

THE ROLE OF CHIEFS IN THE ADMINISTRATION OF
JUSTICE IN KWAZULU

by

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PREFACE

At the end of 1982 Prof J C Bekker, the then director of the Institute for Public Service and Vocational Training of the University of Zululand, organized a group of legal academics from the Institute and the Law Faculty to do research on matters related to the administration of justice. This research was part of the well known national research project on intergroup relations which was conducted by the Human Sciences Research Council (HSRC). The findings and recommendations of the main committee of the HSRC received a lot of publicity in the country (see Main Committee: HSRC Investigation into Intergroup Relations The South African Society: Realities and Future Prospects 1985).

I was asked to deal with the role of chiefs in the administration of justice. The information I collected was far more than was required for the HSRC project. It then occurred to me that I might as well kill two birds with one stone: use part of the information for the limited project of the HSRC, and utilize the rest for acquiring a further qualification. What made this more appealing to me was that this project seemed to dove-tail with the investigation by the Hoexter Commission of Inquiry into the Structure and Functioning of the Courts, especially because the Hoexter Commission had little to say on

the functioning of the chiefs' courts. It was therefore appropriate to provide for this gap left by the Hoexter Commission. To make the project more manageable I had to limit it to KwaZulu although frequent reference is made to other areas in Southern Africa or even Africa in general.

When this thesis was nearing completion the Legislative Assembly of KwaZulu passed a law altering the name of the traditional incumbent from "chief" to "inkosi". To bring this thesis in line with this would have meant rewriting it as a whole. Seeing that the change is merely in name and not in status and function, I decided to keep to the original one. But wherever the word "chief" is used, it should be understood that "inkosi" is the appropriate substitute. No offence is meant by this action.

There are a few people who deserve appreciation for their contribution towards the successful completion of this research project. No doubt the usual disclaimer applies. These include the following:

To Professor J M T Labuschagne my promoter, I owe a debt of gratitude for the meticulous and yet expeditious manner in which he supervised the research and for the guidance and assistance he provided during the writing of the thesis. He made me feel that

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I would also like to thank the Human Sciences Research Council and the Research and Publications Committee of the University of Zululand for the financial assistance which made this research project possible. To the University of Zululand, my alma mater, I owe a debt of gratitude for the financial assistance granted me to study at the University of Pretoria.

A number of my students and former students deserve thanks for their assistance with research and proof-reading the manuscript.

I cannot mention all by name. But I think Messrs A C Zwane, E B Zulu, C S Zondi and Miss M. Malatji deserve special mention.

I am also grateful to Miss T A Ngema for greatly assisting me with the typing of the thesis so expeditiously.

To God alone be Glory!

This thesis is dedicated to my dear wife BUYI and our three lovely children LINDI, KHANYA and NATHI. They mean so much to me.

SUMMARY

Although justice, the indispensable attribute whereby law facilitates social stability, is difficult to define precisely, every society has a certain conception of justice based on the values of that society. The most popular idea has been that of equality of treatment which in the administration of justice involves treating like cases alike.

This concept of justice is based on the Gesellschaft ideals and values. The idea of justice in traditional black society was modelled on Gemeinschaft ideas which emphasize more the peace-keeping function of law rather than due process and the creation of a general rule of precedent.

Various societies have developed certain procedural safeguards and principles to ensure the doing of minimum justice by judicial tribunals. These vary from society to society as a result of sociological and political developments in each society.

The chiefs' courts in KwaZulu represent the traditional judicial machinery. Although they have been influenced by western ideas and procedures, their mode of operation remains substantially unaltered. Most of the procedural guarantees evolved in the

west, largely do not apply to these courts owing mainly to the nature of the society from which they developed.

Chiefs generally do not act as individuals in the administration of justice, but are assisted by their councillors on whose wisdom and opinions they rely for judgment. These councillors have the liberty not only to cross-examine witnesses but also to ensure that the parties are fairly treated. Despite these traditional restraints irregularities do occur.

Notwithstanding the irregularities chiefs' courts remain largely popular in Zulu society because they provide inexpensive, informal, flexible and expeditious access to justice. The procedural and evidentiary approaches emphasise reconciliation and finding a mutually acceptable solution to the dispute, desirable goals even in modern society.

Regulations have been introduced which have modified the traditional procedural approach. It is nonetheless stipulated that the procedure should accord with the customary law of the tribe concerned. Some of these rules modify customary law and others are contrary to it. In a number of cases chiefs do not comply with these regulations.

Although for some chiefs' courts and their method of operation are unacceptable as they compare unfavourably with western courts, these are in the minority in KwaZulu. Chief's courts therefore still enjoy a measure of legitimacy so that abolishing them without providing a viable substitute would be premature. Similar attempts elsewhere in Africa were unsuccessful. Small claims courts are not yet available in KwaZulu and their functions are limited.

Although chiefs' courts in KwaZulu still have a role to play in the administration of justice, their method of operation should be improved, not with the object of making them pseudo magistrates, an unnecessary duplication, but with the aim of encouraging efficiency thereby instilling the confidence of the public in their functioning. Proper education and training as well as continued in-service training could achieve this. In the meantime suitable alternatives could be investigated.

SAMEVATTING

Alhoewel geregtigheid, 'n onmisbare eienskap waardeur die reg sosiale stabiliteit vergemaklik, moeilik is om presies te omskryf, het elke gemeenskap 'n sekere opvatting van geregtigheid gebaseer op die waardes van daardie gemeenskap. Die bekendste idee is die van gelyke behandeling wat in die regspleging vereis dat soortgelyke sake eenders behandel moet word.

