for the actual damage caused.

Labuschagne and van den Heever (1993:568) state that the penal element

“...eerder abstrak voorgestel kan word deur die klem te laat val op die bedoeling of oogmerk wat die reg daarmee het, as om op die konkrete uitwerking van die bedrag te konsentreer” (“can rather be seen as abstract by emphasising what its purpose or aim in the law is rather than concentrating on the concrete calculation of the amount” [own translation]).

Research with a strong ethnological base would still appear necessary to obtain greater clarity on the parameters of and boundaries between the two delictual remedies and criminal law.

This chapter discussed the topic in general terms and concluded that strict categorisation into water-tight compartments is not a feature of indigenous legal systems. Moreover, the Swazi focus on the nature of the right infringed (*vis* the nature of the act/offence committed).

Chapter 9

THE LAW OF PERSONALITY AND INDIGENOUS LEGAL SYSTEMS

9.1 INTRODUCTION

The theoretical basis of the law of personality was discussed in chapter 4. This chapter examines the degree to which such theories are applicable or relevant to legal systems in indigenous cultures.

Earlier, it was demonstrated that unspecialised legal systems follow a concrete, real and visible approach (see chapter 6, section 6.2.3). The abstract and theoretical basis of the specialised Western legal systems is largely absent from indigenous law. One has to guard against ethnocentric bias in any exercise involving a comparison of theoretical perspectives. As observed in chapter 5, (section 5.3), there is always a tendency to try to fit (consciously or unconsciously) concepts into Western frameworks – thus distorting such concepts and rendering conclusions based on their examination either unreliable or invalid.

As a general theoretical base, indigenous legal systems follow the classic natural school of law, wherein justice required no more than that every person receive what is due in accordance with the status associated with his/her role in society (van Wyk and le Roux 2000: 8). However, indigenous legal systems also embrace the post-modernist view that focuses on such elements as care, imagination, empathy, story-telling and tradition – with these good guides to

human interaction constituting the essence of both law and communal life (van Wyk and le Roux 2000: 67).

Both post-modernists and indigenous legal systems do not regard people as abstract bearers of even more abstract rights, but as real and concrete persons with duties to the community as whole. Both regard individualism as an asocial philosophy and attach great importance to harmony of the collective and the moral content of law. Both postulate that ethical values and rights are the product of interactions between human beings, who live together collectively in a tradition. Thus, law and ethics cannot be separated, and value judgements both can and should be used in applying law to reflect and uphold the *mores* of a given society (van Wyk and le Roux 2000: 69).

In indigenous communities, social harmony is achieved by means other than rules *per se*: mediation and conciliation are essential to the process of maintaining social order – as is the healing force of ritual (belief in which involves the co-operation of watchful ancestral shades) (Bennett 1985: 3).

Howard (1986: 18-19) encapsulates the real approach of indigenous legal systems derived from a culture where status and tradition are paramount, stating that

the so called “African concept of human rights” is
..... actually a concept of human dignity. The
individual feels respect and worthiness as a result of
his or her fulfillment of the socially approved role.
Any rights that might be held are dependent upon

one's status or contingent on one's behaviour. Such a society may well provide the individual with a great deal of security and protection..... One may even argue that people may well value such dignity more than their freedom to act as individuals.

The question is whether the indigenous law of personality protects the same or similar interests to those of South African law; in addition, whether there are additional interests subsumed into the indigenous law of personality (and that do not merit protection under South African law). Moreover, it has to be established whether similar classifications of personality interests exist in indigenous law and what the practical realities are which inform indigenous legal thinking; and finally, whether cultural differences existing between Westernised and indigenous peoples prescribe different values that require protection of different interests in the law of personality – whether greater importance is attached to certain values in indigenous cultures than in Western cultures. The questions will be examined in order to provide some insight into the situation obtaining in indigenous law.

9.2 NATURE OF INDIGENOUS LEGAL SYSTEMS

The nature of indigenous legal systems was reviewed in chapter 6. In particular, it was noted that indigenous legal systems adopt a concrete, real and visible approach with no clear distinction between categories and concepts. As such systems are generally of a customary nature and represent the living expression of community values, it is perhaps not entirely appropriate to talk of abstract theoretical bases for such systems. They are essentially of

a practical nature in relation to the community's way of life and world-view. Such systems are not founded upon any observable theories *per se*, but develop out of tradition and incorporate the rules for living designed to uphold community *mores* and advance community interests. Myburgh (1985: 8) states that it

“is not the relations between persons that are stressed but the persons themselves acting as entities by virtue of the relations”,

which indicates that the concern of indigenous legal systems is for human justice, thereby stressing the highly personal nature of personality rights.

It can be argued that much of Western legal theory would be inapplicable. Since no normative base for regularities of social interaction has been clearly conceptualised or articulated, theoretical abstractions provide an inappropriate basis for endeavouring to determine the fundamental precepts in an indigenous community's legal system.

Nevertheless, there are certain discernable elements of a culturally determined nature, which permeate most indigenous legal systems, and which provide an element of theoretical guidance or relevance in the indigenous environment. These are briefly reviewed below.

9.3 SPECIALISATION

With indigenous legal systems being primarily of an unspecialised nature, the question is whether a similar classification and delimitation of categories of personality interests – characteristic of Western legal systems – is to be found in indigenous legal systems.

Generally, a sharp distinction between categories, institutions and concepts is foreign to indigenous law (Vorster & Whelpton 1999: 23). In particular, it is not always possible to distinguish whether a transgression is harmful to the interests of the community (and thus a crime) or harmful to the interests of family groups (and thus a delict). For example, in indigenous law, the theft of another person's property is generally merely a delict, while stock theft is always a crime. In indigenous legal systems, there is no distinction between criminal and civil cases and no separate court proceedings for such cases.

Despite this general lack of distinctions and classifications in indigenous legal systems, however, no legal system is totally unspecialised. Between the two poles of specialised and unspecialised, there is some middle ground, where the beginnings of certain specialised concepts are gradually accepted into the non-specialised systems. It is submitted that such an approach is appropriate to the rights of personality – giving rise to the relevance and applicability of certain specific rights of personality.

In the indigenous situation, Joubert's (1953) broad dual classification of personality rights (see chapter 4, section 4.6.1), although vague, does seem particularly pertinent to indigenous legal systems. According to Joubert, such personality rights protect a person's physical/mental sphere and the spiritual/moral value sphere, thereby emphasising the highly personal nature of personality rights. While the physical/mental sphere is relatively easily perceived and understood from a Western/Eurocentric

perspective, it is easy to underestimate the importance of the spiritual/moral value sphere of indigenous peoples. Mbiti (1990: 2-3) emphasises its fundamental influence, stating that “wherever the African is, there is his religion”; in other words, indigenous peoples are generally so religious that religion is their whole system of being. This demonstrates the need for protection of personality rights in both the wider contexts of body and mind (spirit). The nature of personality rights must always be related to the practical realm of day-to-day reality in indigenous community life.

9.4 GROUP ORIENTATION

The strong group orientation obtaining in indigenous legal systems requires that the personality interests of dignity and good name are accorded paramount importance. Status is especially crucial in indigenous culture and any conduct in conflict with or disregarding the status of the victim requires both censure and compensation to restore the victim’s standing and reputation in the community (also see section 9.6 below).

9.5 HARMONY OF THE COMMUNITY

Any conduct which disturbs the harmony of the community is viewed in a serious light. The violation of personality rights can clearly result in such disharmony, and accordingly, such interests are protected not only to give a measure of compensation to the victim, but also to restore harmonious relations within the community. Reconciliation of the parties involved in an action for the violation of personality interests is also structured to remove a

potential threat to the stability of the community.

9.6 STATUS

Status is linked to a person's legal position or standing, and it is this status (influenced by such factors as age, sex and rank) that determines the powers held by such person: the higher the status, the more powers the person obtains (derived from objective law)(Myburgh 1985: 78). With the rights of personality being shared by the comprehensive agnatic group, the share of a member in the contents of the rights of personality, namely in the powers derived from these, depends on his or her status (Myburgh 1985: 48). However, such early indigenous law situation has been tempered to some extent in modern indigenous law by the more individualistic approach adopted (although with the individual still functioning within the group context).

In examining the jurisprudence of the *Barotse* in Zambia, Gluckman (1965: 39-40) found the underlying theme to be that of a society dominated by status – status being located within the matrix of social relationships. It is submitted that this holds good for most indigenous communities. Indigenous courts generally tend to view a litigant in what Radcliffe-Brown (quoted in Allott et al 1969: 38) calls his “total social personality”.

With social relations situated at the very core of indigenous legal systems generally, a person's status within the community is thus deserving of comprehensive protection. Allott et al (1969: 46) define status as “a coherent agglomeration of a variety of specified rights and duties or capacities or incapacities”. Status relates to

either a particular social function or social functions generally of its possessor, whose incidents are determined by law and imposed by law as a result of a given social or legal event, and which marks out a category within the community of similar status holders.

With the dominance of familial and kinship relationships in indigenous society, any default in the obligations of status risks the ultimate expulsion of the defaulter from his status. Thus, any conduct which may adversely affect a person's status is deserving of compensation or redress. Given the importance of harmony, the protection given to status has a twofold purpose – to protect the individual concerned and also, in the broader framework, to prevent disharmony in the community resulting from infringements on an individual's status.

9.7 SPECIFIC PERSONALITY INTERESTS IN INDIGENOUS LEGAL SYSTEMS

Personality interests in indigenous legal systems will be examined according to Neethling's (1996: 29 – 38) classification.

9.7.1 Right to the body

Myburgh (1985: 34-39) observes that indigenous culture also recognises, as an infringement of the interest in bodily integrity, any conduct which detrimentally affects either the physique, psyche or sensory feelings. Myburgh (1985: 34) points out that remedies for bodily injuries are directed towards the wound or its healing. However, outside of KwaZulu Natal, the indigenous law of delict does not recognise assault as actionable – based on the concept that “no person may eat his own blood” (Vorster &

Whelpton 1998: 45). Among most groups, assault on the body is a crime and not a delict. In KwaZulu Natal, however, a delictual action can be instituted in terms of either common law or indigenous (*Zulu*) law.

Indigenous culture clearly subsumes into the right to the body the underlying fundamental right of the right to life. Such a right to life is not however restricted to the right to keep one's own body alive, but extends, in indigenous perceptions, to the freedom or liberty of the individual to strive towards the defence and protection of life (Broodryk 2002: 31). It extends to embrace other human rights – stressing that the focus of human rights is on human relations: the fact of being a human being deserves recognition by all other human beings (embraced in the concept of *ubuntu*). Indigenous views of human rights are thus removed from the theoretical realm to the practical realm of day-to-day living incorporating values of humanness.

9.7.2 Right to physical liberty

In a close-knit indigenous community (with group orientation), clearly deprivation of liberty or any interference with an individual's freedom to move or act cannot be tolerated, and necessitates the protection of such a right. Imprisonment as a criminal penalty is unknown in indigenous legal systems, which illustrates the abhorrence with which indigenous people view any depravation of liberty.

9.7.3 Right to good name, dignity or honour

The rights to good name (reputation) and dignity or honour are

closely linked to the concept of status (see section 9.6 above), and are of fundamental importance in the indigenous environment. In this instance, the violation in question may pertain to either the individual or (and more generally) the agnatic group concerned. Such violations have great potential to disturb peace and unity in the community, and the redress sought for these violations will also contribute to the restoration of communal harmony.

9.7.4 Right to feelings

Both the religious and spiritual realms remain at the very core of indigenous life, and feelings associated with such realms merit legal protection. Mbiti (1990: 1) stresses that religion “permeates into all the departments of indigenous life so fully that it is not easy or possible always to isolate it. Religion is the strongest element in traditional backgrounds, and exerts probably the greatest influence upon the thinking and living of the people concerned”. Traditional religions are not primarily for the individual, but for the community of which he is part.

According to Mbiti (1990: 74), the spiritual world is so important in African life that it is not easy, or even necessary, at times to draw the distinction between the spiritual and physical universe or to separate them: they intermingle and dovetail with each other. Indigenous people’s insight into spiritual realities is very sharp: they distinguish between what Mbiti describes as the “living dead” (the departed remembered up to four or five generations) and those ancestors who are no longer remembered (and thus no longer “human beings”) and have moved on to the stage of full spirits. Mbiti (1990: 83-84) is of the opinion that the commonly used term

“ancestral spirits” is too limiting a concept and is misleading, since there exist spirits and living dead of children, brothers, sisters, barren wives and other members of the family who were not in any way the “ancestors”.

With the “living dead” (or ancestors) being the guardians of family affairs, traditions, ethics and activities, any offence in such matters is ultimately regarded as an offence against the forebears – acting as the invisible police of the families and communities (Mbiti 1990: 82). Any disregard for religious or spiritual feelings strikes a heavy blow at an indigenous person’s innermost being, and any infringement of such feelings merits protection in indigenous law.

9.7.5 Right to privacy

Indigenous culture defines privacy in terms other than the “exclusion from publicity” of Western law. Among some indigenous peoples, the concept of honour also includes privacy in the sense of domestic peace, in so far as the right to the latter is protected against violation in consequence of a dispute (Joubert 1953: 87 and 135).

9.8 INDIGNEOUS CULTURE PERSPECTIVES ON INDIGENOUS RIGHTS OF PERSONALITY

9.8.1 General

The above section indicates the importance attached in indigenous cultures and legal systems to such concepts as status, dignity, value judgements, community harmony and duties (rather than rights). It also points to an emphasis different to that obtaining in South

African law together with a corresponding difference in the degree of protection which is provided for such rights. Indigenous legal systems generally view the maintenance of tradition as a paramount objective, seeking to counteract any behaviour calculated to disrupt the *status quo* (Bennett 1999: 3). Western systems, on the other hand, do not venerate age and the past in any marked degree, and consequently facilitate a constant momentum of purposeful change. An examination of the protections for the indigenous rights of personality requires a thorough appreciation of the social settings and cultures in which such legal protections are to apply.

9.8.2 Differences in perspective

It can be stated that the classification of the rights of personality which are protected in both South African and indigenous law is broadly similar. However, certain elements of indigenous culture (such as guardianship) provide a different perspective on the scope of the protection provided, and these elements are examined below.

9.8.2.1 *Guardianship*

Guardianship is considered a patrimonial right, because it entitles the group concerned to the production of its members (Myburgh 1985: 110). This particular element of guardianship is completely lacking in Western legal systems. The right of guardianship (infringed through such delicts as seduction, adultery and abduction) is primarily a patrimonial right (Myburgh 1985: 33). However, such delicts may also result in the infringement of the group's honour and good name, and thus constitute a

simultaneous infringement of personality rights.

9.8.2.2 *Witchcraft*

Although a belief in witchcraft is not recognised in South African law, indigenous people consider an accusation of witchcraft a serious attempt to detract from an individual's character. Hence legal protection must be afforded to the victim to counteract such accusation. (Bekker 1989: 384).

9.8.2.3 *Posela-ing*

A false accusation of *posela-ing* a girl (placing her under a spell by means of herbs or charms to make her responsive to her lover) is actionable under indigenous law. Such a concept is completely unknown, however, in South African law and culture.

9.8.2.4 *Status*

As indicated above (see section 9.6), in the indigenous environment, status and kinship of necessity also involve the wider concept of the community and the maintenance of harmony therein. The protection afforded in indigenous systems thus goes beyond the narrow individualistic confines of personality rights in South African law (where protection is usually restricted to matters of good name and reputation).

9.8.2.5 *Religious and spiritual elements*

Protection of personality rights in indigenous systems involves a religious element, in that disrespect, neglect or contempt of the ancestors is regarded in a very serious light (see chapter 5, section 5.1.1.4). The rules for living are both derived from and protected

by ancestral spirits, and any disregard for such rules is often accompanied by punishment of a supernatural origin (from the ancestral spirits)(Vorster & Whelpton 1999: 14). Such a concept involving respect by the living for their ancestral spirits is also generally unknown in South African law.

9.8.2.6 *Pollution*

A further distinction is that infringement of rights of personality is often considered to be polluting in indigenous systems. Rituals are performed to remove the pain, sorrow or defilement. For example, Vorster and Whelpton (1999: 8) cite the case of defloration among some southern *Nguni*, where a beast is taken from the wrongdoer's place of residence by the women of the seduced girl's group. This beast, referred to as *isihewula*, is then ritually slaughtered by them – both as an act of cleansing and also to obtain satisfaction. This slaughtering serves to provide satisfaction for the violation of honour, while the claim for damages based on the violation of guardianship follows later (Hammond-Tooke, (1962: 96) cited in Myburgh (1985: 33)). The purpose of this slaughtering is to show that patrimonial gain is not the aim, but that it is solely associated with the “pollution” and disgrace brought about by the seduction.

The killing of a group member also injures honour because of the “pollution” brought about by death. It should be noted that various forms of insult not known in common law can injure honour or dignity in indigenous law. Hence cursing (for example, that a woman will bear her father-in-law's children), neglect of avoidance taboos (*hlonipha*) in relation to affines, and accusations that

someone is a witch or sorcerer, all found delictual actions in indigenous law.

9.9 CONCLUSION

The emphasis on elements particular to indigenous culture – such as group orientation, status, respect for ancestors and “pollution” – influence both the extent to which rights of personality are protected and the degree to which and the manner in which infringement thereof is to be compensated.

Differing world-views applicable to different cultures result in different perspectives on rights of personality. With community *mores* in indigenous cultures being prescribed and protected by the ancestral spirits, rights of personality have a religious-spiritual dimension that is completely lacking in the West. With the whole focus in indigenous society being on duties rather than on rights (with corresponding group vs individualistic orientation), redress for violation of rights of personality is aimed primarily at maintenance of communal harmony.

It is also evident that there is a strong criminal dimension present in situations where insults violate rights of personality. Many instances of redress in disputes simultaneously provide both satisfaction and fines for delict and crime, respectively. Indigenous legal systems, being unspecialised, do not invoke the strict categorisation or classification of rights of personality, nor do they have clearly demarcated divisions separating such rights from the criminal sphere.

Many of the general theories and classifications of personality rights are broadly present in indigenous legal systems.

Nevertheless they are imbued with a particular indigenous character flowing from adherence to traditional culture and from ancestral involvement and supervision.

Chapter 10 examines infringement of the various rights of personality with practical illustrations taken from the various ethnic groups in South Africa and the Kingdom of Swaziland.

Chapter 10

REVIEW OF THE RIGHTS OF PERSONALITY IN INDIGENOUS LEGAL SYSTEMS

10.1 INTRODUCTION

10.1.1 General

In South African law, many of the rights of personality are enhanced with constitutional protection (see chapter 4, section 4.6), but in indigenous legal systems, the protection emanates mostly from community *mores* and respect for the institutions of indigenous culture (such as status and agnatic groups).

Enhancement of protection of these rights of personality comes in a different form in indigenous legal systems – namely the ancestral spirits. Affronts to the body and bodily freedom, dignity, honour and good name, for example, all require appeasement to both the living injured parties and also to their watchful and ever-present ancestral spirits. The elements of the various categories of personality rights, identifiable in indigenous legal systems, will be examined next in terms of the broad classification followed in chapter 9.

10.1.2 Classifications

It may be argued that using the classification designed for the Western legal model is endeavouring to force Western classifications on indigenous concepts. However, in defence of his position, the researcher at all times had regard to the fact that indigenous law remains part of the lifestyle of a community. These

classifications are used merely as a point of departure, and should any indigenous component render such classification unsuitable or unreliable, such difference in perspective will be acknowledged, and the effect on the operation of the “living” law analysed in order to maintain a holistic balance.

10.1.3 General criteria

Myburgh (1985: 33) cautions against extraction of general criteria from ethnographic sources. Important features of rights of personality include the aspect of “pollution”, which may sometimes be involved in their violation together with the fact that what constitutes satisfaction is often both acquired through self-help (by force, if necessary) and also often destroyed. While such features are relevant in determining whether a violated right is, in fact, a right of personality and distinguishing the object of the right, nevertheless they do not occur uniformly among all peoples. Consequently, these features cannot be utilised as either the only or the general criteria for examining rights of personality.

10.1.4 Format

This chapter reviews rights of personality by examining the right to the body and bodily freedom. The position among the various tribal groupings in the South African context is considered first and then the position obtaining in the Kingdom of Swaziland. Other rights of personality are similarly examined.

10.2 INFRINGEMENT OF THE BODY

10.2.1 Territorial implications

At the outset, it is important to distinguish between the position

obtaining inside and outside KwaZulu Natal. Outside KwaZulu Natal, a delictual action for assault cannot be brought (see chapter 9, section 9.7.1) – based principally on the concept that “no person may eat his own blood” (Vorster & Whelpton 1998: 45).

Consequently, among most groups, assault is recognised as a crime and not a delict. However, in KwaZulu Natal, a person may institute a delictual action either in terms of common law or in terms of indigenous (*Zulu*) law.

10.2.2. The right to the body

10.2.2.1 General

Myburgh (1985: 34) notes that with delicts causing bodily injury, satisfaction is directed towards the wound and its healing. The hurt is associated with a right to the body that is shared by the whole group or even with a right of the group to the bodies of all the members (Myburgh 1985: 35). Among the *Zulu*, when a girl is injured by an assault, she not only shares in consuming the meat of the expiatory animal, but is also sprinkled with the animal’s gall – similar to the action usually taken in ordinary sickness, where all the inhabitants of a village are sprinkled with the gall of such animal (Krige 1936: 296).

Emphasis on the body is also clearly demonstrated among the *Zulu* in that, where an injurer’s group shows interest in the recovery of the injured party (by visits and offers of remedies), moves towards a settlement can follow (Krige 1936: 228). Among the South *Sotho*, Ashton (1952: 243) states that assault is excused or at least mitigated by conciliatory and caring gestures on the part of the

guilty party, such as the application of saliva, bathing, salving or bandaging the wounds. In the absence of such voluntary actions, a court may order performance “to heal the wounds” (Ashton 1952: 257). Satisfaction for bodily injury is generally rendered by the transfer of goods or value (Schapera 1937: 210). However, Monnig (1967: 327) notes that, among the *Pedi*, goods only are normally used, unless a court has issued an order for whipping. Van Warmelo (1967: 1157) states that, among the *Venda*, any animals received in satisfaction must be slaughtered. Myburgh (1985: 35) cites ethnographic data indicating that satisfaction is obtained in the form of retaliation (*talio*). The *Tswana* (Schapera 1938: 259) and the *Pedi* (Monnig 1967: 323-4) use the principle of repayment in kind (“an eye for an eye”), enabling an injured party to inflict injuries similar to his own upon the assailant. According to van der Merwe (2000: 208), this principle still holds good among the *Bakwena ba Mogopa* who say, “*bopodi ba kgonwa ke ba ba dinaka*” (“that which has horns and pierces another will also one day be so pierced”). Van der Merwe (2000: 207) also notes that if the assault on the body is of a serious nature (for example with a weapon such as a stick) or if blood flows, then the matter is immediately referred to the chief’s court. In this latter instance, the chief (*kgosi*) deals with the matter, because only he has the right to let a man’s blood flow, according to the maxim *tlhogo ya motho ke ya kgosi* (“the head or blood of a person belongs to the chief”).

Most cases of ordinary (minor) assault never reach the indigenous courts though and in an effort to restore harmonious relations within the community, the family or group members come together to resolve the dispute and achieve reconciliation between the

parties. The *Bakwena ba Magopa* maxim *bana ba motho ga re we re a amaonana* (“family members only quarrel with each other, they do not fight”) illustrates this (van der Merwe 2000: 207).

10.2.2.2 *The Swazi*

Among the Swazi, any assault (*kushaya*) resulting in fairly serious injury must be reported to *Sikhulu* (the chief) after being reported to and investigated by *Indvuna* (the headman). Unlawful and intentional injury of another’s body constitutes the crime of assault. To the extent that assault also infringes rights of personality, a settlement may be reached entailing the delivery of livestock by the assailant’s family to the victim’s family (Whelpton 2004 *Emacala*: 5). If the matter is brought to court, the assailant may be fined and the victim awarded an animal as consolation for his injury. It should be noted that in the criminal sphere, criminality itself does not depend on the severity of the attack or the means, although these factors may influence the punishment imposed. To smack with an open hand or thrash with a stick would both amount to assault.

Nevertheless, a mere smack is also an indication that one’s personal dignity has been undermined, and thus a right of personality is infringed. Although generally physical violence of some sort is required for assault, non-violent but hurtful actions may also amount to assault (Whelpton 2004 *Emacala* 5) (see also section 10.2.3 below). The panel of Swazi experts confirmed that in the case of a threat, an apology was generally accepted as sufficient,

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and that no further action for compensation or fine by the court would be pursued. However, a serious threat (such as with a knife) *per se* constitutes a crime and has to be dealt with by the court.

With regard to the amount of the penalty for the offence of assault, a fine of one beast is usually imposed. The punishment in this, as in any criminal matter (and also with any delictual compensation simultaneously awarded), would depend on the gravity of the offence and the attitude of the offender (including the offering of an apology). Respect plays a pivotal role in Swazi culture, therefore any assault by a young person inflicted on an adult (especially an elderly adult) is regarded in a very serious light. Apologies – especially for minor assaults – are readily accepted. This forgiving attitude has its origins in regimental fights. In such fights, the victor was duty-bound to shake hands and the victim to forgive the hurt; traditionally, the hurt was subsequently washed away in drinking beer together.

The modern form of apology is often accompanied by the offer of an amount of cash to cover the cost of a victim's visit to a medical doctor to heal the wounds. Assaults within a family environment are, for the most part, settled with either the family head (in the case of an adult) or parents (in the case of an offending child) going to the victim's home with the offender to offer apologies. In addition, at such family meeting, the offender will receive counselling not to repeat the assault, so that reconciliation may be achieved without any compensation being involved.

However, should the assault be of a serious nature (if, for example,

blood has flowed), and after lengthy family meetings no reconciliatory solution has been reached, then the matter can be referred to the court for settlement. In addition, the old principle of ‘an eye for an eye’ is still applicable in Swazi law and custom. The Swazi say “*lihlo ngeso*” (literally meaning “the same stick delivers the same taste”) and such retaliation is condoned and accepted.

10.2.3 Wider contexts of the body

Bodily injury must be understood in the indigenous context as including not only the wound itself (as a result of the assault), but also as extending to the causation of worry, sorrow, fright and dismay (Joubert 1953: 131). Among the Southern *Sotho*, for example, Ashton (1952: 258-9) found that mere threats and intimidation are seen as assault. Myburgh (1985: 35) cites ethnographic data that satisfaction obtained by close relatives for homicide similarly applies to the harming of the body (by causing dismay *et cetera*), which is accordingly treated with strengthening medicines. Among the *Zulu*, Krige (1936: 228) found that the relatives of a slain man could accept a beast to “wipe away the tears”. Hammond-Tooke (1962: 220) states that among the *Bhaca*, the court could make an award of cattle to the relatives of victims of homicide. Myburgh (1985: 36) indicates that retaliation was, in fact, known among the *Tswana*, *Tsonga*, *Venda* and the *Zulu*. In such retaliation, the *Zulu* slaughtered any cattle seized for use in the strengthening ceremonies.

Among the Swazi, while physical violence is normally necessary for assault, such actions as pouring water on a sleeping person can

also amount to assault because it is “hurtful” to be woken in such a manner. The position amongst the *Rolong* is similar (Myburgh 1980: 81). A mere threat to one’s body also constitutes assault, irrespective of whether the victim believes that the person so threatening him is able to carry out such threat.

10.2.4 Homicide

Generally, homicide constitutes violation of the patrimonial right of guardianship. From the above examples it is evident that, among certain peoples, homicide can also be viewed as the simultaneous violation of the right of personality to the body (Myburgh 1985: 36).

In modern indigenous law, the strong delictual elements of early indigenous law have given way to homicide now generally being regarded as a crime (Prinsloo 1978: 8). Furthermore, homicide has fallen outside the jurisdiction of the indigenous courts and is immediately referred to the Magistrate’s Courts. However, van der Merwe (2000: 211) indicates that among the *Bakwena ba Mogopa* in early indigenous law, the death of a bread-winner was referred to the courts, which usually directed that the guilty party and his group had to be responsible for the care and maintenance of both the widow and the upbringing of the children, as the *Tswana* say “*go ntlwisa bothoko*” (“to alleviate the heartache”). Formerly, a distinction was made between intentional and negligent homicide. In the case of intentional homicide, the court would order the death penalty of the guilty party and direct that his or her group were to be responsible for the maintenance of the widow and children and

also the upbringing of the children. This illustrates the strong group orientation typical of non-specialised legal systems.

Among the Swazi, the death penalty imposed for homicide (*kubulala*) under original law and custom could be reduced in view of certain mitigating circumstances. For example, old women smothering an idiot delivered by a midwife would not be found guilty of murder, since permission for such act was usually given by the male family members.

10.2.5 Violation of patrimonial rights sometimes includes elements of personality rights

10.2.5.1 *Dismay caused by and associated with the theft of property*

The protection afforded to the right of personality in the body extends to the “dismay” caused by theft, which, in itself, is the violation of the patrimonial right of ownership. Ashton (1952: 266) states that among the South *Sotho* in cases of theft, twice as much as the value of the stolen thing is awarded “because of the trouble caused”, with the equivalent being damages (for violation of the patrimonial element) and the multiple being satisfaction (for the violation of the personality element). Schapera (1937: 207) found the same position among the *Tswana*.

The approbation with which theft is viewed by indigenous people as a violation of a right of personality is also demonstrated among the *Pedi* (Monnig 1967: 327) and *Venda* (Stayt 1931: 222), where an order may be made for the transfer of property to the victim of more than twice the value of the stolen property. Post (1887 2:84-6)

found that among the Southern *Nguni*, between five and ten times and among the *Tswana* up to four times the value of stolen property can be awarded. Among the *Tswana*, for the theft of cattle (of special status and religious significance to indigenous people), a whole herd of cattle from the kraal of the thief's home may be awarded (Schapera 1966: 129). Again, to illustrate the seriousness with which this violation of a right of personality is regarded, should more than one thief be involved, full performance is, in fact, required from each guilty party among the South *Sotho* (Ashton 1952: 267) and the *Tswana* (Schapera 1938: 272).

It is should be noted that as stock theft (especially cattle) is regarded in such a serious light, it is generally also punished as a crime. Vorster and Whelpton (1998: 44) postulate that the compensation awarded for cattle theft does, in fact, include an element of satisfaction, because not only are cattle a sign of economic welfare but also have a special place in indigenous religious life. Some groups refer to the beast as “the god with the wet nose” – the Tswana say “*modimo o nko e metsi*” (since it is the chosen sacrifice to the ancestors); therefore to steal a person’s cattle amounts to contempt for his ancestors (with the accompanying impairment of his honour).

Among the Swazi, theft (*kuba*) is the intentional taking of a movable thing owned by others without permission. Theft of private property has always been a civil wrong, while theft of public resources (not owned but controlled in public law) has always been a criminal act. Stock theft (especially theft of cattle) is also regarded as very serious and generally also punished as a

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crime: the thief must both return the stolen item and pay a beast as a fine to *Umphakatsi* (chief's court). Any theft of property accompanied by violence is punished more severely than ordinary theft (Whelpton 2004 *Emacala*: 12).

In certain cases, theft is treated as a very serious offence equivalent to witchcraft because thieves usually adopt the same sneaky tactics as a witch under the cover of darkness. Punishment for theft is assessed on the seriousness of the offence. Generally, the punishment is a “fine” of two beasts – one of which goes to the *Umphakatsi* (chief's court) and the other to the victim: a beast paid as a fine is called *luswati*. In addition to this fine, the sentence may order that the thief return the stolen property or render its value to the victims.

Stock theft, in effect, may destroy the family's whole economy. The Swazi regard it in the light that the thief has “killed” the owner of the cattle, and neighbours will call to commiserate and “mourn” the loss of the owner's wealth, since “the pillars of his household” have been stolen. Theft of an ancestral cow or white heifer is viewed in a particularly serious light. The contentment of the ancestors is demonstrated with there being a fertile herd and increasing number of cattle; should the animals “reserved” for the ancestors be stolen, the ancestors would be highly displeased, and such displeasure would be manifested in the visitation of sickness or misfortune on the living family.

Likewise, theft of ceremonial artefacts would also be highly upsetting to the ancestors and thus be regarded as a serious

occurrence. To steal these artefacts would also destroy the wealth and prosperity of the home, which, it is thought, may “disintegrate” following their theft. Of particular significance amongst the artefacts are the *inyoni* (headdress), *sikhali* (spear), *lihawu* (shield) and *umdada* (leopard skin). Articles of apparel are held in high esteem because they have a special attachment to the ancestors. Such articles are not washed and thus contain (and retain) the sweat of the forefathers – providing a special bond between the living family and their ancestral spirits (the ‘living dead’). Indeed, such is the particular regard with which the *umdada* is held that should a stolen *umdada* be recovered from the thief, it is considered to be “polluted”, because it may have been worn by a non-family member. In such a case, diviners have to be consulted. If the *umdada* is badly polluted, the family will refuse to accept it back and demand of the thief that he provides a brand new one. If, however, it is capable of being cleansed, the diviners will instruct on the manner in which this is to be effected.

Generally, in such cases of stolen cattle or artefacts, a fine of at least two beasts is imposed by the court. However, if the thief displays true remorse for his actions and offers apologies to the family, the owner’s family may accept a lesser compensation. The thief would despatch a family member to the owner’s family with a goat (as a conciliatory gesture), and the owner’s family would then decide whether this would be acceptable (together with an apology) as adequate compensation for the theft. Although generally a goat would be regarded as insufficient compensation, it could be accepted as sufficient to restore peace and harmony in the local community (based upon the premise “do not take advantage of a

thief – it may one day happen within your own family”).

10.2.5.2 *Dismay caused by damage to property*

The same principle applies to the intentional or negligent damage of property, for which the defendants can be ordered to render much more than the equivalent of the damage to compensate for the dismay or anguish engendered. Schapera (1937: 207) found this among the *Tswana*. Monnig (1967: 324-4) states that among the *Pedi*, even multiples of such damage may be ordered from the defendants. Where a whole crop is destroyed by animals, not only the defendant’s crop but also a number of his livestock may be awarded to the plaintiffs.

Such redress includes an element of retribution in that the adversaries must also suffer damage and experience the ensuing dismay. Myburgh (1985: 37) indicates that retribution among the Southern *Nguni* occurs in a pure form: where cattle damage crops, they may be driven into the crops of their owners.

When ownership is infringed, personal injury is experienced in the body (*vis* dismay or anguish), accordingly the victims may use self-help redress against the perpetrator by attacking his body (Myburgh 1985: 37). When crops are damaged, the negligent herder may be thrashed – in the case of the *Tswana* (Schapera 1938: 271), the Southern *Nguni* (Whitfield 1948: 420), the *Tsonga* (Junod 1927 1: 440) and *Venda* (Stayt 1931: 222). In instances where thieves are caught red-handed, thrashing is also permitted among the *Tswana* (Schapera 1938: 271), the *Pedi* (Monnig 1967:

327) and the *Tsonga* (Junod 1927: 64). With cattle being so important in indigenous culture, among the Southern *Sotho*, cattle thieves caught in the act could formerly be killed on the spot (Ashton 1952: 54). Such punishment was also permissible among the *Tswana*, or, alternatively, the thief's hands could be cut off or burned away (Schapera 1938: 271).