Hierdie konsep van geregtigheid is gebaseer op die Gesellschaft ideale en waardes. Die konsep van geregtigheid in die tradisionele swart gemeenskap is gebou op Gemeinschaft idees wat die vrede funksie van die reg eerder as die "due process" en die skepping van 'n algemene presedent beklemtoon.

Verskillende gemeenskappe het sekere prosesregtelike waarborge en beginsels ontwikkel om minimum geregtigheid deur geregshoue te verseker. Hierdie verskil van gemeenskap tot gemeenskap as gevolg van sosiologiese en politieke ontwikkelings in elke gemeenskap.

Die kapteinshoue in KwaZulu verteenwoordig die tradisionele geregtelike stelsel. Alhoewel hulle deur westerse idees en prosedures beïnvloed is, het hulle werkswyse wesenlik onveranderd gebly. Die meeste van die proses^sregtelike waarborge in die

weste ontwikkel is grootliks nie van toepassing tot hierdie howe nie weens hoofsaaklik die aard van die gemeenskap waarin hulle ontwikkel het.

Kapteins in die algemeen tree nie op all^genlik nie, maar word bygestaan deur hulle raadslede op wiese wysheid en opinies hulle staatmaak vir beslissing. Hierdie raadslede is geregtig nie net om getuies te kruisondervra nie maar ook om te versker dat die partye redelikerwys behandel word. Ten spyte van hierdie tradisionele beperkings vind onreelmatighede plaas.

Nieteendstaande onreelmatighede, bly die kapteinshowe grootliks gewild in die Zoeloe gemeenskap omdat hulle goedkoop, informele, buigbare en spoedige toegang tot die reg voorsien. Die prosesregtileke en bewysregtelike benaderings beklemtoon versoening en die vinde van 'n wedekering aanvaarbare oplossing tot die geskil.

Regulasies is ingestel wat die tradisionele prosesregtelike benadering gewysig het. Dit word nog bepaal dat die prosedure ooreen moet stem met die gewoonte reg van die besondere stam. Sommige van die reëls wysig gewoonte reg en ander is teenstrydig daarmee. In die meeste gevalle steur die kapteins hulle nie aan hierdie reëls nie.

Alhoewel kapteinshowe en hulle werkswyse vir sommige onaanvaarbaar is omdat hulle nie mooi vergelyk met die westerse howe nie, is die in die minderheid in KwaZulu. Kapteinshowe het nog bestaansreg sodat om hulle af te skaf sonder 'n lewensvatbare plaasvervanger ontydig sou wees. Soortgelyke pogings iewers in Afrika het misluk. Kleineishowe is nog nie beskikbaar in KwaZulu nie en hulle funksies is beperk.

Alhoewel kapteinshowe in KwaZulu nog 'n rol speel in die regspleging, moet hulle werkswyse verbeter word, nie met die doel om van hulle pseudo-magistrate te maak nie, 'n onnodige duplisering, maar om doelstreffendheid te bevorder en sodoende die vertroue van die gemeenskap in hulle funksion^{er}ing te laat inboesem. Behoorlike opvoeding en opleiding sowel as voortgesette opleiding sal hierdie doel vervul. Intussen kan gepaste alternatiewe ondersoek word.

TABLE OF CONTENTS

	PAGE
PREFACE	i
DEDICATION PAGE	v
SUMMARY/OPSOMMING	vi
 CHAPTER I	 1
INTRODUCTION OF RESEARCH AND PRELIMINARY CONCEPTUAL ANALYSIS	1
1.1 INTRODUCTION	1
1.1.1 The Concept of justice	8
1.1.2 The Conception of a Court	22
1.1.3 The Concept "administration of justice"	30
1.2 STATEMENT OF THE PROBLEM	32
1.3 RESEARCH	35
1.3.1 Aim of research	35
1.3.2 Scope of investigation	37
1.3.3 Execution of research	38
1.3.4 Methodology	39
1.4 CONCLUSION	42
FOOTNOTES	44
 CHAPTER II	
FUNDAMENTAL PRINCIPLES FOR THE FAIR ADMINISTRATION OF JUSTICE	54
2.1 INTRODUCTION	54
2.2 FUNDAMENTAL PRINCIPLES IN BROAD OUTLINE	55
2.2.1 The doctrine of separation of powers	60
2.2.2 Judicial independence	62
2.2.3 Access to justice	76
2.2.4 Fair process	78
2.3 CONCLUSION	85
FOOTNOTES	87

CHAPTER III		
	MODELS OF LITIGATION	96
3.1	INTRODUCTION	96
3.2	LITIGATION IN TRADITIONAL SOCIETY	97
3.3	LITIGATION IN MODERN SOCIETIES	100
3.4	CONCLUSION	108
	FOOTNOTES	109
CHAPTER IV		
	THE RECOGNITION OF CHIEFTAINSHIP	111
4.1	INTRODUCTION	111
4.2	TRADITIONAL JUDICIAL STRUCTURE OF THE ZULUS	113
4.2.1	Historical background	113
4.2.2	Traditional judicial structure	120
4.3	RECOGNITION OF CHIEFTAINSHIP	126
4.3.1	Before 1927	127
4.3.2	Recognition of chieftainship in 1927	136
4.4	CONCLUSION	138
	FOOTNOTES	140
CHAPTER V		
	APPOINTMENT AND JURISDICTION OF CHIEFS	148
5.1	INTRODUCTION	148
5.2	APPOINTMENT	149
5.3	JURISDICTION	155
5.3.1	Civil jurisdiction	158
5.3.2	Criminal jurisdiction	159
5.4	LAW DISPENSED	163
5.5	POWER TO PUNISH FOR CONTEMPT OF COURT	171