10.2.5.3 *Dismay caused by and associated with the impregnation of a girl.*

Using examples, Myburgh (1985: 37-8) indicates that the same act may simultaneously violate both the patrimonial right of guardianship and also the right of personality in the body.

Myburgh cites two cases confirming the award of damages for violation of the patrimonial right (for the reduction in the *lobolo* obtainable by the girl's group) and of satisfaction for the contumely in the violation of the group's honour: the *Mpondoland* case of *Ndamase v Mda* (1953 NAC 127 S) and the decision of the Natal High Court in *Devine v Dali* (1918 NHC 95). In the latter case, two beasts were claimed – one for patrimonial damages and the other for satisfaction to remove the stigma incurred in the violation of the right of personality.

Among the *Tsonga*, should a man impregnate his girl in her village, a goat has to be slaughtered in the night and a certain ritual performed early the following morning to protect the villagers from “pollution” caused by breaking the taboo against pregnancy. Although for the girl, such ritual duty appears to be only of a disciplinary nature, for the man, it takes the form of redress for the violation of a right of personality in respect of which the emphasis

falls on health and therefore on the body (Joubert 1953: 131). The ritual serves to protect the body against illness and not to purify. In addition to the right of personality ritual, the man must pay a sum of money, which is not included in the *lobolo* sum, for the infringement of the right of guardianship (Junod 1927 1: 97).

Should a *Tsonga* man impregnate the girl in **his** village, (with no prior arrangements about marriage goods), however, her male relatives may converge on such village, armed, seize a pig and slaughter it. They take the meat with them and only if a settlement is reached, do they send a piece to the lovers as a token of their consent (Junod 1927 1: 507). Junod goes on to quote a case in which the girl's father was suitably confused and thus dismayed because of the infringement of guardianship. Satisfaction in this instance was allowed for the violation of the right of personality to the body. Similarly, among the *Kgatla*, a girl's father may thrash a lover if he catches him in the sexual act with his daughter but, unlike with the *Ngwato*, cannot prefer to sue (Schapera 1938: 264). Among the *Ngwato*, should the girl become pregnant, the man's group must deliver an ox to the girl's people, because the "lover has broken through their fence". The animal is then slaughtered and eaten (Schapera 1938: 137). Myburgh (1985: 38) maintains that since no mention is made of insult, uncleanliness or disgrace, it is reasonable to assume that the body is the object of the violated right of personality – due to the distress again caused by infringement of the patrimonial right of guardianship.

Among the Swazi, seduction (*kwemitsisa*), to be actionable, must result in pregnancy (due to the difficulty of proving sexual

intercourse has occurred if no pregnancy ensues). The Swazi distinguish between patrimonial damages and satisfaction (the latter being “sentimental” or moral damages). Seduction infringes upon the girl’s family’s right of guardianship as well their honour and good name (Whelpton 2004 *Emacala*: 8). Five beasts are paid by the boy’s parents to the girl’s parents. Damages are paid because less *emalobolo* will be received for such a girl as a result of the seduction: “*uvule sibaya sendvodza*”, meaning “having sex with an unmarried woman”. In this case, it means impregnating a girl to the detriment of the father, who is considered the girl’s guardian. Should the seducer eventually marry the girl, such damages paid will form part of the *emalobolo*. The girl’s father will also be compensated for the infringement of the family’s honour and good name – indicating an element of satisfaction in the seduction fine.

The panel of experts in Swaziland confirmed that one of the five beasts referred to above (a cow) was slaughtered (known as *umdzalaso*) just before the girl delivers the baby (*kuchitsa umhlolo*). After this cow is slaughtered, it is eaten by the girl’s family as a ritual to be rid of the bad omen and ensure that other girls in the homestead do not fall pregnant. The girl herself (and all in her age-group regiment) do not partake in this meal in view of the “pollution” associated with her seduction. Thereafter, for the same reason, the girl is not permitted to participate in the activities of the regiment. In the case of the male regiments, where one man in the regiment has seduced a girl, all members of the regiment have to contribute towards the fine/compensation for this insult that “they” have delivered. This approach of the Swazi

towards seduction accords with that observed by Hammond-Tooke (1962: 101) among the *Bhaca* in KwaZulu Natal.

While kidnapping is not actionable, the abduction of a girl by the man who has made her pregnant is recognised as an insult/offence for which compensation or a fine must be paid. In Swazi culture, it is a disgrace for an unmarried girl to have a child in her family's home: this brings "pollution" into the home and it must be "washed away". Abduction is often resorted to in order to minimise the disgrace and insult caused. Following the abduction, the boy's family approaches the girl's family with an offer of a cow to "wash away" the insult and at the same time to request that the girl be given in marriage. This corresponds with the situation among the *Zulu* (Myburgh 1944: 55-56) and with the Southern *Sotho* (Ashton 1952: 260), where a girl's kidnapping is met with a sound thrashing to cleanse the insult, which is seen as a public jibe at the girl's chastity.

10.2.6 Rape

Although generally dealt with as a crime in indigenous legal systems, amongst some groups, rape also has important delictual dimensions. Myburgh and Prinsloo (1985: 101-2) found that among the *Ndebele*, rape, accompanied by violence and penetration, is regarded as a delictual act, and the victim's family is to be compensated with both satisfaction and damages at the court's discretion. However, Schapera (1937: 20) states that among the *Ngwato*, the guilty party gets only a thrashing; no damages are payable, therefore it would appear that this group

regard rape solely as a crime. For the *Kgatla*, on the other hand, rape is both a crime and a delict with the imposition of both a thrashing and cattle to be paid (not only to the court but also to the victim's family).

Monnig (1967: 323-6) states that for the *Pedi*, redress is obtained by way of a sound thrashing of the rapist caught red-handed. Harries (1929: 106) found that in some instances, in addition to such satisfaction, the court makes an award for the insult. Among the Southern Transvaal *Ndebele*, Fourie (1921: 156) found that a rapist of a married woman had to pay whatever the husband demanded. According to Myburgh (1985: 46), a lack of limitation would indicate more than just damages, and thus satisfaction or its inclusion in a claim for violation of the right to honour as well as the body. In this respect, van der Merwe (2000: 209) indicates that among the *Bakwena ba Mogopa*, the cattle paid to the father or guardian of the injured girl (or husband of the woman) were in satisfaction for the injury to the group's honour (through deliberate assault upon the body) as well as for damages for violation of the guardian's right of guardianship. Corporal punishment could also be ordered, which would indicate it being viewed as a crime by this group.

For the Swazi, the act of rape (*kugagadlela/kudlwengula*) does not require penetration as an essential element. Thus, merely throwing a female to the ground and grabbing hold of her in an unsuccessful move to ravish her amounts to rape (Whelpton 2004: *Emacala* 6). The punishment for rape was the death penalty (*umphini*), but since rape is also regarded as a delict, damages and satisfaction may be

awarded to the victim's family.

Rape is viewed with particular distaste in Swazi culture, with the perpetrator being regarded as being 'worse than an animal'. Thus, to restore the honour and to console the family of the violated female, compensation in the form of a beast is generally awarded. In the case of a "young" offender, the father would be responsible for his son's actions (*umshayele tinyoni*), hence the father would pay the compensation and the youth would be thrashed.

10.2.7 Adultery

Both the delictual and criminal elements of adultery were noted in chapter 7 (see sections 7.3.3.3.2 and 7.3.3.3.3). Schapera (1938: 268) states that among the *Tswana*, for the delict of abduction a tribal court nowadays authorises seizure of all the cattle of those liable (and that formerly would have been looted by feud action). Myburgh (1985: 21) points out that such relief is similar to that formerly obtained by self-help and associated with revenge.

Among the Southern *Sotho*, cattle are demanded of an adulterer for the indignity suffered (Ashton 1952: 263); among the *Pedi*, such cattle are to assuage feelings (Harries 1929: 24). Among the *Venda*, animals delivered for adultery may not be kept, but must be slaughtered (van Warmelo 1967: 1156 – 7).

Myburgh (1985: 25) concludes that for many peoples, adultery is also to be viewed as a patrimonial loss, for which the family group can claim damages, namely as a violation of the group's right of authority resulting in diminution or extinction of the value of that

right. Among the Southern *Sotho*, adultery is viewed as an infringement of marital rights (Ashton 1952: 263), while the *Pedi* regard it as damage done to the wife (Harries 1929: 24). The *Tswana* grant the husband's group a claim for as many cattle as they please (Schapera 1938: 267), while the *Tsonga* grant the equivalent of what would be demanded for giving a girl in marriage (Junod 1927 1: 197).

Bekker (1989: 365) states that the customary fine for adultery among the *Fengu*, *Pondo*, *Pedi*, *Sotho* and *Xhosa* is fixed at three head of cattle – increasing with some tribes to five head should pregnancy ensue from adultery. It should be noted that condonation of a wife's adultery does not bar the husband from suing for adultery. Should he dissolve the customary marriage because of the adultery, he would be obliged to forfeit his *lobolo*; thus, condonation is rather the rule than the exception (Bekker 1989: 376).

Among the Swazi, in cases of adultery (*kuphinga*), the adulterer is also obliged to pay what the wronged family demands, although such a claim could be reduced if the matter comes before the court (Whelpton 2004: *Emacala*: 9). The amount awarded as damages depends on the circumstances, and may be as much as ten beasts (when, for example, the adulterer took the woman to his place of residence). One of the beasts so awarded is slaughtered at *uMphakatsi* (chief's court) as a ritual beast (Whelpton 2004 *Emacala* 10). The slaughtering is done by the adulterous man himself, who must then cook the meat and serve it to all present. He also has to take a meat portion (known as *sankhala*) home to

report that he has faced the appropriate discipline.

In Swazi law and custom, adultery can take place during the husband's lifetime or even after his death, if his wife is involved in an *ngena* union. It should also be noted that unlawful sexual intercourse between a married man and an unmarried woman constitutes seduction, and is not regarded as adultery.

Should a woman be accused of adultery, proof of the act must come from an enquiry into the matter by the *lusendvo* (family council). If found guilty, her parents are obliged to pay a "fine" of two beasts *tinkhomo tekugeza emacansi* – ("to cleanse the mats") to the husband's parents. In addition, the adulterer has to pay a fine (*siti*) to *uMphakatsi* (chief's court).

Conduct not amounting to adultery can, however, still be viewed as sufficient to found a claim. Also among some *Zulu* tribes, even sensuously taking hold of a married woman necessitates the delivery of a head of cattle or two goats, which will be slaughtered by the husband's group (Myburgh 1944: 279-80). Furthermore, Myburgh notes that there is evidence of a *Zulu* custom, whereby a man who calls another's wife to sit with him in the dark, has to deliver a beast to cleanse the husband's kraal (*Hlatshwayo v Msibi*, 1954 N.A.C. 122, NE).

10.2.8 Witchcraft

Bodily injury may also be imputed to witchcraft, which is defined as the use of magic to harm another person in particular or the

community in general. The means employed can vary from using material with a clandestine effect to making use of natural phenomena, such as lightning. Formerly, a *Tswana* court, believing bodily injury to have been caused by witchcraft, might order the cure of the patient (Schapera 1938: 276). Witchcraft is generally regarded in a very serious light. For instance, Myburgh (1944: 284) found that among the *Zulu*, unfounded accusations of witchcraft made by a wife against her husband entailed the production of a beast by her group for slaughter.

Among the *Swazi*, practising witchcraft (*kutsakatsa*) remains a serious offence, but since witch-hunts (*umkhaya*) were officially banned by King Sobhuza II, there is a genuine concern that witches are now living unhindered in communities (Whelpton 2004: *Emacala* 18). Examples of some of the most commonly known forms of witchcraft are *kutsebula* (turning a person into a zombie), *kudlisa* (putting a poisonous potion into another's food or drink) and *nhliziyo* (causing someone to commit suicide). Any person suspected of witchcraft is – with *Sikhulu's* (the chief's) sanction – subjected to *emkhayeni* (the process of divining). An alleged witch could not be taken to court for witchcraft. Formerly, if found guilty by *emkhayeni*, the party was put to death. Today, however, banishment is the severest form of punishment, and such banishment results in the cleansing of the community.

10.3 THE RIGHT OF PHYSICAL INTEGRITY AND FREEDOM OF THE BODY

10.3.1 General

Since little has been written on this topic, the general elements of

indigenous culture have to be examined to assess such right. Van Niekerk (1995: 308-9) notes that a very specific content is given to rights such as freedom of movement – dictated not only by the interests of the collectivity, but also by the interests of superhuman (ancestral) forces. Van Niekerk goes further to state that it may be both difficult and inappropriate to apply Western concepts in an indigenous law context, in which the exercise of free movement may be proscribed, because it might disturb the relationship with the superhuman (ancestral spirits) and result in the possible application of superhuman sanctions.

Freedom of movement is culturally curtailed in indigenous society by rules associated with taboo. For example, a father is prohibited from entering the birth hut for a certain period; it is forbidden to go into the fields on the day when a person dies, and women are forbidden to enter the kraal area or appear in court (which is adjacent to the kraal) whilst they are menstruating.

10.3.2 The Swazi

For the Swazi, violation of a taboo (*kungahloniphi loko lokutilwako*) may affect not only the violated taboo but also the community as a whole (Whelpton 2004: *Emacala* 17). It is believed that should anyone violate taboos while they are in force, when the rain comes, it will turn into hail and destroy the crops, which is a supernatural sanction. In addition, there is a penal sanction with the punishment of one beast imposed by *Sikhulu* (the chief) upon anyone shown to have broken a taboo. This illustrates that such a taboo has become sufficiently important to be

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reinforced not only by a supernatural sanction but also by the court. Accordingly, working in the fields on the day after a fall of hail, performing activities on the death of *Sikhulu* (the chief), and tilling the soil on the day of the death/burial/cleansing ceremony of a dead person are all examples of taboos (involving restrictions on movement), the violation of which is punishable under Swazi law and custom.

In addition, his majesty the King is also subject to certain restrictions upon his own movements, because it is taboo for him to come “close to death”. The King (together with the chiefs) do not attend funerals and may not even come into close proximity to a deceased person. In the event of a fatal traffic accident, the panel of Swazi experts confirmed that the royal entourage would be redirected away from the scene of the accident. Any person that has been in contact with a deceased person is obliged to stay away from the King for a period of several days until the “pollution” has disappeared.

A woman in mourning is subject to specific taboos. She must refrain from such acts as going into the cattle kraal, hitting a child, scolding or talking loudly, running, and also from sexual intercourse. With regard to the latter, should a married woman in black (mourning) be caught with a man, this also constitutes an offence. In addition, her family is obliged to go to her in-laws to explain why their child has offended “while in black”. This is an insult that carries back to the in-laws’ ancestors, and upsets both the living family’s and the ancestors’ well being in the community. Accordingly, the mourning clothes are deemed polluted, and after

reporting the matter to the Chief, the woman is required to divest herself of her mourning attire, after which these clothes are placed in a separate clay pot and may not be re-used. The woman will nevertheless retain the status of a widow even though she is “undressed” (*vis* no longer allowed to wear mourning clothes).

This misbehaviour, involving the breaking of a taboo, has ripple effects that permeate several generations back. The insult caused thereby has serious repercussions not only in the immediate and extended families (together with their ancestors), but also in the broader community itself because of the “pollution”. The ideal to which all parents strive is *bani washiwa indvuku ebandla* (“to leave a good stick in society”), that is, to leave a legacy of well behaved and morally upright children. The insult caused by a “bad stick” attaches to the family and has to be washed away by payment of compensation (typically one beast) to the in-law’s family after negotiations between the two respective families. The compensation is framed to include the wishes and instructions of the respective ancestors. The successful culmination of the negotiations together with payment of the compensation ensures the restoration of peace and equilibrium in the community with the “pollution” having been removed.

10.3.3 Imprisonment

Generally, individual freedom is so highly valued in indigenous culture that it is rarely taken away from anyone – not even a criminal; imprisonment is regarded as a degrading punishment. This is one of the principal reasons why many indigenous people

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may still mistrust Western systems of justice – especially in South Africa, where the former apartheid government was not slow to use imprisonment as a punishment for a myriad of offences - both major and minor – with scant regard to the value of human dignity.

Myburgh (1985: 102) states that imprisonment is not generally known. However, restriction, removal and banishment do all form part of the regimen of punishment that may be imposed by criminal law through satisfaction. In particular, banishment is regarded as second only in severity to the death penalty, and is ordered for crimes which bear superhuman consequences (from ancestral spirits) and threaten the co-existence of the group. Myburgh (1980: 48 – 52 and 96 - 97) cites treason, murder and practising sorcery as instances where banishment is appropriate – in large measure, to remove the element of “pollution” associated with the wrongdoer from the community.

10.3.4 Banishment

Among the Swazi, if a person is found guilty of witchcraft by *emkhayeni* (the process of divining a suspected witch by an *inyanga*, a diviner), a person would be banished from the community. The suspected witch could not be taken to court for witchcraft, but had to be taken to *emkhayeni*. Usually, he/she would be required to pass through seven chiefdoms and only be allowed to settle upon reaching the eighth one (Whelpton 2004: *Emacala* 18). It is believed that a sorcerer can cause injury to another person or the community by using magic harmfully. Accordingly, to rid the community of the negative effects of

“pollution” caused by witchcraft, the sorcerer has to be banished to a faraway territory.

The panel of Swazi experts confirmed that issues of witchcraft are serious, and should a family suspect witchcraft is being practised against them (*kuba ngumtsakatsi*), they will approach *sikhulu* (the chief), saying “*asiphili ngaloku okwentekkeyo*” (“we are not well”), because of all the illness and misfortune that they have suffered. *Sikhulu* will then direct that the family go to the diviners (together with *sikhulu*’s own representative) for the diviners to carry out the *emkhayeni* process.

The process of banishment for the sorcerer may only be initiated by *sikhulu* once he has received a request from the community or the “bewitched” family. *Sikhulu* sends his *indvuna(s)* (headmen) to the King requesting a directive that the suspected sorcerer be taken before the diviners (*kumikisa umuntfu emkhayeni*). The issue is so sensitive that the King also sends his own emissary to oversee the situation. Following a positive finding by the diviner, *sikhulu* and the King’s own emissary report back to the King, who himself issues the banishment order after reviewing the reports.

In addition to banishment for witchcraft (the most serious form of banishment involving removal through seven chiefdoms), other less serious forms of banishment/removal can also be imposed. For example, a compulsive or habitual thief may be removed to another area: the process is again instituted by *sikhulu* who requests permission from the King to effect the removal. The same procedure would also be applicable to a “confirmed” adulterer.

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Sikhulu approaches the King for permission to remove the adulterer (“with the roving eye”) to another area, where he would be unable to gain easy access to the women with whom he has been consorting.

Banishment in a lesser form is also practised in the case of lack of respect or of consistent disobedience within the family. Thus, a father whose son has been continuously disrespectful or consistently disobedient may approach *sikhulu* requesting permission for his son to be moved to a new area within the chieftainship. The relevant maxim is “*andzise tetsha*” (literally, to “spread the dishes around”). The father will accompany *sikhulu’s* *indvuna* (the chief’s headman) with his son to bless the new place of residence selected, to demonstrate that he is not chasing his son away with a bad heart, but merely that he deems it prudent for him to start afresh on his own in a new environment.

The panel of Swazi experts confirmed that where the King is obliged to replace a chief (for whatever reason), the displaced chief is removed to another area, where he becomes merely an ordinary citizen. He enjoys no special status or privileges, since his removal was due to his failure to carry out his duties as chief. Such removal also avoids a possibility of friction with or lack of respect to the newly installed chief.

Joubert (1953: 131) indicates that deprivation of liberty or interference with freedom of bodily movement would not be rights that would generally require protection in indigenous society. With regard to kidnapping, no action for violation of personal

freedom is available. Unlike in Western legal systems, kidnapping is thus not regarded as an object of a right of personality pertaining to the body (Joubert 1953: 131). However, as indicated earlier (see chapter 9, section 9.7.2), generally should the right of freedom to move or act be violated, the victim's status and functional position within the agnatic group would thereby be threatened (in addition to dignity, honour and good name) and, as such, would be deserving of protection.

From the discussion in this section, it is evident that the scope of the right of personality to the body is invested with many tribal and cultural variations. This results in the right being circumscribed in certain instances, especially in relation to both taboos and the respect for ancestors. In addition, the differentiation between crime and delict is often blurred, which makes it difficult to postulate any delictual rules of general application with regard to the particular right of personality to the body.

10.4 THE RIGHT TO GOOD NAME (REPUTATION): DEFAMATION

10.4.1 Distinction between honour and good name

Myburgh (1985: 39) states that indigenous peoples regard honour and dignity as the objects of a right of personality, since they attach delictual consequences to various forms of insult. Moreover, it is widely believed that violation thereof causes pollution, which, itself, is not a bodily attribute.

Two different approaches are evident in this sphere. Myburgh (1985: 41) and others regard honour (dignity) and good name (reputation) as forming parts of the same right of personality. Myburgh (1985: 41) states that “defamation or violation of the right to a good name is therefore also violation of the right to honour. Defamation also includes insult, but implies that third parties know of the imputation and may be influenced by it”.

In regard to the *Basotho*, Ashton (1967: 263-5) and Palmer (1970: 141) propose a distinction between the two elements, based in part on the type of insult – although Ashton states that the distinction is often difficult to determine. Palmer (1970: 141) points out, however, that “customary law has always recognised an action for insult (*hlapa*), which is distinguishable from defamation in that, like mere verbal abuse, it is an affront to one’s dignity of personality but not to his reputation”.

It would be instructive to apply the theoretical distinction made in the South African law of personality (see chapter 4) to indigenous law. Good name or reputation refers to the sphere of defamation because it concerns the regard which the person enjoys within the community – the esteem in which he is held by others in society. Honour or dignity, on the other hand, embraces only subjective feelings of self-respect: infringing a person’s honour or dignity means insulting that person. As such, this objective personality should thus be distinguished from other personality interests. Although one and the same act may infringe both rights of dignity and good name, the distinctive nature of each legal object could be kept conceptually separate, but an examination of the ethnography

shows that this may not be the case in most of the groups that have been studied. Among most groups, there is no apparent distinct categorisation or classification of good name/reputation on the one hand and dignity/honour on the other. This lack of conceptual separation of objects of rights of personality stems principally from the wide spectrum encompassed by the indigenous cultural view of dignity, into which, among many peoples (including the Swazi in particular), good name and reputation are subsumed. Thus, the theoretical distinction between the two concepts observed in Western legal systems is largely absent from indigenous legal systems.

10.4.2 Types of insult amongst indigenous peoples

Various types of insults need to be examined to establish which are sufficient to lower or tarnish a person's reputation within the community and *ipso facto* amount to defamation or, alternatively, are of sufficient seriousness to merit such insults being regarded as either a crime or as both a delict and a crime. Non-defamatory insults infringing only subjective rights of honour and dignity (of a restricted definition) will be examined in sections 10.4.3, 10.5 and 10.6.

Myburgh (1985: 41) lists three allegations as defamatory, namely witchcraft or sorcery, disobedience to the authorities, and theft. Satisfaction for the violation of the right to good name is often sought in the form of “clearing, washing, cleaning or cleansing of the injured name” (*Tswana*), “washing away the imputation” (*Xhosa*) or “cutting off the tongue” (*Basotho*). Schapera 1938:

258) notes that some tribes afford relief only if the statement complained of has resulted in “trouble” (such as a trial). Nevertheless, the emphasis throughout the whole process remains one of amends rather than patrimonial restitution (Myburgh 1985: 22).

Since status is such an important cornerstone of communal life, insults which in any way detract from such status and the good name and standing associated therewith clearly violate a right of personality and merit protection. The seriousness of the insult and whether it would amount to defamation varies considerably with the tribal context. Labuschagne and van den Heever (1998: 295-308) conducted an ethnological survey of defamation in Southern African customary law and found, among other things, that the Northern *Sotho* appear to regard defamation solely as a criminal offence since only a fine is payable to the chief. Labuschagne and van den Heever (1998: 297) cite Prinsloo’s (1983: 210-212) finding that in Lebowa, a crime is committed should someone else be insulted or falsely charged with a crime. In other tribes however, insult is only a delict – except insulting the tribal chief (*kgosi*), which is always a crime. Children who commit defamation are usually subjected to corporal punishment, which is a clear indication that, in certain cases, defamation in indigenous law is still primarily a crime. Myburgh (1985: 41) maintains that the finding of the indigenous court in such cases simultaneously deals with the awarding of reparation to the plaintiff for the defamation and punishment for defamation as a crime.

Among the *Basotho*, Ashton (1067: 263-265) and Palmer (1970:

141) propose a distinction between defamation and insult (and honour and good name) based partly on the type of insult (see section 10.4.1). Ashton (1967: 285) concludes that the primary goal in *Basotho* defamation proceedings is the restitution of the plaintiff's reputation rather than deriving satisfaction from the action. Palmer (1970: 141-142) states that if an insult is publicly withdrawn, this constitutes a valid defence to a demand for reparation. In other words, then, the fact that the words used, their withdrawal, and the apology all have to be uttered publicly indicates that the impinging of the victim's good name (*fama*) in the community is stressed rather than that person's subjective honour (*dignitas*). This approach endorses Ashton and Palmer's distinction between honour and good name (see section 10.4.1), but on the available material, it may be difficult to distinguish and justify the postulated distinction from a conceptual standpoint.

The Southern *Sotho* describe a verbal insult as a curse and it occurs when a person is called an evil magician/worshipper of the devil, or a product of an extra-marital relationship, or an adulterer or thief, or is abused with reference to his own or his mother's excreta (Myburgh 1985: 40). Satisfaction is obtained when goods or value are transferred or a pardon is requested (Ashton 1952: 263-5). Hence, it would appear that such curses/insults are all sufficiently serious to damage the victim's standing in the community.

Among the *Tswana*, defamation consists of sullying one's right to a good reputation (*go mo senya liena*), therefore allegations of theft, witchcraft and seduction are all considered defamatory. Van der Merwe (2000: 202), found that among the *Bakwena ba Mogopa*,

accusations of theft and witchcraft are regarded in the most serious light. If a chieftain is insulted, this is regarded as a crime, the punishment for which is banning (van der Merwe 2000: 203). Moreover, “publication” in the Western sense is not a requirement – it must merely occur in another person’s hearing (van der Merwe 2000: 204).

Among the *Zulu*, Reader (1966: 304) (cited in Labuschagne and van den Heever 1998: 300) states that, among the *Makhanya*, in defamation all that is required of the defendant as a defence is to apologise in public. Like the Southern *Sotho*, it is thus the victim’s good name in the community rather than his subjective dignity that is relevant in matters of defamation. Sometimes he is also given a small fine – indicating an element of punishment for a crime.

Winick (Dictionary 1958) defines “defilement” (“pollution”) as “a concept that is midway between spiritual and physical uncleanliness”. When this element of “pollution” is brought into the frame of rights of personality, it also becomes difficult to determine whether the insult is indeed defamatory or merely violating the subjective honour of the family group. That violation of rights of personality can cause “pollution” in the community is not at issue and Myburgh (1985: 18,33,39,44 and 47) cites many examples thereof. It is submitted that the abhorrence with which “pollution” is regarded in indigenous communities (and in particular its association with ancestral displeasure and sanctions) should elevate a “polluting” insult above the level of a purely subjective insult. The former has fundamental implications and effects in the community at large, and should be limited only to the

honour/dignity of the recipient of the insult.

The *Zulu* take the same view as above and for them, disregard of the rule against uttering the names of certain affines (and words sounding like them) is an insult to the ancestors and thus to the whole group of affines. If the wrongdoer is a woman, her family of origin must provide a sacrificial animal to prevent a visitation of disaster from the ancestors, such as an old woman from among them preventing her from giving birth when she is confined. Should the wrongdoer be a man, his mother's relations or her house must provide a sacrificial animal to prevent the spirits from killing him, striking him dumb or visiting illness upon his child (Myburgh 1944: 193-6).

Myburgh (1985: 39) states that no greater curse can be hurled at a *Zulu* woman than the accusation that she will bear children conceived by her father-in-law. Such "pollution" sticks to her, and she must remove her blanket and inform her female relatives. The latter seize a beast from the guilty party's kraal, slaughter it and pour the gall over their bodies to "cleanse" themselves and thus transfer the "pollution" to the animal's meat (which has to be avoided by fertile persons).

For the *Zulu*, homicide also brings "pollution". Homicide is considered a violation of the close relatives' right to the body, and a pollutant in the community, as well as a violation of the group's honour (Myburgh 1985: 39).

Hunter (1936: 417) (quoted in Labuschagne and van den Heever

1998: 301) states that among the *Xhosa*, only the *Pondo* regard defamation as a crime. As each subject is seen as a “shield of the chief”, it is, in reality, the chief who is prejudiced by the defamation of his subjects. Thus, the entire fine is awarded to the chief and not to the victim of the defamatory statement.

Among the *Ndebele*, some tribes view insult as both a crime and a delict, and award a portion of the fine to the plaintiff. Should such fine take the form of an animal, it is slaughtered, and both the plaintiff and defendant are invited to share a reconciliatory meal with the court members. For other tribes, however, insult and defamation are only delicts.

Labuschagne and van den Heever (1998: 303) quote Stayt (1931: 220-1) who notes that among the *Venda*, it sometimes happens that, when the evidence is unsatisfactory, the defendant (with the permission of the Court) requests the plaintiff to consult a “witchdoctor”. In this way, it can be determined whether the defendant is guilty of committing either a delict or a crime.

Among the *Shangaan – Tsonga*, Labuschagne and van den Heever (1998: 304-5) indicate that some tribes regard defamation as both a delict and a crime, but that the position varies from district to district. The customary reparation awarded for defamation is a head of cattle to clear a person’s reputation.

Among both the *Tsonga* and *Venda*, an accusation of practising black magic is an actionable insult (Myburgh 1985: 40). Among the *Tsonga*, such imputation may be accomplished merely by

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pointing the index finger at the victim (Junod 1927 1:445). Such actions are available only if the person against whom the allegations were made appears in court as a consequence thereof. If the court finds such accusations unfounded, the action is thereupon dismissed because honour that is lacking cannot be violated.

10.4.3 The Swazi in the Kingdom of Swaziland

10.4.3.1 *The Swazi view of dignity*

The panel of Swazi experts was of the view that, in Swazi law and custom, no distinction is made between the objects (of right of personality) of reputation or good name, on the one hand, and subjective honour or dignity on the other. As mentioned in section 10.4.1, Ashton (1967) and Palmer (1970) point out that such a distinction is often difficult to determine. For the Swazi, dignity is paramount: good name/reputation /honour all appear to be subsumed into the concept of dignity. Furthermore, in examining the elements of dignity, the Swazi perception would attach to it many of the constituent elements of the indigenous concept of *ubuntu*.

Dignity is a subjective feeling of honour – a person’s pride in his/her own moral value; dignity involves the recognition of a person’s spiritual/moral value (Joubert 1953: 131) and forms part of the wider philosophical concept of *ubuntu*. *Ubuntu* is about the African art of being a true human being through other true human beings, encapsulated in the Swazi maxim “*umunftu ngumunftu ngebantfu*” (“a person is a person thorough other people”), literally

translated into “humanness” in English and “menslikheid” in Afrikaans. *Ubuntu* embraces such values as tolerance, empathy, compassion, respect and dignity. Since such fundamental spiritual/moral values are of paramount importance in indigenous community life, any insults which affect a person’s inherent perceptions concerning such values strike deep at the heart of that person’s world-view.

The Swazi appreciate and understand the concept of dignity in the context of *ubuntu* with such associated values as humanness, respect, caring, sharing and compassion. The right (of personality) to dignity is thus imbued with this world-view. For this reason, the concept of dignity is invested with more of a generic nature than is normally found in specialised Western systems. For example, in Western systems, an insult suggesting that a person was uncaring, disrespectful or uncompassionate would not find an action in either the good name (*fama*) or honour (*dignitas*) categories.

Although Western cultures regard the latter qualities as laudable moral viewpoints, there is no elevation of such qualities to the status of high moral virtues (such as chastity, for example), which go hand-in-hand with good character. Western society does not seek to regard uncaring or disrespectful people with any great approbation; caring and respect are merely desirable but not essential qualities in a person of upright character. However, humanism, which is an essential part of the African world-view, in general, and the Swazi world-view, in particular, demands a different perspective. Humanism would view such *ubuntu* qualities as of foremost priority in all conduct, and as such, they are to be ranked before other considerations (such as economic and financial

ones).

Sparks (1990: 14) states that traditional African societies place a high value on human worth – humanism in a communal context. To the Swazi people, the quality of being human involves the dignity of the human personality – the two cannot and should not be separated. Against this background, it becomes easier to understand the broad scope of the concept of dignity in Swazi law and custom. With human values being generally subsumed into the concept, there would be little justification in endeavouring to separate elements of good name or honour. The cultural view of dignity embraces all the values of humanness. This concept, so defined, is respected in Swazi communities.

10.4.3.2 *Scope of dignity*

A whole range of insults are actionable in Swazi law and custom, which find no resonance with the more limited Western specialised concepts of honour and good name. Thus, the classes of insult which might affect a person's standing/reputation in Swazi society are far broader-based than in Western society. Any insult which detracts from a person's humanness *ipso facto* is detrimental to that person's character, and merits some form of compensation or apology. According to the Swazi, “*watalwa labo lobuntfu balche*” (“a person is born with *ubuntu*”). This is the comprehensive object of the right of personality, and one which Swazi law and custom seeks to protect.

Having established the wide scope of the concept of dignity, it does

not necessarily follow, however, that a whole host of actions actually eventuate from insults to a person's character. Such insults are in a communal environment and in indigenous communities generally (and the Swazi in particular), the emphasis is always on maintaining communal harmony. Thus, the accent is on seeking solutions within the community: apologies are readily accepted and discussions to bring about reconciliation are always encouraged. It is accepted and understood that many insults are made in the heat of the moment, and conciliatory discussions between the two family groups involved will frequently restore harmony. The intensely litigious nature characteristic of many specialised Western cultures is largely absent: part of the *ubuntu* spirit includes qualities of forgiveness and understanding, and these values are promoted to restore harmonious relationships within the community.

10.4.3.3 *Types of insult*

10.4.3.3.1 *General*

A person or family's honour and good name are in question particularly in cases of defamation (*inhlamba/kuhlambalata ligama*) (Whelpton 2004: Persons 4 –5). To allege that a person is a thief, sorcerer or seducer is to “spoil one's name”, and such insult has to be “washed away” (*inhlamba iyagezwa*). In such instances, it is generally not the status of the person insulted that determines the amount of damages for the insult, but rather the weight or severity of the insult itself. This view is evaluated and criticised in section 10.4.3.3.2. Generally, compensation is three beasts, of which two go to the defamed party and the other one to the court. “Washing away the insult spoiling someone's name” (“*inhlamba*

iyagezwa”) is required to restore such person’s dignity in the eyes of the community in general and not merely to assuage the subjective honour of the party insulted.

10.4.3.3.2 *Verbal insults*

The panel of Swazi experts indicated that the weight or severity of the insult is itself imbued with cultural specifics. For example, the insult “you are a dog” would not be regarded as particularly offensive in most Western cultures. However, in Swazi culture, the panel of experts stated that it would constitute a serious insult.