5.6	CONCLUSION	173
	FOOTNOTES	176
	CHAPTER VI	
	THE PROCEDURE AND EVIDENCE IN THE CHIEF'S COURT	181
6.1	INTRODUCTION	181
6.1.1	The nature of the accusatorial process	184
6.1.2	The nature of the inquisitorial process	187
6.2	PROCEDURE IN THE CHIEF'S COURT	190
6.2.1	Chiefs' and headmen's civil court rules	204
6.2.1.1	Granting of default judgment	204
6.2.1.2	Impartiality of the chief	205
6.2.1.3	Prohibition of legal representation	206
6.2.1.4	Written record	207
6.2.1.5	Registration of judgment	210
6.2.1.6	Execution	211
6.2.1.7	Appeal against chief's judgment	213
6.2.1.8	Scale of fees	218
6.2.2	Chiefs' and headmen's criminal court rules	218
6.3	CONCLUSION	224
	FOOTNOTES	226
	CHAPTER VII	
	THE VALUE OF CHIEFS' COURTS	236
7.1	INTRODUCTION	236
7.2	THE LEGITIMACY OF CHIEFS' COURTS	236
7.3	THE WORK DONE BY CHIEFS' COURTS	240
7.3.1	Mtunzini magisterial district	244
7.3.1.1	Chief Mathaba	244
7.3.1.2	Chief Mzimela	247
7.3.1.3	Chief Mkhwanazi	249
7.3.1.4	Chief Zulu	251
7.3.1.5	Chief Nzuza	252
7.3.1.6	Chief Dube	252
7.3.2	KwaMsane magisterial district	253
7.3.2.1	Chief M Hlabisa	253
7.3.2.2	Chief Mdletshe	255

7.3.2.3	Chief Mkhwanazi	256
7.3.2.4	Chief D J Hlabisa	257
7.3.3	Lower Umfolozi magisterial district	258
7.3.4	Mahlabathini magisterial district	262
7.4	CONCLUSION	263
	FOOTNOTES	265
CHAPTER VIII		
	LAY JUSTICE IN AFRICA: A COMPARATIVE PERSPECTIVE	267
8.1	INTRODUCTION	267
8.2	BOPHUTHATSWANA	268
8.3	BOTSWANA	272
8.4	CISKEI	274
8.5	LESOTHO	276
8.6	SWAZILAND	277
8.7	ZIMBABWE	277
8.8	TRANSKEI	283
8.9	CONCLUSION	287
	FOOTNOTES	291
CHAPTER IX		
	CONCLUSION AND RECOMMENDATIONS	296
9.1	FINDINGS	296
9.2	CONCLUSION AND RECOMMENDATIONS	304
	FOOTNOTES	316

BIBLIOGRAPHY	317
TABLE OF CASES	335
TABLE OF STATUTES	340
APPENDIXES	342

CHAPTER I

INTRODUCTION OF RESEARCH AND PRELIMINARY CONCEPTUAL ANALYSIS

1.1 INTRODUCTION

Popular dissatisfaction with the administration of justice is both old and ubiquitous.¹ In the words of Roscoe Pound,² "... as long as there have been laws and lawyers, conscientious and well-meaning men have believed that laws were mere arbitrary technicalities, and that the attempt to regulate the relations of mankind in accordance with them resulted largely in injustice."

It is rather paradoxical that law, which should be the vehicle for justice, should be perceived by ordinary people as an instrument of trickery. This perception may both be justified and unjustified. Whatever the merits of this unpopularity, dissatisfaction with the administration of justice may be healthy in that it may lead to the improvement of the methods of performing this important social function. Complacency with an unsatisfactory state of affairs may be a greater evil.

Despite the unpopularity of law, man needs it to serve as a broad framework within which he can realize his ends in an orderly and predictable fashion in society. This facilitates social

stability. The law achieves this by often curbing man's anti-social conduct, and thereby enables individuals with conflicting interests to coexist harmoniously.³ Without law there would be chaos, which is a state of affairs that is contrary to order and progress, and which, although not completely inconsistent with the nature of man in general, is incompatible with the very idea of society.⁴ For society, according to Rawls,⁵ "is a more or less self-sufficient association of persons who in their relations to one another recognize certain rules of conduct as binding and who for the most part act in accordance with them."

Order and stability should not be equated with total absence of conflict, but should rather be interpreted to mean the existence of rules and machinery for the resolution of conflicts and the settlement of disputes. Order will not necessarily prevail because certain forces are completely eliminated, but by dealing with them in a manner that will facilitate social harmony.^{5(a)}

The degree of tolerable conflict will vary from society to society. Yet even the simplest society does need conflict-resolution machinery.

Justice is the major attribute whereby law attains peace and stability. Indeed over the centuries law has either been regarded as the embodiment of justice, or at least the attainment of justice was, and still is, considered the chief and ultimate

object of law; hence the expression "administration of justice" when reference is made to the formal settlement of disputes by the application of rules of law by competent institutions in society. It is illuminating to realise that in the biblical context, and especially in the Old Testament, law and justice are used synonymously.⁶ In this sense justice means that which is right. When the phrase "law and justice" is used, justice often refers to "an encompassing state of being 'good' and upright, while law denotes the proper conditions on which the said 'goodness' and uprightness prevail".⁷

The aim of justice has been described as the co-ordination of the diversified efforts and activities of the members of the community and the allocation of rights, powers and duties among them in a way which will satisfy the reasonable needs and aspirations of individuals while at the same time promoting the maximum productive effort and social cohesion.⁸ As already indicated, justice is not simply the ideal to which law ought to conform in order to be good law, but it is the indispensable ingredient for securing social stability. Consequently the nearer a legal system comes to being just, the more willingly it will be obeyed, and the more easily social stability will be facilitated. An unjust system of law largely depends on strong sanctions for its enforcement. While no law can be completely devoid of sanctions, complete reliance on coercion without

society's approval may conduce rebellion and anarchy, which
 implies disintegration of society. According to Bodenheimer:

History teaches the lesson that men will not put up with all systems of law, however 'orderly' and formally consistent the integrative normative structure of such systems may be. There are conditions under which men, groups, and nations will, for entirely rational reasons, either rebel against a positive legal system, evade some of its major commands, or make a strong effort to change it.

To do justice therefore is the price man has to pay for living in an orderly community. Central to the idea of natural law has consequently been the view that law is "an essential foundation of the life of man in society and that it is based on the needs of man as a reasonable being and not on the arbitrary whim of a ruler."¹¹

No legal system, however, can always secure perfect justice because, as Beinart¹² puts it, "that is an ideal rather than a working proposition". But the real test of legal technique is its ability to convert ideals into working doctrines."¹³

The discrepancy between law and justice is often created by the fact that law-makers are motivated by certain ideals and

political considerations in law making and may not feel constrained to follow any particular concept of justice. This has further been exacerbated by the positivistic separation between law and justice. Positivism separates law from morals and relegates justice to the sphere of morality. This therefore means that even if a law is unjust, it nonetheless remains law as long as it complies with the requirements of legal validity although, needless to say, it will be bad law.¹⁴ This approach is in marked contrast to the natural-law thinking. According to a certain version of natural-law philosophy, a law that conflicts with true principles of morality or justice is not valid.¹⁵ This is obviously a controversial issue which cannot be settled in a few lines. The view that is taken here is that the mere non-compliance of law with principles of justice need not mean that that law is no law at all. It may simply mean that it is an unjust law. The term "unjust law" would be a contradiction in terms if law simply by virtue of its falling below a certain standard of justice ceased to be law.

This view does not imply support for the idea of a strict separation between law and morality. Law is a product of society and is based on the values and ideals of a particular society. These constitute the "inner morality" of law or a morality^{15(a)} "immanent in the legal system". This means a decisive dependence of law on morality because these values are based on

the moral views of that society. By attempting to make a value-free study of a concept that is value-laden, positivism's value is extremely limited.

The above exposition illustrates that law cannot be readily obeyed because of authority and ultimately force, however essential these are to law, but because of the accepted belief of the community that the underlying authority is legitimate.¹⁶

Legitimacy has been defined as "the capacity of the system to engender and maintain the belief that the existing political institutions are the most appropriate ones for society".¹⁷ Yet it would be folly to think that law could ever completely dispense with the notion of coercion and depend merely on voluntary acceptance. This is because there is no simple explanation for man's obedience to law, since persons obey law for a variety of reasons among which is the element of coercion.¹⁸

No doubt legitimacy is not the all-important consideration. Equally significant in law is the element of effectiveness, which has been described by Kelsen in the following words:¹⁹

The principle of legitimacy is limited by the principle of effectiveness ... (I)t is undeniable that a legal order in its entirety, and an individual legal norm as

well, lose their validity when they cease to be effective; and that a relation exists between the ought of the legal norm and the is of physical reality also insofar as the positive legal norm, to be valid, must be created by an act which exists in the reality of being.

Legitimacy and justice are closely related and effectiveness draws its support from justice. From the foregoing discussion it is clear that justice is the concern of a lawyer. No lawyer worthy of his salt can ignore the significance of justice to law. To be preoccupied with the mechanics of law to the utter disregard of the substance thereof is to adopt an ostrich philosophy. Both of these are essential. As Bodenheimer²⁰ points out:

No philosophical or sociological treatment of law which refuses to face the question of the 'goodness' of the law in addition to that of its formal validity and technical organization can provide us with an adequate insight into legal reality.

When one is dealing with the administration of justice, one can equally not ignore the question of justice because justice has both formal and substantive components.²¹ Although attention has largely been paid to the importance of justice, the preliminary question has not been answered, namely: what is justice?

1.1.1 The Concept of Justice

Concern with the definition of justice is necessitated by the fact that the judicial process is indispensable for the dispensing of justice. Moreover, the administration of justice whether by traditional or modern institutions is not a purely mechanical exercise, but very much a value-laden one.

Justice, "the hope for all who suffer, the dread of all who do wrong" is an extremely elusive goddess, the quintessence of which it is difficult to define in precise terms. Its definition has over the centuries exercised the minds of philosophers and jurists alike. ²² No more than a cursory attempt to adumbrate some of its salient features will be made here.

23

Despite the difficulty of defining justice, Sir Norman Anderson is of the opinion that justice is not just a high-sounding ideal of little or no practical relevance, but that it is in fact "a concept which is still active and relevant in various contexts and systems of law", and that although it may not be precise at its edges, it can empirically be demonstrated to possess a core of substance which is tolerably clear and vitally essential to maintain both individual liberty and social cohesion which law seeks to foster. It is imperative to review the influential theories propounded over the years by various philosophers. Only a few important theorists will be mentioned.

The thinkers on justice over the years may broadly be categorized into two main groups, to wit, those who defined justice as meaning "equality" and those who circumscribed it as "freedom".