Firstly, it assumes that you are not a normal and proper person, which in itself, is an affront to your dignity as a human being. Secondly, people with abnormalities (for instance being left-handed) are generally feared (due to supernatural elements associated therewith) and therefore the insult of being a dog attaches to it the stigma of abnormality. Moreover, indigenous perceptions of a dog (which, incidentally, accord with Muslim perceptions of dogs and pigs) go beyond the general (Western) equating with an animal – such perceptions include the facts that dogs eat rubbish and smell out rotten food to eat. Such factors thus increase the severity of the insult rendered.

Similarly, accusations of being a drunkard or a coward go to the heart of personal dignity. Both insults are not only direct affronts to a person’s personal character, but also suggest that that person is “not normal” in the sense of community norms. As a result, the person would lose the respect of the community with the corresponding loss of dignity attached thereto.

The protection of a woman's virtue and reputation is of fundamental importance in indigenous communities. Thus, to allege that a person is a seducer or an adulterer without any conclusive evidence is a very serious matter in Swazi law and custom, and can involve as much compensation as five beasts. This is in contrast to allegations of being a thief which, the panel stated, could be compensated by an award of between one and three beasts. From a Western perspective, such a "scale" of compensation is difficult to appreciate, since Western *mores* would generally attach a greater degree of approbation to allegations of being a thief than to that of being an adulterer or seducer.

Whelpton (2004 : *Emacala*) states unequivocally that "it is not the status of the person insulted that determines the amount of damages to be paid for the insult, but the weight of the insult". The panel of Swazi experts disagreed with this statement, because, in their view, if it were the Chief who was insulted, a higher compensation would be awarded. Accordingly, for example, the insult of "you are a coward" directed at a chief would require at least two cows as compensation (increasing to as much as five cows) whereas in the case of an ordinary citizen, the compensation might be as low as a goat.

Any insult that involves the ancestors would also attract greater compensation. The "status" of the ancestors is held in particularly high esteem and reverence, therefore the insult that "your father/grandfather/great-grandfather was a coward" is regarded as far more serious than an accusation of cowardice against any living

family member. An insult involving the ancestors also carries with it the insinuation that a person has come from bad roots and further, that these bad roots would continue into future generations of the family. It also has wider ramifications in the context of the extended family and even with regard to respect for the clan itself. Thus, the panel maintained that the appropriate compensation for an insult involving ancestors could be as much as two cows – much more than would be awarded for a similar insult to a living person.

With regard to the status of the person insulted, the Swazi, like the Zulu (see section 10.4.2), would regard the curse that a woman would bear her father-in-law's children as very serious. Because of the strict taboos associated with the daughter-in-law towards her father-in-law (including not even entering the bedroom or touching the bed of her father or mother-in-law), the status of the father-in-law in this curse directly impacts upon the severity of the insult itself, and the consequent award of at least one beast as compensation.

Finally, the panel were also of the view that in the case of an insult by a child directed at an adult (especially an elderly adult), this would involve severe disrespect, in addition to the normal “weight” of the particular insult. As such, the adult’s status as an adult person has also been violated, which would be deserving of a greater measure of compensation from the child’s family (should an apology not be accepted).

It is submitted that in Swazi law and custom, the status of the person insulted can and does have an influence on the amount of

damages awarded. The status of the person is thus a significant contributory factor in the assessment of compensation to be awarded in addition to the weight or severity of the insult. Both factors are complementary and neither is used exclusively to determine the award of compensation.

10.4.3.3.3 *Insulting actions*

The panel of Swazi experts confirmed that such activities as spitting, coughing up phlegm, blowing one's nose uncleanly with fingers, sticking out the tongue, making faces or gestures (the latter *tishanshu*), and a man or woman publicly exposing their genitals are all signs of disrespect and, as such, these insults may be subject to compensation. The most serious insult is most clearly the latter – the exposure of either genitals or buttocks. In this instance, no apology can be accepted and compensation of at least one beast would be payable. Many of these actions also contain a criminal element, so that both a fine and satisfaction are together included in the same award. The other actions (regarded as less serious in nature) can frequently be settled by means of an apology made either to the victim's family or to the court (should the matter have progressed that far). This will usually be accompanied by a warning to the offender not to repeat the insult again – given by either the family or the court.

In the unusual event that an immature boy is seduced by a woman, this is also regarded as a very serious insult in Swazi law and custom. There is a taboo against such conduct because the older woman is regarded as much “stronger” than the immature boy – so

that issues of consent or force are generally not applicable. The panel suggested that the two families involved would endeavour to settle the matter between themselves (without resort to the court), due to the highly sensitive nature of the issue. The panel was of the opinion that if the woman's family pleaded for leniency with the boy's parents and also provided a cow to "cleanse" the insult, this would, in all probability, be acceptable. However, if the matter did go to court, the panel thought that both a fine on the woman and compensation to the boy's family would be awarded – which could be up to five head of cattle in total.

10.4.3.4 *Mitigation of insult*

As indicated earlier (see section 10.4.3.2), in indigenous communities (including the Swazi) acceptance of apologies and reconciliations (resulting from family discussions) frequently provide acceptable settlements. In addition to the non-litigious nature of indigenous communities, a further important distinction between Western and indigenous cultures is that prospective settlement negotiations are not conducted by the individuals themselves (and/or their respective lawyers), but in the forum of lengthy discussions by the two "opposing" family groups involved. Apologies cannot be offered or accepted by the individual culprit or victim; since it is a family matter, they have to be presented and ratified by the families concerned. The process is initiated by the despatch of an emissary, usually a relative, from one family (the offender) to the other family (the victim).

Should the matter come before the *libandla* (the Chief's Council),

the attitude of the culprit will determine whether the court will accept any apology offered. If he or she appears to be genuinely remorseful and tenders the apology in a humble fashion, the culprit will be excused or minimal compensation will be awarded. However, should the culprit display any arrogance in the apology, the court is less likely to accept it and will award at least a goat as compensation.

In Swazi law and custom, drunkenness may result in mitigation of the compensation awarded. If it appears that the culprit had to get inebriated to muster the courage to make the insult, and he subsequently displays genuine remorse, the court will reduce the compensation because the insult did not come from a “normal” person – it was the liquor acting! Should the matter not reach the court, the family head has the power to impose a “fine” of a goat upon the drunkard, in an effort to get the culprit to mend his/her ways (see chapter 7, section 7.2.3.2.4). In such a case, the drunkard (hopefully now sober) would have to slaughter, skin and cook the goat himself and then share in a reconciliatory meal with the family.

In Swazi law and custom, there is a strong emphasis on settling matters within family groups. Matters initially referred to *uMphakatsi* (the chief’s court) are often referred back to the families concerned by *uMphakatsi* for settlement and reconciliation. Swazi communities do not approve of “*tibi tendhlu*” (“family dirty linen being washed in public”). The Swazi also say “*yasine kayinganusa iyakusala nawe*” (“if you involve yourself in clan matters that do not concern you, we shall know

about it") and "*yemvdeni ungaboyingena*" ("do not involve yourself in family matters that do not concern you").

The context of where or to whom the insult was made has little effect on compensation. Thus, the panel were of the view that an insult made publicly at a football match with a large crowd present or one made in a small circle of acquaintances, for example, would not be regarded any differently because, in both instances, a person's dignity had been infringed.

With regard to insults by children, it is an integral part of Swazi culture that children have to be respectful to adults. Thus, any insult by a child is regarded in a very serious light, and "minority" does not excuse or lessen the insult. Such an insult would also indicate that the parents have failed to give their child a good upbringing hence they would be "fined" usually one beast for the insult itself and a goat for the court. In addition to a warning from the court, the child would also receive a thrashing (usually three strokes of the cane on the buttocks), demonstrating the penal element attaching to such insults.

With regard to the feeble-minded, any insult made would be excused because, as the panel stated, the insult comes not from the retarded person but from the "condition" itself (see chapter 7, section 7.2.3.2.2). The community generally exercises considerable patience and understanding with such persons. The community do not "expect" or insist upon an apology from a retarded person, because the Swazi say that to expect such an apology would imply looking down on a retarded person which, in

itself, would be an insult to the dignity of such person.

In Swazi culture, women are respectful to men, and should a woman insult a man, the first thought would be that she might be mentally unbalanced, because such an insult is completely contrary to tradition. In the event that a married woman insulted a neighbour, the two families would meet to discuss the matter, following which the husband would send an emissary (relative) to the neighbour's family to apologise on her behalf. If a woman was given to frequently making insults, the community would approach the husband with warnings concerning his wife's uncouth and unacceptable behaviour. The Swazi say "*akatalanga uyise klafa ematfumbu*" ("the father did not bring a good child into the world – his bowels were rotten").

The panel also indicated that a chief himself is not immune to the consequences of any insults he may have made. Generally, the chief is expected to set an example by his good conduct in the community. However, there may be occasions where he displays bad conduct, such as fondling a married woman at a function or visiting a shebeen. Traditionally, a chief should not go to a shebeen because his status is reduced in so doing. In fact, when he pays any visit, he is supposed to be accompanied by his *indvunas* and, if he is served beer, a special "chief's" sieve has to be used as a sign of respect. Should a chief display contempt of his position, community elders can discuss the matter with him in an attempt to get him to mend his ways. Should the chief still persist in unacceptable conduct, the elders have the right to take the matter to the King who will refer the matter to the *libandla* (council) for

discussion and subsequent warnings to the chief. Failure to heed such warnings will eventually result in the chief being removed by the King.

This whole section has demonstrated that in traditional African societies, the possession of a good name and the protection of personal dignity were always regarded as important to a person – especially so in matters such as marriage (for example, the suitability of a person as a bride or bridegroom). Accordingly, if a person's good name were spoiled, the wrongdoer would be expected to comply with the *Xhosa* maxim “*ahlambe igama lalomntu*” (“to do something to wash such person's name”)(Mqeke 1981: 375). The panel of Swazi experts confirmed a similar Swazi maxim “*inhlamba iyagezwa*” (literally meaning “an insult should be washed” – in other words, a person who has been insulted must be compensated). An out of court settlement is usually the norm, since the litigants are often related and/or neighbours. However, where it is clear that the motive of the wrongdoer is to get another person into trouble (say, by labelling him as a thief), then the victim will wish to clear his name in the community by taking legal action against the wrongdoer.

Considerable uncertainty and differentiation between the different peoples is apparent in the sphere of defamation in indigenous law. Generally, however, accusations of witchcraft and theft, and sometimes of seduction, will found an indigenous action for defamation. In many instances, the insult also gathers a criminal mantel about it (due to repercussions in the wider community) and

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an indigenous court's adjudication will frequently involve both the award of satisfaction (for the delict) and punishment (for the crime) simultaneously.

10.5 RIGHT TO DIGNITY OR HONOUR

10.5.1 General

The concept of dignity was discussed in section 10.4. With the community being so pivotal in indigenous society, most insults that directly affect a person's dignity will also injure that person's good name (and status) in such society. As indicated in section 10.4, in most instances, reparations made in indigenous law will be for defamation rather than for injury to purely subjective feelings of honour (dignity). With strong group orientation, for practical purposes, it is the dignity or honour of the group rather than the individual that is in question. However, this does not necessarily mean that satisfaction granted for a right of personality violation involving defamation will be greater than one involving purely subjective insult. Should the insult be viewed as sufficiently serious in the indigenous socio-cultural environment, then substantial satisfaction may be awarded – even though no specific repercussions harming specifically the victim's good name occurred. Myburgh (1985: 42) cites the *Tsonga* case in which a child was given a butterfly to eat and for being subjected to such an abomination, the court made a substantial award for the insult to the dignity of the group. If human blood, saliva or excrement be forced into a child's mouth, the insult is regarded as so serious that the equivalent of a whole *lobolo* must be furnished (Junod 1927 1: 445). Myburgh (1985: 42) states that the substantial satisfaction

awarded in such cases is calculated by taking into consideration the probability that the mother is mortified to the point of leaving.

Among the *Venda*, should an immature boy be seduced by a woman, as much as a kraal-full of cattle is claimed (van Warmelo 1948: 273).

Ashton (1952: 264-5) states that among the Southern *Sotho*, verbal insults (such as cursing, swearing, hurling imputations at another or addressing a superior disrespectfully) call for an apology or payment of money or delivery of a beast. He goes on to say that the nature of the relief sought is effectively illustrated by a case in which a successful plaintiff asked the court to remit its reward since his honour had been vindicated (cf satisfaction for violation of good name).

10.5.2 Forms of *iniuria*

South African law distinguishes between two forms of *iniuria*, namely *fama* (where publication is required because a person's reputation in the community is at stake) and *dignitas* which is *iniuria* in the narrow sense of the word (where publication is not required, since it affects only the injured person subjectively, that is his/her own self-worth, reputation and sense of honour).

Labuschagne and van den Heever (1998: 296) conclude, however, that it is not always clear whether the same distinction is fully evident in the indigenous law of delict (and see section 10.4.1). Since such matters involving dignity are often settled between the parties themselves to their mutual satisfaction, the wider aspect of the community dimension is often thus not specifically involved.

The importance of reconciliation of the feuding parties in indigenous law is again illustrated in such instances.

10.5.3 The Swazi in the Kingdom of Swaziland

The Swazi do not distinguish between the right to good name/reputation, on the one hand and to honour/dignity, on the other (see section 10.4.3). In Swazi law and custom, there would appear to be only one object of this right of personality, namely dignity, and all insults are subsumed into the violation of this one right.

10.5.4 Blurred distinction

Just as the distinction between crime and delict in indigenous legal systems is often blurred, so – in the narrower confines of “insult” in the indigenous law of personality – the distinction between good name and honour (dignity) is also blurred and far from clear. Since the individual’s rights are always subservient to the greater harmony of the community, and with the important focus on the community in indigenous life generally, both defamation and honour are generally viewed more in the community context, with the result that the subjective honour/dignity aspect may often be submerged into the greater community environment.

However, among the Swazi, the object of the right of personality is restricted to ‘dignity’, although there would appear to be possibly one exception to this general view, namely a personal right to feelings (see section 10.6 below). Should subjective honour/dignity exist generally in indigenous legal systems as the

object of a right of personality, it is only of a very limited nature and may be restricted to cases of insults involving either abominations or insults infringing a right to feelings (of a moral/spiritual nature).

10.6 RIGHT TO FEELINGS

Generally, in the indigenous environment, infringements of this right will usually involve feelings of dignity. However, the spectrum of human feelings is wider and embraces spiritual/moral values. It is possible to infringe a person's feelings of chastity and religion without necessarily insulting that person, whereas dignity normally does require an insult to constitute infringement thereof.

With regard to seduction (see section 10.2.5.3), not only the feeling of dignity but also wider feelings involving chastity and socio-religious taboos would be involved. Although not articulated specifically in indigenous law in terms of a right to feelings (in general), it would appear appropriate to accept this categorisation as applicable to indigenous legal systems, given the importance of the spiritual/moral values in indigenous life and of the ever-present watchful eye of the ancestors as custodians of such values.

With regard to the Swazi, the panel was of the view that, in Swazi law and custom, there did exist a personal dignity and belief that was separate from the concept of dignity in general. There is an object of a right of personality distinct from dignity which could be equated with a Western type right to feelings – the result of deep-rooted personal convictions, which could be infringed without

necessarily involving an insult to dignity. Violating such a right to feelings would, in the words of one panel expert, “deprive me of part of me”, which would injure deep-rooted spiritual/moral convictions. One of the experts illustrated this by pointing to the regimental necklace, which he wore with great pride. The regiment (*libutfo*) serves as the main channel for inculcating values of loyalty and group morality in Swazi society (where formerly, specialised formal education institutions were non-existent). The regimental necklace had been awarded to him by the Chief, after he had undergone stringent entrance requirements to gain acceptance into the regiment. If any person dares to insult that necklace, it would strike at the very core of his being and the insult would be transposed to each and every member of the age regiment.

Membership of a regiment entails strong loyalty and camaraderie. The wearing of the necklace requires observance of special duties with regard to the regiment, and any insult would thus be of a fundamental nature. Such insult would severely wound his feelings and would require compensation to “wash the wound”. The fine of one beast is also payable if any unauthorised person dared to wear the age-regiment necklace without being a duly admitted member.

10.7 RIGHT TO PRIVACY

The concept of “seclusion from others” as known in Western legal systems is not known in indigenous legal systems, due largely to the absence of the strong individualistic approach of the former, which is absent from the strong group orientation found in the latter systems. Indigenous life is essentially communal (in which duties and the concepts of caring and sharing are paramount). The

need for privacy for the individual appears less necessary in the group-orientated society and, in fact, pursuance thereof would be generally regarded as asocial. Indigenous law does not seek to protect any such unnecessary and asocial behaviour, and no equivalent right to privacy would appear to exist or be merited.

However, the concept of honour does include an element of privacy peculiar to indigenous law. Joubert (1953: 87 and 135) states that, generally, privacy in the sense of domestic peace is protected as a personality right – against violation in consequence of a dispute. Ashton (1952: 264) points out that among the Southern *Sotho*, it is an insult to enter the courtyard of a homestead on horseback after a quarrel. The *Tswana* have a rule that one does not enter another's home to fight – expressed in the maxim “*noga ga e latelelwwe mosimeng*” (“one does not pursue a snake into its burrow”) (Schapera 1938: 297). The *Ndebele* have a similar rule expressed in the maxim “*inyoka ayilandeleva ngemgodini wayo*” (“one does not enter another's home to fight)(Myburgh & Prinsloo 1985: 78). Should this injunction not be observed, the infringing party may be forcibly removed, since refusal to leave a homestead is an infringement of both ownership and rights of personality (Church 1980 :14).