24

According to Plato justice consists in a harmonious relationship between the various parts of the state. Every individual must do his duty in his specific place and do the thing for which he is best suited without meddling into the affairs of other members. Plato's state is a class state consisting of rulers, and subjects. In his view some people are born to rule, some to assist the rulers in the performance of their duties, and others are supposed to be farmers or artisans or traders. Any person who does a job for which he is not suited is acting unjustly. It is the function of the rulers of the state to see to it that each person is given his appropriate station in life, and that he properly performs the duties of his station.

25

Aristotle, on the other hand, approached the problem of justice differently. Justice in his opinion consists in equality of treatment. It involves an equitable distribution of the goods among members of the community. This just distribution must be maintained by law against any violations. He distinguishes between distributive, commutative and retributive justice. Distributive justice involves the distribution of offices,

rights, honours and goods to members of the community on the basis of geometrical equality, an equality which takes into account the peculiar inequality of the subjects considered for the distribution. The criterion which should be used to determine equality is personal worth or merit. Equals must be treated equally and unequals must be treated unequally. And, in Friedmann's ²⁶ paraphrase "Injustice arises when equals are treated unequally, and also when unequals are treated equally."

Commutative justice is based on arithmetical equality, which is different from geometrical equality in that it disregards subjective inequalities and requires strict equality irrespective of any subjective attributes of the parties concerned.

Corrective or retributive justice, according to Aristotle, guarantees, protects and maintains the distribution against illegal attacks and restores the disturbed equilibrium. If harm has been suffered, it must be compensated. Here the equality postulated is arithmetical, being unconcerned with the subjective qualities of the person, but merely concerned with the computation of losses suffered.

Although the Aristotelian concept of justice is not free from anomalies, equality of treatment as the central notion of justice has become the cornerstone of modern theories of justice. ²⁷

28
 Justinian defined justice as "the set and constant will to give every man his due". This definition is attributed to the Roman jurist Ulpian, and it is to some degree related to the Aristotelian idea although it differs in formulation. 29 It has, however, been regarded as begging the question as there is no prior determination of what is man's due. 30 Concededly it implies equality of treatment for those in similar circumstances. Equality of treatment, as already indicated, does not mean that all people should be treated alike whatever their peculiar circumstances, but that if there is disparity of treatment, it must not be motivated by arbitrary or capricious considerations, but must rest on objectively justifiable and acceptable ones. Differences in the conditions of persons may necessitate legal differentiation. The distinction between justifiable differentiation and unjustifiable differentiation is often expressed by the use of the terms "differentiation" which is devoid of negative undertones and "discrimination" which has some 31 negative connotation.

It is undoubtedly difficult to decide when cases are alike and when they differ. The law itself does not always provide a yardstick to establish this. It is rather the moral outlook of the people in a particular society at a specific time which is a determinant. This accounts for the somewhat relative nature of 32 justice, although it is rather one's conception of justice which is relative than justice itself.

Herbert Spencer adopted a fundamentally divergent view of justice. For him the underlying idea of justice was not equality, but freedom. According to Spencer every individual is entitled to acquire whatever benefits he can derive from his nature and capabilities. Although he is allowed to acquire various rights and freedoms, he is only limited by the consciousness of and respect for the unhindered activities of others who have similar claims to freedom. "The liberty of each is to be limited only by the liberties of all." ³³ As Spencer put it:

Every man is free to do that which he wills, provided he infringes not the equal freedom of any other man.

A similar approach to justice was adopted by Emmanuel Kant. According to him liberty was the only original, natural right belonging to each man in his capacity as a human being. For him therefore justice and law represented all "the conditions under which the arbitrary will of one can coexist with the arbitrary will of another under a general law of freedom." ³⁵

35(a)
Hart, on the other hand, reverted to the Aristotelian idea of justice as the treatment of like cases alike. He elaborated on the idea of distributive and retributive justice. Justice, as he puts it, is the equivalent of fairness. Fairness, is not

necessarily coextensive with morality in general, but is only relevant to the assessment of conduct not of a single individual, but of the manner in which classes of individuals are treated when some burden or benefit falls to be distributed among them, and when compensation or redress is claimed for injury suffered. Although the terms "justice" or "fairness" can be used in other contexts, those contexts are derivative applications of the notion of justice as equality of treatment which can be adequately explained once the primary application of justice to matters of distribution and compensation is understood.

36

Rawls, does not define justice as fairness because he does not regard the two terms as synonymous. According to him justice comprises principles which rational beings would rationally adopt as fair if they had to decide what is fair in general without knowledge of their own particular position in society, or, as he puts it, principles which would be chosen by an individual "situated behind a veil of ignorance". These entail, in broad outline, that every person must have the largest political liberty compatible with a like liberty for all, and that inequalities in power, wealth, income and other resources must not exist except in so far as they work to the absolute benefit of the worst-off members of society.

It is not necessary to analyse in detail the intricate exposition of Rawls's theory of justice. Suffice it to say that his theory has attracted considerable favourable and adverse comment.

37

38

To come nearer home, Hahlo and Kahn circumscribe justice as "the prevailing sense of men of goodwill as to what is fair and right - the contemporary value system." Much as this definition is commendable for its flexibility, it seems to create the impression that justice is nothing more than the transient views of particular persons at a particular time. Yet it does illustrate an important point, namely, that justice is influenced by the society's sense of values. Values change. As a result, what is regarded as just today may not be considered just tomorrow. Moreover, ideas of justice vary according to societies owing to the different value systems in various societies. Yet it is more correct to distinguish the concept of justice from its practical application.

From the brief exposition of theories of justice made above, it is abundantly clear that theories of justice are often idiosyncratic. Another characteristic which has been exhibited is that justice cannot be defined in terms of freedom or equality only. It is more a reconciliation of freedom and equality.

39

The greatest difficulty, however, has been the practical application of the idea of justice to the everyday affairs of man

whether in the distribution of goods and benefits or in the compensation for harm occasioned. History does not provide one egalitarian pattern. In the words of Bodenheimer:

Recorded history has furnished no proof so far that one particular conception of justice in human social affairs must be looked upon as so superior to all rival conceptions that the latter are a priori condemned to failure or bankruptcy.

What is important, however, is that justice is often identified with a certain attitude or disposition of the mind. It requires an impartial, objective and considerate attitude towards others, "a willingness to be fair, and a readiness to give or leave to others that which they are entitled to or retain". As Bodenheimer⁴¹ graphically explains:

The just man, either in private or in public life, is a person who is able to see the legitimate interests of others and to respect them. The just father does not arbitrarily discriminate between his children. The just employer is willing to consider the reasonable claims of his employees. The just judge administers the law with even-handed detachment. The just lawgiver takes into account the interests of all persons and groups who he is under a duty to represent. Thus understood, justice is a principle of rectitude which requires integrity of character as a basic precondition.

In the administration of justice, in particular, the principle of treating like cases alike, although essential, is not all encompassing. Equally important is the attitude of the judicial officer not only to the case, but also to the person whose case he is trying. His integrity or uprightness is absolutely indispensable for the unimpeachable dispensing of justice.

Justice, by its very nature, is the opposite of selfishness. It conflicts with inconsiderate claims made with disregard for the justified claims of others. For this reason justice, although it is more limited in scope than rationality, may be identified with rationality, the ability to abstract one's ego and place oneself in the position of the other man, and by generalizing one's sentiments and reactions, project oneself into the person of another. This capacity makes one realize the importance of certain legal and moral restraints in the process of adapting our needs to the needs of others in order to make life tolerable in the community. It is this quality to think with detachment on the inevitable or most desirable conditions of social coexistence which renders human beings capable of framing generalized ethical systems and codes of law.⁴²

Upon this is based the Christian view of justice. According to the Christian ethic, justice entails treating others in exactly the same manner you would like them to treat you.⁴³ There is no

better definition and practical application of the idea of justice than this. It is predicated on the assumption that everyone loves himself so much that he will always act in his best interests either in the matter of the distribution of goods or in the assessment of compensation for injury suffered. This view of justice therefore is closely aligned with the Christian golden rule of loving one's neighbour as oneself.⁴⁴

In the context of the administration of justice, the practical application of this injunction was once illustrated by William Temple the Archbishop of Canterbury. He took the Christian teaching of love and related it to justice as follows:

Love finds its primary expression through justice, which means in practice that each side should state its case as strongly as it can before the most impartial tribunal available, with determination to accept the award of that tribunal. At least that puts the two parties on a level, and is to that extent in accordance with the command 'Thou shalt love thy neighbour as thyself'.

And, as Denning further expounded it:

'each side should state its case as strongly as it can' - that is the part of the advocate. 'Before the most impartial tribunal available' -

that is the part of the judge.
'With the determination to accept
the award of the tribunal' - that is
the part of the ordinary man.

The beauty of the Christian idea of justice is its simplicity of formulation and ease of practical application. As was pointed out above, the application of the concept of justice based on the idea of equality of treatment has been difficult. It has often led to the mistaken impression that justice is a concept that is fluid and devoid of substance. The difficulty has been to determine who are equals and who are unequals. Right down the ages there has been no unanimity on this. People have been treated unequally without any rational justification. This has largely been due to the degree of knowledge at the time. Moreover, the notion of justice as equality of treatment suffers from two shortcomings, namely that if people who are in the same circumstances are mistreated equally, it does not mean that justice has been done, and it also fails to articulate that justice is not simply confined to the comparison of individuals, groups, and legally relevant situations for the purpose of establishing the similarity or dissimilarity, but is much more concerned with the proper judicial treatment of peculiar situations and uncommon combinations of events which cannot easily be compared. For this reason the conception of justice as equality of treatment must be complemented by the other conception of justice which is that everyone must get what he deserves.

Despite the deficiency of the view which equates justice with equal treatment, equal treatment has fundamental significance. It emphasizes the universal human trait which revolts against discriminatory treatment which may be regarded as unreasonable, unjustified and capricious. Yet the further qualification to this view renders the concept of justice difficult to apply in practice or rather makes it difficult to define.

The Christian formulation of justice as the treatment of others as you would like them to treat you, eliminates the use of many qualifications. Du Plessis has based his definition of justice on this Christian perspective. He defines legal justice as:

die religieus gedronge, ampsmatige doen (-ingeborgenheid) aan 'n ander in konkrete situasies (ter wille van die ander se geborgenheid) langs die legale weg van amptelike (of ampsbeskermende) menslike instellings op sowel 'n institusionaliserende as 'n geinstitutionaliseerde wyse. Die 'doen' kan verder as 'n 'doen ... dit wat jy aan jouself in dieselfde situasie gedoen sal wil hê' omskryf word.