If a man chastises his wife in her parent's home (even with reason) he must perform in favour of her group for the insult (Schapera 1938: 259). Myburgh (1985: 41) cites Maclean's (1858: 129) statement that an action for removing the cover of a man's private parts can be allowed and be accompanied by an order for delivery of cattle as indicating that the Southern *Nguni* recognise an action

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that is reminiscent of a sense of shame and of privacy (as aspects of honour or dignity).

With traditional indigenous societies being group-orientated, individualism and the concept of privacy that attaches to it are regarded as unnecessary and largely undesirable. However, in modern times, there is an increasing movement towards individualism, with the result that Swazi culture is being partially diluted and stamped with the cheapness of individuals living in an industrial economy. While privacy may thus eventually “grow” into being a fully-fledged right of personality, the panel of Swazi experts confirmed that in Swazi law and custom, the concept currently exists in no other form other than inclusion in the concept of dignity.

The panel further indicated that matters pertaining to privacy generally comprised insults to dignity as a more broad-based and generic objective of a right to personality. Incidents like a noisy dog barking and disturbing the neighbourhood peace were essentially matters of each family having a duty to respect each other. The issue of a noisy dog would be discussed between the two families involved, and if no satisfaction was reached, the matter would be reported to the Chief’s *indvuna* (headman) to negotiate with the parties to achieve a solution: no compensation is payable. Should the noise still persist, the matter would then come before the Chief to counsel. Thereafter, should the noise continue, the matter is referred to *bandlancane* (a special division of the *libandla*- council) to admonish the offending party and to issue a warning that if the noise is still allowed to continue, it will be

regarded as a crime, with the appropriate fine being imposed should the matter again come before the court.

The Swazi have a maxim “*kwetfula ingwe esihlahleni*” (“if there is a leopard in your home, you have the right to do whatever is necessary”). While a person would have the right to hit or restrain a stranger who forced himself into his house, this would amount only to a minor insult to dignity and no resultant compensation would be necessary.

10.8 RIGHT TO IDENTITY

Like the concept of privacy above, the right to identity is apparently generally not known in indigenous legal systems. The *indicia* of identity used to express a person’s uniqueness in Western culture (to distinguish him from others) are largely absent in indigenous culture. The concept of status in indigenous communities, in effect, gives a built-in protection to a person’s identity and, due to the pervasive force of acculturation, no-one in the community would seek to violate the uniqueness of a person’s personality. To attempt so do to would not only be viewed as asocial, but might well also incur the disapproval of the ancestors as guardians of the socio-cultural environment. To violate such a concept would be seen as highly disruptive, and thus a threat to continued maintenance of social harmony. Maintenance of the social system (involving status) can be linked directly to the maintenance of harmonious relations in that society. There is no need for an equivalent right of identity since, for all practical purposes, identity is subsumed into the social-cultural element of

status.

With regard to the Swazi, the *indicia* of identity are relevant only in so far as an infringement of dignity might be involved. The *indicia per se* do not form a separate object of a right of personality in Swazi law and custom, but insults against such *indicia* could well contribute to the impairment of a person's dignity.

10.9 CONCLUSION

This chapter used the two classifications of “good name/reputation” and “dignity/honour”, respectively, from the Western legal model as a point of departure only. The researcher stated that should such classifications be found in appropriate in indigenous legal systems, the differences giving rise to such inappropriateness would be acknowledged and analysed.

The two differing approaches of Myburgh 1985 and Ashton 1967 and Palmer 1970 were analysed. According to Myburgh (1985), honour/dignity and good name/reputation form part of the right of personality. Ashton (1967) and Palmer (1970) postulate a distinction between the two, although Ashton cautions that such a distinction is often difficult to determine.

The question that arises is whether such a conceptual separation exists in indigenous legal systems. It is submitted that, from the ethnographical material studied, it is difficult to support the existence of such a distinction. In the world-view of African indigenous societies, the concept of “dignity” is imbued with many

of the elements found in their traditional concept of *ubuntu*. This invests the concept of dignity with a far wider scope than is generally the case in both Western philosophy and legal thinking. This indigenous accent on humanness would appear to render inappropriate or even undesirable any distinction between good name/reputation, on the one hand and honour/dignity, on the other. The virtual equation of the concept of dignity with that of *ubuntu* has the effect that dignity (so defined) would be infringed by various forms of insult, including those to both good name and to honour (as understood and defined in Western classification). In indigenous legal systems, it would appear that there is little justification for having two separate objects of rights of personality since they are both subsumed into the one generic object of dignity.

With particular reference to the Swazi, the panel stated clearly that they equated the concept of dignity with humanness. This approach is confirmed by the Swazi maxim “*watalwa labo lobuntfubalche*” (“a person is born with *ubuntu*”) (see section 10.4.3.2). To the proud Swazi nation, dignity (so defined) is profoundly cherished and revered. Consequently, any violation of a person’s dignity has to be remedied by an apology or compensation.

However, one *caveat* is necessary in the above postulation with regard to the Swazi, although the following proposed exception may be difficult to justify conceptually. When the researcher attempted to determine whether a separate objective right of personality to feelings existed, the panel confirmed a right to personal, deep-rooted spiritual/moral convictions: “a part of me” (see section 10.6). To attempt to justify the separation of such

intensely personal dignity from a general type of “humanness” /dignity and to regard them as conceptually separate rights of personality is a difficult proposition to sustain and falls outside the scope of the present study. However, it is a noteworthy departure from the generally held view of a mono-concept of good name/honour, and perhaps supports the minority views of Ashton and Palmer on insults to dignity and reputation.

After extensive discussions with the panel of experts, the researcher is of the opinion that, in Swazi law and custom, there may well be the equivalent of a separate right to feelings – in relation to deep-seated personal convictions (usually of a moral/spiritual nature). Since indigenous legal systems generally have no rigid forms of categorisation or classification, conceptually it is unnecessary to justify the separation of such a right to feelings from the general right to dignity. However, from a holistic perspective, it should be borne in mind that highly personal moral/spiritual convictions are often coloured by deeply emotive issues. With personal emotions running high, there might be the temptation ‘fabricate’ a special right of personality to protect those intensely personal issues, when, in reality, perhaps such special right was not justified. These highly personalised convictions could possibly be readily subsumed into the widely defined concept involving the humanness of dignity.

However, if the powerful dimension of the ancestors were added, more weight could be given to the “separate right” view. The ancestors are regarded as the custodians of the community’s spiritual and moral values. With their ever-present watchful eye on

the living family members, insults infringing such values would also carry ancestral disapproval and require remedial action to appease the ancestors. Such ancestral sanction might well endow a “right to feelings” with a sufficiently vigorous significance to merit it being regarded as a special class of right of personality on its own.

Chapter 11

CASE STUDY

11.1 INTRODUCTION

This case study is based on a report that appeared in the Times of Swaziland of Tuesday, June 29, 2004. Permission was obtained from the management of the newspaper to reproduce this article and the full context thereof is quoted hereunder.

11.1.1 Newspaper article

Funeral stopped as corpse “disappears”.

Mkhitsini – In a rare occurrence, a funeral was unceremoniously stopped when it was realized that the corpse had suddenly ‘disappeared’.

The incident occurred in the early hours of Saturday during the night vigil of Estelle Loncwala Nkambule at a Mndzebele homestead.

It was established that the mourners came to realize in the morning that what had brought them together had disappeared from the room in which it was kept after 4 uncompromising men had snatched it.

These were identified as the deceased’s brothers and information gathered is that they decided to ‘steal’ their sister after talks with their brother-in-law Petros Ndoda Mndzebele over the deceased’s burial had reached a deadlock.

Narrating the ordeal to this newspaper, Pureen Ntongo Mndzebele who is the deceased's eldest daughter, mentioned that her father was the cause of the fracas as he wanted to bury her mother in a remote area, away from the family's official gravesite. Both families objected to this.

"My father wanted to bury my mother away from the official gravesite and my uncles objected to that. They wanted their sister buried at the Mndzebele's gravesite just like other deceased family members", she said.

Pureen explained that her father told the families in a meeting earlier on that his youngest wife, LaDludlu, did not want her rival buried in the said official gravesite, claiming it was her land.

The Times gathered that the Nkambules decided to snatch the coffin while the digging of the grave in the bushes and the night vigil proceeded, after they had told the mourning women to back off.

The deceased was finally buried at her parental home at Mbondyweni at 11am on Saturday. The deceased's husband could not be reached for comment as he could not be found at home when the Times arrived.

The half-dug grave still lies open where the initial burial was meant to take place.

11.1.2 Purpose of the study

The purpose of this case study was to establish, in relation to burial, the extent to which offences or infringements of rights of personality had occurred in Swazi law and custom. The facts concerning the occurrence (as reported in this article) were put before the panel of Swazi experts for discussion. The discussions also examined the socio-cultural implications of the events from a general perspective. Should offences or infringements of rights of personality be demonstrated on these facts, it would consequently be necessary to determine, by means of focused questions to the panel, the scope of punishment and/or compensation that would be applicable in Swazi law and custom.

11.1.3 Lack of separation between civil and criminal proceedings in Swazi law and custom.

As noted earlier (see chapter 7, section 7.3.2), in indigenous law, although the same act may constitute both a crime and an infringement of a right of personality, the indigenous court may hear the matter as a whole. In its adjudication, the court will order the offender not only to make amends to his victim, but also to suffer punishment. From the facts reported, it appears that this situation might obtain in the case under discussion.

11.2 ASPECTS OF THE SOCIO-CULTURAL BACKGROUND AND THE IMPLICATIONS.

11.2.1 General

There was consensus among the panel of experts that, to their knowledge, this was a unique occurrence and one that had not been heard of before in Swaziland. As with most indigenous cultures,

the burial of a deceased person is a very important and solemn event accompanied by observance of strict formalities and taboos. “Pollution” is also associated with death in indigenous cultures: thus, when a person dies, both flesh and spirit must be correctly treated to safeguard the living. Should this not be done, it is feared that, as a sign of displeasure for the disrespect shown to them, the ancestors will send punishment in the form of illness or misfortune to the deceased’s family. Death threatens family integrity: the disruption it presents must therefore be counteracted by adherence to burial and mourning rituals.

The burial ceremony is a “*rite de passage*”, marking the deceased’s separation from the community of the living and his acceptance into the community of the “living dead” or ancestors. In the ancestral cult, the world of the living is projected into a world of the spirits (*emadloti*): it is thus essential that this passage is achieved smoothly in order not to upset the ancestors.

After a death, for those left behind, it is essential to attend speedily to the corpse, which is a source of “pollution” contaminating the whole kraal. The body is ritually prepared for burial, while the grave is dug by the closest relatives – usually the brother(s) of the deceased. Marwick (1966: 222) states that once the *lusendvo* (family council) has announced the death, the boy chosen as heir is given a hoe to dig the first sod of the grave. Once the grave is ready, the deceased’s mother goes to superintend the bringing out of the corpse and the placing it - in a sitting position - into the recess at one side of the grave.

Strict taboos are associated with death. For example, on the day of the death, no one partakes of food or water nor is any cooking done. The mourning period begins at death and strict taboos are observed until burial: during this period, nothing may be done in the kraal. Thereafter, lesser taboos will remain in force for up to a year, depending on the individual's relationship to the deceased.

The deceased's spirit is finally laid to rest, incorporated and accepted into the ancestral realm by means of special ceremonies, such as *ukubuyasa lidloti* ("the bringing home of the spirit of the deceased"), which takes place a full moon after the deceased's death (Marwick 1966: 225).

11.2.2 Selection of burial site

A burial is one example of the many occasions in traditional indigenous society when the family or families come together to meet, discuss and agree – in this particular instance, upon funeral arrangements. For a man, the usual options available to the family with regard to the selection of a burial site are either at his forefather's gravesite or at his own homestead. For unmarried women, the general rule is that the burial should take place at the parental home. For a married woman, however, the burial place is generally to be at her in-law's homestead. In exceptional cases, however, and only upon express agreement between the two families concerned, the married woman may also be buried at her parental home. The panel illustrated this with an example of a married woman who was born in Mbabane (in the north of Swaziland) and who was married in the south of the country. If she were to die in Mbabane, the families would meet and might agree that, in view of

the financial or logistical difficulties involved in transporting her remains to the south, she could be buried at her birthplace. Her husband's family would then approach *sikhulu* (the chief) in the Mbabane area for permission for the deceased wife to be buried at her birthplace.

According to Swazi custom, a woman pledges that "*la endzele khona uta ncwatshelwa khona*" ("in the place where I am married, there I will be buried"). As part of the traditional marriage formalities, the bride is given a spear and is sent into the cattle kraal. There she has to stab the earth with this spear and proclaim "*kute langiya khona ngitawufela la*" ("I am not going away – I will die here"). The Swazi hold that there are three occasions when a married woman has to cry "customary" tears: when she is released from her family to get married, when she makes the above pledge on marriage and lastly, when her husband dies. Any departure from the choice of a customary burial site for a married woman would have far-reaching repercussions for the two families involved.

The selection of a burial site for a married woman is not simply a matter for the two families concerned. Just as with a forthcoming marriage, a forthcoming funeral must also be reported to *sikhulu* (the chief). No woman is "accepted" into any homestead (whether by way of marriage or burial) unless her "arrival" has been reported to the chief. Failure to do so constitutes an offence for which the whole homestead may be answerable. The chief will send a representative to the funeral as an observer, who will report back to him that all went well (*vis* that all traditional procedures were observed). The importance attached to a funeral in Swazi law and

custom is demonstrated by the fact that failure to inform the chief constitutes an offence. Some of the panel were also of the view that the report had to be made even before the grave is dug – the digging of an “unauthorised” grave might also constitute an offence.

In Swazi law and custom, there are certain specific instances when a deceased person may not be buried in a family graveyard, and the panel gave four illustrations. If a person drowned, that person must be buried where the body was found. Should a person be struck by lightning, he or she could not be buried in a normal graveyard. In the event that a person committed suicide, that person had to be buried alone. In former times, if a person was fatally shot or stabbed in war, his body was not brought back to the family graveyard, but buried at the site of the battle.

The traditional Swazi belief is that if a person dies in the manner of any of the four examples above, burial at the family graveyard would “attract” a similar catastrophe upon the remaining members of the family – the deceased would be “calling” the others to die in the same fashion. In the facts outlined in the newspaper article under study, however, there is no indication that the wife met her end in any of the first three ways listed by the experts. It appears that there was no taboo applicable which would have prevented her normal burial in a family graveyard.

It is against this socio-cultural background that this case is examined. It is important to appreciate the depth of beliefs associated with death and burial in indigenous world-views in order to evaluate the various offences and violations of rights of

personality, which would emanate from disregard for traditional procedures and taboos concerning a burial. To the Western mind, disputes about a burial site and subsequent removal of a corpse (failing agreement upon a site) might be viewed with abhorrence or distaste – based mainly upon religious grounds. However, to a member of an indigenous community, such a situation concerning a burial impacts fundamentally upon his world-view – both in regard to traditional rights to be observed by the living and to the effects in the ancestral realm. For the indigenous person, any failure to adhere to prescribed procedures concerning a burial would engender serious consequences; this would be carried through to the appropriate punishment or compensation for any crime or infringement of a right of personality resulting therefrom.

11.3 REVIEW OF THE FACTS

In reviewing the facts of this case, the panel endeavoured to formulate the correct procedure that should have been followed (in order to avoid the commission of any crime or violation of any personality right). As indicated above, most of the panel concurred that a death in the family had to be reported to *sikhulu* (the chief); failure to do so would constitute a offence. Once the death had been reported, and before the commencement of any grave digging, the husband's family should have approached the chief to request permission to bury the deceased in a place other than the family graveyard. Unless there was strong motivation for such a request (such as the wife's suicide), it is unlikely that permission would have been granted. To bury a person alone in the bush is contrary to Swazi custom and would not have been sanctioned. Thus, the

panel were of the view that the chief would have directed that the wife be buried at her parental home, as there appear to be strong family objections against her burial in the marital home.

Subsequent disregard for the chief's instructions and the attempt to bury the wife in the bush would constitute both an offence and a serious insult (lack of respect) to the chief. It would also infringe upon the dignity of the wife's family (including their ancestors) and result in a serious infringement of this right of personality.

With regard to the brothers' "stealing" the corpse, this also attracts both criminal and delictual consequences. The brothers' proper course of action was to report the situation to the chief who, in eventually directing a burial at the deceased's parental home, would also have specified suitable arrangements for the removal of the deceased's body. Although it could be argued that the deceased's body "belonged" to the husband or wife's family, the panel was of the opinion that the wider interest of the community precluded the removal of the body without the chief's permission and, accordingly, in so doing, the brothers were committing a offence.

For the purposes of these deliberations with the panel, it was assumed that the deceased was, in fact, the husband's lawful wife, married in accordance with the requirements of a traditional Swazi marriage. Support for this approach comes from the description in the report of *LaDludlu* as the husband's "youngest wife". Likewise, it is also assumed that the deceased was, indeed, a wife and not merely an unmarried woman co-habiting with the man. In the event that neither of these assumptions is correct, the man's

family would have little or no say in the burial arrangements, which would, by custom, take place at the parental home.

Two further matters concerning the “youngest wife” are not clear from the facts reported in the article. Firstly, there appears to be an element of coercion on her part over her husband on the burial issue. This goes completely against Swazi custom in that a married woman has no right to dictate terms on such matters concerning the homestead to her husband. Secondly, the reported claim that the official gravesite was “her land” also makes no sense in that family graveyards cannot be “owned” by an individual but remain an integral part of the homestead.

Following the death of a family head (and his burial near the cattle byre), the family would leave the homestead and establish a new residence nearby. However, following any subsequent deaths in the family, burials would still take place at the “home of the deceased” in the original family gravesite. For the first year following the family head’s death, the older married women in the family would continue to cultivate vegetables behind the deceased’s hut (“*kuhlutshwa tinjelwane*”). Thereafter, this practice had to stop and no one was allowed on that ground. No wife has any right to refuse burial in a family gravesite. Such a claim may thus be considered purely emotive or obstructionist. It clearly has no justification in Swazi law and custom and should thus be ignored for the purposes of this study.

In answer to any criminal and delictual actions against him, the husband would be unable to plead justification in that he had been

coerced by his second wife to bury the deceased in the bush. The panel went so far as to hint that were such an attempt to be made by the husband, it would immediately cast serious doubts on his mental stability, if he had allowed himself to be so influenced by his second wife. Such “coercion” would only be taken into account as a possible mitigating factor in assessing punishment or satisfaction.

11.4 CRIMINAL ASPECTS

Two parties may be involved in possible offences arising from the facts of this case: the husband and the deceased’s brothers.

11.4.1 *The husband*

The panel were of the opinion that for the possible offences of not reporting the deceased’s death to *uMphakatsi* (the chief), digging the grave in the bush, and not obtaining *uMphakatsi*’s (the chief’s) sanction for the digging of the grave, the appropriate fines by the chief’s court would be one beast for failure to report the death, one beast to “close” the pit (digging an unauthorised grave), and two beasts for not obtaining the chief’s sanction.

11.4.2 *The deceased’s brothers*

For the offence of removing the corpse without authorisation: the panel concluded that it was a serious matter to remove the corpse from the area of one chief to another without reporting or obtaining permission from the respective chiefs. In the panel’s view, the appropriate fine would be at least two beasts.

11.5 DELICTUAL ASPECTS

More complex issues are to be considered when dealing with the delictual aspects of insults violating rights of personality. Dignity has been infringed, but such infringements are not limited to the families concerned, and extend to the community at large.

11.5.1 Authority of the chief

Failure by the husband both to report the deceased's death and to obtain permission for the digging of the grave, on the one hand, and the failure of the brothers to request permission to remove the corpse to another chief's area, on the other, all impact seriously on the prestige and authority *uMphakatsi* (the chief). The whole community has witnessed this saga and is left with the impression that their area has become "lawless". Respect for *uMphakatsi* (the chief) and his authority is thus diminished, which constitutes a serious insult. In addition to the punishment for the offences proposed above, the panel indicated that a further two beasts might be awarded to *uMphakatsi* (the chief) as compensation for loss of dignity.

11.5.2 Implications for the deceased wife's family

11.5.2.1 *The husband*

In not arranging a meeting to discuss the burial arrangements and in digging a grave in the bush, the deceased wife's family's dignity is seriously impaired.

11.5.2.2 *The brothers*

Through their "theft" of the corpse, they have brought a bad name

and disrespect upon their own family and its standing in the community.

11.5.2.3 *The second wife*

The second wife's actions in coercing/persuading the husband to bury the deceased in the bush were directly responsible for the insult to the deceased's family. In addition, some members of the panel thought that her actions might also have impinged upon the dignity of her own family, seriously undermining the character and standing of her family in the community. The second wife's family would be obliged to pay compensation to the deceased's family for violation of their dignity. The panel proposed that, in addition to any punishment for offences, a suitable award of compensation would be made. As for the husband, he would pay the deceased wife's family two beasts. With regard to the brothers, they would pay at least one beast to their own family head and the second wife's family would pay one beast to the deceased wife's family.

However, in assessing the amount of compensation to be awarded, the panel emphasised that, despite the distasteful nature of the matter, a holistic approach would nevertheless be maintained. The family backgrounds would be examined to establish whether any prior or unsettled disputes or personal animosities existed, which might have led to or exacerbated the situation concerning the burial.

11.6 ANCESTRAL INVOLVEMENT

As indicated earlier, more complex issues are involved in

evaluating the scope of the insults, because such insults extend not only to the living family members but also include the “living dead” (ancestors). In this regard, the panel were of the opinion that, since it had been found that offences had been committed (by both the husband’s and deceased wife’s families), each family would pay a fine of one beast each. These beasts would be slaughtered and a ritual meal then be held to appease the ancestors of both families. At the feast, a request would be made to both sets of ancestors for peace and the restoration of harmony between the two family groups. The panel considered that such was the severity of the insults involved that, in all probability, two separate ritual meals might be necessary to fully appease the ancestors: one would be held at the second wife’s parental home and the other at the marital home.

Finally, the panel recalled a previous case in which a wife sought to have her deceased husband buried in an urban area according to her own wishes. However, the court ordered that, in Swazi law and custom, the deceased had to be buried in accordance with the rites of the clan at his family gravesite (which was in a rural area).

11.7 A COMPARATIVE KENYAN CASE

To highlight the differences in perspective between Western and indigenous approaches to burial and burial rights, the researcher wishes to briefly outline a matter that came before a Kenyan court in 1987, in which the court was asked to determine whether a deceased’s widow or a deceased’s eldest brother was entitled to determine the mode and place of burial (van Doren 1988). This case (apparently unreported in any law report) emphasises the

importance of burial as a major event in indigenous culture. The widow of the deceased, S.M. Otieno, who was a prominent lawyer, contended that her husband's body should be buried near Nairobi – which she claimed was the family home. However, the deceased's eldest brother contended that the deceased should be buried near Lake Victoria (the land of his patrilineal *Luo* ancestors). The Kenyan Appeal Court finally decided in favour of the brother, and by implication favoured the “social solidarity of the clan (together with) traditionally based sex discrimination against the widow” (van Doren 1988: 342-343). In reaching their decision, the court disregarded both the lifestyle and form of marriage.

In Western society, the place of burial (and the vesting of authority to decide upon such place) would have some importance but, being a largely individualistic society, it would not be subject to any overriding control of the group (as in indigenous societies, where group morals and supernatural beliefs are in point). For indigenous societies, a burial is a time to gather together entire groups to reinforce and reassert group solidarity: the clan is the source of protection that nurtures and maintains the values of the group (van Doren 1988: 344-5).

In most Western societies, a widow is normally entitled to determine both the place and manner of burial in the absence of specific instructions from the deceased by will or otherwise. Thus, for example, Doren (1988: 343) points out that, in the statutes of Louisiana, USA, while the surviving spouse has first priority as to the disposition of the deceased's remains, a surviving brother is listed as only fourth in priority. This is in stark contrast to the

indigenous situation in this case with the *Luo*, where the widow's views may be considered, but if they proved to be different to those of the new head of the family (eldest brother) and clan, they would be deemed irrelevant. The surviving elder brother has the prerogative to make the burial arrangements – in consultation with clan elders should he so desire (van Doren 1988: 341). Should the deceased not be buried in accordance with custom, indigenous societies fear supernatural retribution on the living family members from ancestral spirits, in general, and from the spirit of the deceased, in particular.

This brief outline, in serving to highlight the differences in perspective between Western and indigenous approaches to a burial and rights attaching thereto, is intended to assist readers to understand and appreciate the broader issues raised in the Swazi case study.

Chapter 12

CONCLUSION

12.1 THE PHENOMENON

This study draws attention to cultural phenomena in the form of jural figures that are expressions of jural systems as cultural universals, just as lingual phenomena are expressions of languages as cultural universals (Coertze 1960: 43).

Linguists show that all languages are capable of philosophical explanation in spite of great differences, and the jurist should therefore be able to explain the jural phenomena of all cultures jurisprudentially however divergent these may be (Myburgh 1985: 31).

While theory is and always will remain an abstraction that can be tested only against the background of social reality (cf Church 1991: 33), this study proves that indigenous law may be studied in accordance with jural theory, adapted if necessary, in the same way that specialised systems are studied. Both Pospisil (1971: 341) and Gluckman (1974) (quoted in Church 1991: 34) deny the “uniqueness” of indigenous law, although the latter does recognise the difficulty inherent in translating one legal system into another. Given that law is a cultural universal, this study is done against the background of the whole culture or way of life of the indigenous peoples and, more specifically, of the Swazi in the Kingdom of Swaziland.

The researcher has demonstrated that, while specialised and non-specialised cultures may have different world-views, similar criteria may be utilised to examine both specialised and non-specialised legal systems (see chapter 5). This study thus confirms that jural theory, combined with holistic anthropological adaptations, is relevant to an exposition of indigenous law in order to provide legal certainty, facilitate the advancement of comparative legal studies and promote legal development. The micro-study of the Swazi in the Kingdom of Swaziland (see especially chapter 3) attempts to fulfil the latter three objectives in the sphere of indigenous rights of personality.

There is a distinguishable division of private law, namely the law of personality, for the protection of the personality, the rights in question being known as rights of personality, not only in modern jural systems but also in Germanic and in Roman law. This study indicates that a similar phenomenon is observable among the indigenous peoples (see chapter 1, section 1.3.2).

This study confirms that indigenous peoples distinguish between two classes of rights, namely patrimonial rights (ownership, guardianship, and obligatory rights) and rights of personality (see chapter 1, section 1.4.1). The latter do not fall within the aggregate of rights and duties termed an estate whereas the former do (see chapter 1, section 1.4.1).

In respect of delicts, it appeared that relief entails satisfaction when rights of personality are violated and damages when the rights

violated are patrimonial rights (see chapter 1, section 1.4.1). It has also appeared that, among the indigenous peoples, satisfaction may be obtained even where personal injury is caused by violation of patrimonial rights and damages where a personal attack is the cause of patrimonial loss (see chapter 4, section 4.3 and chapter 10, section 10.2.5).

It has been demonstrated (see chapter 5, section 5.1.2.4 and chapter 7, section 7.3.2) that there is no clear distinction in indigenous law between crime and delict. It follows that both criminal and delictual aspects of a matter may be heard in the same court hearing. This is further developed in section 12.2.

Among the indigenous peoples, rights are shared by members of the comprehensive agnatic group, with the share of a member of the group in the contents of rights of personality depending upon his or her status (see chapter 1, section 1.4.3 and chapter 3, section 3.5.3.3). Furthermore, indigenous peoples are not acquainted with the juristic person, but know only the natural person as a human being (see chapter 6, section 6.2.2). Such a human being is the object of a right, with a right in a person either falling within an estate (*vis* guardianship) or excluded from it (*vis* rights of personality) (see chapter 1, section 1.4.1).

12.2 THE RESEARCH

The researcher found that the law of personality has been hardly touched as a field of study (see chapter 1). This study developed the field by determining how rights in persons are to be understood

among the people in question (see chapter 9), what rights of personality are identifiable according to their objects among these peoples (see chapter 9), how personal injury resulting from violation of patrimonial rights and patrimonial loss resulting from violation of rights of personality are to be interpreted (see chapter 10), and how rights of personality are shared (see chapter 10). This study has examined rights of personality among indigenous peoples generally and among the Swazi in the Kingdom of Swaziland, in particular. The holistic focus of this research examined jural phenomena in the context of the whole culture of the indigenous peoples being studied.

In recognising that rights of personality do exist in indigenous legal systems (see chapter 7, section 7.1.2), the researcher followed the format of Western legal classification in reviewing the full spectrum of indigenous rights of personality. While generally appropriate to most indigenous rights, the Western model was found largely inappropriate in the sphere of defamation and dignity (see chapter 10, section 10.9) and this is further reviewed in section 12.3.

The lack of categorisation found in most indigenous legal systems results in the blurring of lines of demarcation between actions infringing rights of personality and those constituting offences. The same act may, in indigenous legal systems, constitute both an offence and a violation of a right of personality (see chapter 7, section 7.3.2). It is not dealt with in separate proceedings before different courts (as in the Western specialised model), however, but is heard by an indigenous court as one matter. The offence will, at

one and the same time, be punished by the court as a crime and the victim of such act will be awarded satisfaction/compensation for the violation of a right of personality. The decision of the court may be in general terms, and often will not necessarily distinguish between a fine and compensation in its adjudication. It frequently occurs that compensation awarded is in the form of animals, which are often slaughtered after the court hearing for a reconciliatory meal between the opposing parties (in which the court members also partake) thereby illustrating that patrimonial gain is not the aim of either the action or court decision.

The element of conciliation also features prominently in the sphere of rights of personality (see chapter 5, section 5.3.3 and chapter 10, section 10.2.2.1). In community-orientated indigenous societies, there exists a strong desire to maintain harmonious relations, and therefore negotiations and discussions will often result in an apology being tendered and accepted – in order to avoid the disruption that would be caused in the community by having a dispute publicly aired in the court. This was confirmed by the micro-study among the Swazi, with whom maintenance of communal harmony is also viewed as of fundamental importance (see chapter 10, sections 2.2.2 and 4.3.2).

12.3 OBJECTS OF RIGHTS OF PERSONALITY

12.3.1 General criteria

Myburgh (1985: 33) cautions against the extraction of general criteria from the ethnographic sources (see chapter 10, section 10.1.3). While phenomena such as “pollution” and self-help are

relevant to the determination of whether a violated right is, in fact, a right of personality as well as of the object of such right, such phenomena cannot be utilised as either the only or as general criteria for examining rights of personality. Elements of a culturally-determined nature (see chapter 9, section 9.9) are, however, relevant to the examination of the degree to which and the manner in which an infringement of a recognised right of personality is compensated.

12.3.2 Right to the body

In examining the right of personality to the body, the study found that not only assaults or threats of assault to the body constituted infringements of this right, but that infringements extended to include the mental effects resulting from the assault, such as causation of worry, sorrow, fright and dismay (see chapter 10, section 10.2.3). In addition, such “dismay” extends to dismay being caused by theft, damage to property and seduction (which are in themselves violations of patrimonial rights of ownership) (see chapter 10, sections 2.5.1, 2.5.2 and 2.5.3).

This study confirmed that, in the indigenous context, freedom of the body was regarded as an important right of personality. Among the Swazi in the Kingdom of Swaziland, the violation of taboos is regarded as having serious repercussions on both inter-family and inter-community relations (see chapter 10, section 10.3.2). In addition, as imprisonment is not known with the Swazi, banishment is the most serious form of sanction that can be

imposed (see chapter 10, sections 3.3 and 3.4).

12.3.3 Right to good name/dignity

12.3.3.1 *Conceptual aspects*

The study demonstrated that the conceptual separation that exists in specialised Western legal systems between good name/reputation and dignity/honour is not found in indigenous legal systems. To attempt to ascribe such a separation to indigenous legal systems would represent a clear example of such separation being “imported” from the classifications of Western specialised legal systems and forced into the mould of indigenous legal systems (see chapter 5, section 5.3), when, in reality, it is inappropriate in the indigenous environment. The definition of defamation in Western specialised systems centres on the wrongful, intentional publication of words or behaviour concerning another which has the tendency to undermine such person’s status, good name or reputation (Neethling 1996: 140). Although the right to a good name is so protected in indigenous societies (which are group-orientated), the emphasis is upon communal duties to maintain the harmony of the collective.

In the indigenous community, the elements of *ubuntu* form the pillars on which the broad concept of “dignity” is based. However, it is not an individual’s personal dignity *per se*, but the dignity of a person in the context of the community that includes the *ubuntu* quality of humanness. It is submitted that actions for “defamation” in indigenous legal systems seek to protect this type of dignity – a broader based concept that would include not only a

personal dignity (honour), but also dignity in the community at large which, in terms of a Western world-view, one would associate with a person's individual reputation and good name. However, such reputation exists in the context of the community: the difference in perspective lies in the philosophical approach to the right of personality that is being protected. The group-orientated approach of indigenous legal systems requires the concept of dignity to be viewed from a greater community perspective than in Western specialised legal systems – the latter systems emphasising individualism, where individual rights may even be upheld against the interest of the community or state. In the indigenous environment, however, the individual functions only within the context of the group.

12.3.3.2 *Theoretical perspectives*

From a theoretical perspective, Joubert (1953: 131) postulates a general right to dignity: the object of this right is the recognition of the spiritual/moral value of the human being as the foremost (physical) entity in creation (“die erkenning van die geestelik-sedelike waarde van die mens as die kroon van die skepping”) (“recognition of the human being’s spiritual/moral value as the crown of creation” [own translation]). However, Neethling (1996: 31) argues that such a concept is too broad, and concurs with de Wet’s (1985: 252) view that a general right to dignity does not take the matter any further than a general right to personality. Neethling (1996) distinguishes between dignity and defamation by stating that the former requires an insult against a person’s subjective feeling of honour and self-respect.

It is submitted that the latter approach is not appropriate to indigenous legal systems: these systems emphasise the duty not to infringe upon the dignity of others. The concept of dignity in the African indigenous world-view is invested with many of the elements found in their traditional concept of *ubuntu* (see chapter 10, section 10.9). In indigenous legal systems, there would appear to be merit in proposing a general right to dignity: dignity is of a far wider scope than exists in Western philosophy and thinking because of the indigenous accent upon humanness.

12.3.3.3 *Scope of dignity*

With the close relationship of the indigenous concept of dignity with that of *ubuntu*, dignity (so defined) would, indeed, be infringed by various forms of insult, including those to both good name and honour (as understood and classified in Western legal systems). In indigenous cultures, rights to reputation/good name in the community are subsumed into the broader spectrum of dignity, and to infringe a person's dignity automatically lowers that person's prestige and standing in the community. Neethling (1996: 32) states that insult has no role to play in, for example, defamation, infringement of the body and the infringement of privacy, insisting that the distinctive nature of each legal object be kept conceptually separate. However, he does concede that the same act is often capable of infringing both dignity and other personality interests.

This study demonstrates, however, that the presence or absence of

insult is insufficient justification for the separation of distinctive objects of rights of personality, namely right to good name and right to personal dignity. In the indigenous environment, in particular, most infringements of rights of personality would involve an insult (broadly defined); infringement of dignity (also broadly defined) is generally caused by a verbal or physical insult. The sophisticated elements applicable to the Western law of defamation are not evident in indigenous legal systems. In the latter, a concrete, visible and real insult is generally to be observed; abstract technicalities in “defamation” actions are absent.