Whatever its formulation, justice is a universal human quest. The concept of justice discussed above is of universal application. Yet the result of its practical application may differ in varying social circumstances because of the influence

of the system of values of those circumstances. Nowhere is this better illustrated than in the difference between the western conception of justice and the African one. The African model of justice is based on the Gemeinschaft level of social organization, whereas the western one derives from the Gesellschaft ideals and values. The Gemeinschaft model of justice emphasises the peace-keeping and conciliatory functions of law. Punishment and the resolution of disputes stress more the community's will and traditions, rather than the rehabilitation of the offender. No sharp distinction is drawn between legal and moral issues; nor is there preoccupation with abstract criteria of justice, but emphasis is more on the substantive aspect of justice directed to a particular case in a specific social context rather than on the creation of a general rule of precedent.

The Gesellschaft model of justice, on the other hand is a product of individualism, connected with social and geographical mobility, with commerce, and the rise of the middle class. It is predicated upon a society based on contract rather than status. Emphasis is placed on formal procedure, impartiality, precise legal provisions and that the legal administration should be more rational and predictable. Anyone used to one or the other is bound to view the other with suspicion and will be inclined to consider it unjust. This should not be so.

The distinction between Gemeinschaft and Gesellschaft models of justice must not be construed to imply that these are totally alien to each other. The difference is more in emphasis. In the black society especially today, the situation is quite fluid. No one conception of justice is supreme. There is a mixture of the two types of justice especially in the black townships. ⁵³ The emergence of the so-called makgotla in some of these townships attests that the sense of justice of certain sections of the black population is not appeased by the administration of justice based on the Gesellschaft idea of social organization with its emphasis on the due process, sometimes to the atrophy of substantive justice. ⁵⁴ Yet the dissatisfaction of some blacks with the mode of operation of these "courts" ⁵⁵ is evidence that the black society today cannot be regarded as homogenous. Traditional values and ideals are subjected to western influences. The situation is therefore in a state of flux. In ⁵⁶ the words of Pound:

In periods of absolute or generally received moral systems, the contrast between legal results and strict ethical requirements will appeal only to individuals. In periods of free individual thought in morals and ethics, and especially in an age of social and industrial transition, this contrast is greatly intensified and appeals to large classes of society. Justice which is the end of law, is the ideal compromise between the activities of all in a

crowded world. The law seeks to harmonize these activities and to adjust the relations of every man with his fellows so as to accord with the moral sense of the community.

Although it was pointed out above that justice and law often diverge, the ideal is the synthesis between the two. That will not be belaboured here. The main concern in this investigation, however, is the manner the law is applied and its substance is not in issue. This presupposes that the law is the vehicle for justice. If the law is properly applied, justice will be done.

This does not imply that law may not result in injustice even if properly applied in the formal sense, but the principal thrust of this investigation is the proper application of the law and the doing of justice where the equal treatment of like cases is crucial. This is the role of the court.

1.1.2 The Conception of a Court

Even the best legal system in the world cannot fulfil its role of securing order and harmony through justice, without an appropriate organ to do this. Courts, and in particular judges, have the important function of settling disputes. This is because law, unlike other norms in society, largely depends on enforcement by state organs, the courts.

Because of the fundamental importance of law in society, it is obvious that even the smallest of societies needs and must have law and consequently courts and judges. If there were no agency to decide impartially and authoritatively whether a man had committed a crime and, if so, what should be done with him, other persons offended by his misconduct would resort to self-help and proceed to punish him according to their unbridled discretion. Similarly, in the absence of an agency empowered to settle private disputes impartially and authoritatively, people would follow the law of the jungle and this would degenerate into physical violence and consequent anarchy. Under those conditions not even the simplest society would survive. All social order would be disrupted. In this sense therefore courts constitute an essential element in society's machinery for maintaining peace. 60

Many cases brought before the courts represent potential rather than actual controversies, in which the court's role is more administrative than adjudicatory. But the mere existence of a court renders unnecessary any frequent exercise of its powers. The fact that it operates according to known rules and with reasonably predictable results, leads those who might otherwise engage in a controversy to settle their differences privately. 61

What is a court is unfortunately not incontrovertible. If one refers to a court, some immediately have in mind a formal forum

manned by robed gentlemen and characterised by solemnity. Although this may be true of western courts, it is not necessarily so of courts in the African context. By court here is meant a socially approved or recognized person or institution with the authority to settle cases. By judge one should understand a person having a socially approved and defined role in the administration of a society.⁶² It is immaterial where he derives his authority from. It may be derived from custom.⁶³

According to this approach, every society known to man has everyone of these attributes. Without them society would fail to function.⁶⁴ Allott, therefore correctly concludes that in all African societies except perhaps the smallest, there can be no doubt about the existence of judges if thereby we mean persons who specialise in deciding disputes which concern legal norms and their implementation.

⁶⁵ Even Koch points out that all legal systems in the world have culturally approved procedures that enable an individual who has been prejudiced, or avers to have been prejudiced, to obtain redress. All societies have, as he further contends, developed methods of conflict management that assure their members, with greater or lesser efficiency access to justice. This, of course, will vary from society to society. In this respect, chiefs in African society can therefore be considered to be judges or administrators of justice and places where they perform their judicial functions are courts.

The contention by Dyzenhaus that a legal system is more than a sophisticated conflict-management mechanism need not detain us here. We are not concerned with the development of a legal system, but rather with the functioning of a legal system.

Although the tribal court is regarded as a chief's court, it is not the chief as an individual who sits in it and decides cases all by himself. It is more a court of the tribe in that the chief sits together with his councillors. All members of the court have the right to ask questions and the chief only has to pronounce the verdict. The chief's court is more like the ding or people's court of Germanic times.⁶⁷ Nevertheless to refer to this court as the chief's court is in line with the fact that these assist the chief in the execution of his duties.