With regard to the publication to third parties (required in Western defamation actions), an insult to an indigenous person’s personal dignity would be perceived by such person as an insult involving others. Publication, as such, to infringe the person’s good standing in the community is thus not required – the insult automatically transposes itself into the community since a person is only a person in relation to other people (the Swazi maxim being “*umuntfu ngumuntfu ngebantfu*” – “a person is a person in relation to other people”) (see chapter 10, section 4.3.1).

In unspecialised indigenous legal systems, it is proposed that the Swazi model – as confirmed by the panel of Swazi experts – be followed: defamation should be viewed in the context of the broad spectrum of “dignity”. Indigenous cultures and legal systems seek to protect these *ubuntu* qualities of humanness that together make up the concept of dignity. Without such qualities, the indigenous person has no dignity. Actions in “defamation” in indigenous legal systems actually look to restore a defamed person’s dignity in the

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community. If a person's dignity is infringed, he or she is less than a complete person in society. His or her humanness has been questioned, and compensation is thus required as part of the process to re-establish such person's dignity in the community. This is accomplished in the community context, so that any harm done is expunged, and the harmony of the collective restored simultaneously with the restoration of the injured person's dignity.

The panel of Swazi experts confirmed this approach. The Swazi maxim is “*watalwa labo lobuntfu balche*” (“a person is born with *ubuntu*”)(see chapter 10, section 4.3.2). An insult which detracts from a person's humanness is *ipso facto* detrimental to a person's dignity (including reputation/good name in the community).

Dignity thus becomes a general or comprehensive right of personality, which indigenous legal systems in general, and Swazi law and custom in particular, seek to protect.

It is suggested that further research is necessary to ascertain the full extent and scope of the concept of dignity and its relationship to *ubuntu*. This research should be by means of micro-studies among the various tribal groupings in Southern Africa, and should seek to clarify whether “honour” and “good name”, generally, are to be subsumed into the concept of dignity in indigenous legal systems – following the approach among the Swazi.

12.3.3.4 Dignity and human rights

This study concurs with Howard's (1986) view that the African concept of human rights is actually a concept of human dignity (see

chapter 9, section 9.1). This study demonstrates further that such concept of dignity is actually experienced by the individual feeling respect and worthiness as a result of the fulfilment of a socially approved role in the context of the community.

It is this sense of dignity that is protected in South Africa in section 10 of the Constitution of the Republic of South Africa (Act 108 of 1996):

Everyone has inherent dignity and the right to have their dignity respected and protected.

In *S v Makwanyane* (1995 3 SA 391 (CC) 45), the Constitutional Court held that this right, and the right to life, are the most important human rights. This statutory recognition of the “inherence” of dignity in a person is important, and has resonance with the indigenous Swazi maxim that a person is born with *ubuntu*.

12.3.3.5 *Dignity in the context of the community*

In indigenous societies, as part of a strategy for the survival of the total community, collective responsibility was an essential part of maintaining harmony. It is concluded in this study that indigenous legal systems ensured that reverence for human dignity was sustained as an integral part of this communal objective – by requiring respect for this personality interest: the duty to respect dignity was fundamental in the communal context.

12.3.3.6 *Separation of rights to good name and to honour is inappropriate in indigenous legal systems*

It is submitted that there would appear to be little justification in proposing two conceptually separate rights of personality in indigenous legal systems: both the right to good name (*fama*) and to honour (*dignitas*) are subsumed into one generic object of dignity. That such concept of dignity extends beyond the living and includes the dignity of the ancestors would perhaps lend additional weight to this submission. Insults involving the ancestors are regarded in a very serious light. An insult involving infringement of the ancestors' dignity would appear to include the reverence and respect (good name) with which they are regarded in the living community.

12.3.3.7 *Rights to privacy and to feelings*

The Western concept of a right to privacy was also subsumed into a general right to dignity (see chapter 10, section 7). Similarly, it is proposed that a right to feelings should also be so subsumed. However, with regard to the Swazi, a possible exception may be made with regard to the existence of a separate right to feelings distinct from the general right to dignity (see chapter 10, section 10.6).

12.4 HOLISTIC PERSPECTIVE ON RIGHTS OF PERSONALITY

Myburgh (1985: 1) maintains that the study of indigenous law requires a multi-disciplinary approach – law, anthropology, linguistics and government. This study shows that elements of the

disciplines of sociology and philosophy (with a jurisprudential focus) should be added to this. Enculturation imbues people with a certain world-view (derived from own culture). Such world-view clearly impacts on the perceptions and application of legal systems, both specialised and non-specialised. Indigenous customs, in general, are in a process of change and partial disintegration, as a result of the increasing influence of Westernisation, with established social patterns slowly dissolving. The unspecialised law that operates in this changing indigenous environment thus has to be both flexible and adaptable in order to remain “living” law for the peoples concerned.

In attempting to maintain a holistic perspective on the indigenous rights of personality, careful note was taken of elements peculiar to indigenous cultures, which might render certain classifications or categorisations of Western legal systems either inapplicable or inappropriate. In contrasting Western and indigenous cultures, the juxtaposition of individual rights and communal-based duties will always lead to difficulties in comparative analysis. If the paramount objective of indigenous legal systems to maintain communal harmony is borne in mind, the flexible nuances utilised by indigenous courts in achieving solutions to disputes will be better understood, and the inappropriateness of such elements of strict rules of procedure and a doctrine of precedent will be appreciated.

12.5 ADAPTATION OF INDIGENOUS RIGHTS OF PERSONALITY AS A RESULT OF EXPOSURE TO WESTERN VALUES

While the social environment is changing (due to the modernising influences of Western values), the deep-rooted elements of culture, which inform indigenous values, remain strong and largely unchanged. Although indigenous rights of personality are showing some signs of adapting to new developments and influences, such adaptations are to be regarded as relatively superficial in nature. The changes that do occur are unique, and are neither typically traditional nor Western.

It has been demonstrated by this study that established legal principles and human values are being retained. The cultural values underpinning the indigenous world-view and way of life are sufficiently strong to remain resilient to the partial disintegration of the social fabric, brought about by Western influences. While some traditional customs may have been partially modified by these influences, core fundamental cultural values are reflected largely unchanged in the application of the indigenous law of personality.

12.6 SWAZI PERSPECTIVE ON RIGHTS OF PERSONALITY

The micro-study of the Swazi in the Kingdom of Swaziland provided critical insight into and direction in examining indigenous rights of personality. In particular, the holistic view of the concept of dignity found among the Swazi would appear to render

inappropriate and inapplicable any conceptual or practical separation of the right to good name and the right to honour in indigenous legal systems generally. In indigenous culture, *ubuntu* is cherished and revered; dignity is an integral element of *ubuntu*; both good name and personal honour are integral elements of dignity. It is this perception of inherent human dignity that is protected as an indigenous right of personality.

The Swazi maxim “*umuntfu ngumuntfu ngebantfu*” (“a person is a person in relation to other people”) encapsulates the indigenous group-orientated view of a person in relation to other members of the community of which he or she is part. The *ubuntu* qualities of humanness – that indigenous culture and law, respectively, expect of and protect in individuals – are harnessed to bring about harmony and the consequent greater good of the community.

According to the Swazi, a person is born with *ubuntu* (“*watalwa labo lobuntfu balche*”); indigenous legal systems seek to ensure that such humanness is recognised and protected in the application of the law of personality.

12.7 THE SOUTH AFRICAN CONSTITUTIONAL RIGHT TO CULTURE

The recognition and application of indigenous law in the Republic of South Africa rests on a constitutionally protected right to culture. This study consistently emphasises that the study of indigenous law has to be carried out against a background of the culture and way of life of the peoples being studied. Confirmation of the importance of culture in the application of indigenous law in

the Republic of South Africa is to be found in sections 30 and 31 of the Constitution (Act 108 of 1996). These two sections specifically designate a right to culture as the constitutional basis for the recognition and application of indigenous law.

The importance of culture in a changing indigenous environment has been demonstrated in this study. The right to culture (enshrined in sections 30 and 31) provides a constitutional anchor in the sea of changing environment to ensure that indigenous law is able to survive as “living” law for the peoples concerned. It is to be hoped that similar recognition and protection for Swazi law and custom will be incorporated in the Constitution to be adopted in the Kingdom of Swaziland.

SWAZI MAXIMS IN RELATION TO INDIGENOUS RIGHTS OF PERSONALITY

<i>Afake sikhali size sidle umhlabatsi</i>	A husband can stab right through an adulterer until his spear touches the ground
<i>Akatalanga uyise klapa ematfumbu</i>	Literally “the father did not bring a good child into the world – his bowels were rotten”; this maxim is used in cases where women consistently show disrespect towards men
<i>Bani washiwa indvuku ebandla</i>	Literally “to leave a good stick in society”, meaning - parents strive to give a child a good upbringing
<i>Inhlamba iyagezwa</i>	Literally “an insult should be washed” – meaning, a person who has been insulted must be compensated
<i>Inkhomo ayihlinzelwa phansi/ Inhlinzelwa elugogweni</i>	Literally “a beast is slaughtered on its skin” – meaning the family head is responsible for the conduct of his family members
<i>Inkhosi ibusa ngebantfu</i>	A king rules through his people
<i>Inkhuhumo ibonakala emehlweni akho</i>	Literally “words are in the eyes”, meaning – any action or agreement must take place in the presence of all the parties
<i>Kwetfula ingwe esihlahleni</i>	If there is a leopard in your home, you have the right to do whatever is necessary to remove it
<i>La endzele khona, uta ncwatshelwa khona/kute langiya, khona ngitawufela la</i>	Literally “in the place where I marry, there will I be buried”/ “I am not going away, I will die here” – referring to traditional pledges concerning burial made by a bride on marriage
<i>Licala aliboli</i>	A debt does not decay
<i>Lihlo ngeso</i>	Literally “an eye for an eye”
<i>Ubashayele tinyoni</i>	Literally “he hit the birds for them” – meaning the family head is responsible for the deeds of his family members
<i>Umlomo longacali manga</i>	The king is the mouthpiece of his people – “the mouth that never lies”

<i>Umuntfu ngumuntfu ngebantfu</i>	A person is a person in relation to other people
<i>Watalwa labo lobuntfu balche</i>	A person is born with humanness (<i>ubuntu</i>)
<i>Yasine kayinganusa iyakusala nawe</i>	Do not involve yourself in clan matters that do not concern you
<i>Yemvdeni ungaboyingena</i>	Do not involve yourself in family matters that do not concern you

TSWANA AND OTHER MAXIMS IN RELATION TO INDIGENOUS RIGHTS OF PERSONALITY

<i>Ahlambe igama lalomntu</i>	To do something to “wash” a person’s name (Xhosa)
<i>Bana ba motho ga re we re a amaomana</i>	Literally “family members quarrel with each other, they do not fight”, meaning – they try to resolve differences amongst themselves without resort to the court
<i>Bopodi ba kgonwa ke ba ba dinaka</i>	Eye for an eye
<i>Diphoko di matlhong</i>	Literally “words are in the eyes”, meaning – any action or agreement must take place in the presence of all the parties
<i>Go mo senya liena</i>	To sully one’s reputation
<i>Go ntlwisa bothoko</i>	Literally “to bring the heartache”, meaning – one is responsible for one’s own problems
<i>Inyoka ayilandeleva ngemgodini wayo</i>	“One does not enter another’s home to fight” – respecting privacy (Ndebele)
<i>Maru gasepula mosi kemolelo</i>	Literally “clouds do not necessarily signify rain but smoke does signify fire”, meaning – prevention is better than cure.
<i>Modimo o nko e metsi</i>	“The god with the wet nose”, referring to a cow
<i>Mosadi fa a inama o ikanya moseso o kwa morago</i>	Literally “if a woman bends, she trusts that the back of her dress will cover her”, meaning – prevention is better than cure
<i>Noga ga e latelewe mosimeng</i>	“One does not enter another’s home to fight” – respecting privacy
<i>Tlhogo ya motho ke ya kgosi</i>	Literally “the blood of a person belongs to the chief”, meaning – only the chief has the right to let a person’s blood flow

GLOSSARY OF SWAZI TERMS

<i>Andzise tetsha</i>	Literally “to spread the dishes around”, meaning – moving a disobedient/disrespectful son to a new area
<i>Asiphili ngaloku okwentekkeyo</i>	Literally “we are not well” – used when family (suspecting that witchcraft is being practised against them) approach the chief
<i>Bandlancane</i>	Chief’s inner councils
<i>Budlabha</i>	Negligence
<i>Bukhosи</i>	Swazi Kingship
<i>Emabutfo/kujuba emabutfo</i>	Regimental age-group/creation of age regiment
<i>Emadloti</i>	Spirit world
<i>Emalobolo</i>	Marriage gifts
<i>Emalungelo</i>	Rights
<i>Emkhayeni</i>	Process of divining a suspected witch
<i>Imfe</i>	Type of grass
<i>Imincele</i>	Boundaries of the Kingdom
<i>Imisebenti</i>	Duties
<i>Incwala</i>	Ceremony of First Fruits
<i>Indlovukazi</i>	Queen Mother
<i>Indlunkhulu</i>	Chief’s court
<i>Indvuna</i>	Headman
<i>Inhlamba iyagezwa</i>	To “wash away” the insult
<i>Inhlamba/kuhlambalata</i>	Defamation
<i>Inhlawulo</i>	Fine
<i>Inhlonipho</i>	Respect
<i>Inhloso</i>	Intent
<i>Inyanga</i>	Diviner
<i>Inyoni</i>	Headdress
<i>Kuba</i>	Theft
<i>Kuba ngumtsakatsi</i>	Family suspect witchcraft is being practised against them
<i>Kubika sisu</i>	To notify a defloration/report a pregnancy
<i>Kubulala</i>	Homicide/murder
<i>Kuchitsa umhlolo</i>	Seduced girl delivers her baby

<i>kuchukuluteka</i>	Provocation
<i>Kudla umuti</i>	A woman's status determines house rank
<i>Kudlisa</i>	Putting poison into another's food/drink
<i>Kugagadlela/kudlwengula</i>	Rape
<i>Kuhlutshwa tinjelwane</i>	Practice of older married women cultivating vegetables behind the deceased family head's hut
<i>Kumikisa umuntfu emakhayeni</i>	Suspected sorcerer is taken before the diviners
<i>Kungahloniphi loko lokutilwako</i>	Violation of a taboo
<i>Kuphinga</i>	Adultery
<i>Kushaya</i>	Assault
<i>Kutinikela</i>	Commitment
<i>Kutsakatsa</i>	Practising witchcraft
<i>Kutsebula</i>	Turning a person into a zombie
<i>Kwemitsisa</i>	Seduction
<i>Libandla</i>	Chief's council
<i>Lihawa</i>	Shield
<i>Lokubatekile</i>	Mentally disabled person
<i>Lusendvo</i>	Family council
<i>Luswati</i>	A beast paid as "fine" for a theft
<i>Ngena</i>	Children born of the <i>ukungena</i> custom
<i>Ngquthu</i>	Beast awarded in satisfaction for seduction
<i>Ngwenyama</i>	King
<i>Nhlizyo</i>	Causing someone to commit suicide
<i>Sankala</i>	A portion of meat from the slaughtered cow to demonstrate that an adulterer has faced appropriate discipline.
<i>Sibongo</i>	Clan name
<i>Sicetelo/sincempheло</i>	Satisfaction/compensation
<i>Sigaba/sitfunti</i>	Status
<i>Sikhali</i>	Spear
<i>Sikhulu</i>	Chief
<i>Siti</i>	Fine paid to chief by adulterer
<i>Tibi tendhlu</i>	"Washing family dirty linen in public"
<i>Tikhulu</i>	Chiefs
<i>Tindvuna</i>	Headmen
<i>Tinkhomo tekugeza emacansi</i>	To "cleanse the mats" – fine paid by adulterous woman's parents to husband's parents

<i>Tinkhundla</i>	System of government involving consultation and discussion at grass-roots level
<i>Tishanshu</i>	Facial gestures
<i>Ubuntu</i>	Humanness
<i>Ukubuyasa lidloti</i>	Special ceremony to bring home the spirit of the deceased – to accept his spirit into the ancestral realm
<i>Umdada</i>	Leopard skin
<i>Umdzalaso</i>	A cow given a compensation for seduction
<i>Umhlambiso</i>	Marriage gifts
<i>Umhlanga</i>	Reed Dance
<i>Umkhaya</i>	Witch-hunts
<i>Umndeni</i>	Family
<i>Umphakatsi</i>	Chief's court
<i>Umphini</i>	Death penalty
<i>Umsebenti wamake/wababe</i>	Duties of parents/traditional ceremony dedicated to dutiful remembrance of deceased parents
<i>Umshayele tinyoni</i>	Father is responsible for his sons' actions
<i>Umtfalo</i>	Responsibility
<i>Ungumuntfu bani</i>	To announce a pregnancy
<i>Uvule sibaya sendvodza</i>	Less marriage goods will be paid for a girl who has been seduced

GLOSSARY OF NON-SWAZI TERMS

<i>Hlapa</i>	Insult (Sotho)
<i>Hlonipha</i>	Avoidance taboos in relation to affines (Zulu)
<i>Ingazi</i>	Assault – an offence of the blood (Ndebele)
<i>Isihewula</i>	A beast seized by the seduced girl's group from the wrongdoer's residence (S Nguni)
<i>Kgosi</i>	Chief (Tswana/Sotho)
<i>Ntlonze</i>	Evidence of adultery in the form of personal belongings of an adulterer (Xhosa)
<i>Posela</i>	To place a girl under a spell to make her more responsive to her lover (Zulu)
<i>Tshenyeletso</i>	Delict (Tswana)
<i>Tshenyo</i>	Crime (Tswana)
<i>Ukungena</i>	The custom by which a successor for a deceased man is procreated by his widows (Zulu)

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