Although it was in the past quite controversial whether African law is really law, today this cannot be seriously debated.⁶⁸ Thus Maine's⁶⁹ speculation that: "Law has scarcely reached the footing of custom: it is rather a habit", is regarded today as inaccurate. Today it is accepted as axiomatic that every society has law and that African law therefore is really law.⁷⁰ No doubt it exhibits distinct features from western law.⁷¹

The denial of the legality of customary law has its origin in Austinian positivism⁷² according to which law is a command from a

sovereign to a subject accompanied by a sanction.⁷³ Customary law was therefore not considered as falling within the purview of "law properly so-called" owing to the lack of organized sanctions or state institutions for the enforcement thereof.⁷⁴ This definition of law was later found to be rather parochial and consequently imprecise.⁷⁵ Hart, for instance subjects this theory of law to painstaking scrutiny, and points out that the imperative theory of law confuses being obliged with being obligated. One may be obliged to do something, but that does not mean that he is under an obligation to do it. Conversely, one may be under an obligation to do something, but if he does not do it, it does not imply that he is no longer under such obligation. For Hart a legal system consists of the union of primary rules of obligation with secondary rules of recognition.⁷⁶

Even Hart's definition of law has later been found to be narrow.⁷⁷ Dworkin makes a fundamental attack on Hart's theory. He contends that when lawyers argue or dispute about legal rights and obligations, they make use of standards that do not function as rules but operate as principles, policies and other types of standard. Positivism's attempt in positing a single fundamental test for law impels us to overlook the significant role played by those standards that are not rules. He further distinguishes rules from policies and principles. According to him policy is "that kind of standard that sets out a goal to be reached,

generally an improvement in some economic, political, or social feature of the community", whereas a principle is "a standard that is to be observed, not because it will advance or secure an economic, political or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality".⁷⁸ Thus the standard that motor accidents must be decreased is a policy, but the standard that no man should be unjustly enriched at the expense of others is a principle.

Although both legal principles and legal rules point to particular decisions about legal obligation in specific circumstances, they differ in the nature of the direction they give. According to Dworkin⁷⁹ rules apply in an "all-or-nothing" fashion whereas this is not so with principles. This entails that principles have a dimension of weight or importance which rules do not have.

In Dworkin's opinion, it is a futile endeavour to attempt to lay down a single test to determine which standards qualify as law and which do not. Lawyers and judges, when they argue and decide cases, appeal not only to rules, but also to principles. What is more they refer to both of these as being law.⁸⁰

The crux of the matter is that one of the causes of varying views of law is that these views have evolved at various times. Law is

also hard to define because it derives from different sources. Moreover, a definition of law is a theoretical abstraction from specific laws. As a result it is a fruitless exercise to attempt a definition thereof without considering the particular on which it rests.⁸¹

In any event most of the schools of jurisprudence have come to recognize African customary law as being really law.⁸² Anyone who denies that need only be reminded of Allott's "virginal" or unsophisticated person "the noble savage", one who has never allowed his mind to be "sullied or infected by abstract thoughts about LAW", who lives in a traditional, customary non-literate peasant society and is subject to its law. Although he may not have troubled himself about the theoretical reasoning about it, he would regard it as ludicrous if he were to be informed that his society has no law. But if you were to take and plunge him in a country with a highly sophisticated legal system, he might think that such a country has no law because it would be hard for him to conceive of that legal system as being really law. It is sometimes inconceivable how our background limits our understanding of things.

To return to Dyzenhaus' assertion, that a legal system is more than a sophisticated machinery for the settlement of disputes,⁸³

the question may well be posed as to whether customary law may not simply be taken as a dispute-settlement mechanism rather than law. Dyzenhaus⁸⁴ refers to Unger⁸⁵ who asserts that there are three types of law, namely the interactional law, operating in a society where there is only customary law, which is more or less consistently observed; bureaucratic or regulatory law, which exists in a society where there is a division between the state and society, where the law expresses the will of the ruler, and where distinctions between habit and duty are drawn; and the legal order or system, which is general and autonomous as well as public and positive. It does not reflect the will of the ruler because its rules are applied by specialized institutions the main function of which is adjudication. It evolves from the separation of the duties of legislation, administration and adjudication. Notwithstanding this distinction, Unger, and by implication Dyzenhaus, is at least prepared to concede that customary law is a type of law. His contention is not directed towards the denial that customary law is law, but merely at pointing out the nature of customary law as opposed to the other types of law.

Customary law manifests differences from western law because it is a law that has developed from the customary practices of the people within a specific type of society.⁸⁶ Yet customary law cannot be interpreted to mean no more than practice. This is

because much of practice may be contrary to the norms, and not every individual practice can be regarded as law. Although the legitimacy which customary law has is not conferred by a legislature, it is equally not a product of an individual idiosyncrasy. Customary law rather, is a set of norms derived by society from practice and which are invested with binding

87

authority. In customary law, however, no rigorous distinction is made between what are legal rules and moral rules. On the

88

contrary, there is a unified culture of which law forms the core.

89

Because the law is abstracted from the practices of the people, it is more popular and readily known by members of the society. Moreover, as customary law is mostly unwritten and is not a product of logical deductions from particular rules, it is mostly simple in nature.

90

It must be pointed out, however, that a significant portion of customary law has been recorded. Even the use of the expression "customary law" is in a sense a misnomer, because African law can today no longer be regarded as purely customary. The use of the expression "customary law" is a matter of taste than of logic.

1.1.3 The Concept "Administration of Justice"

Although in western systems a distinction is often drawn between authority and power, in African systems such a distinction is not really emphasized. According to this distinction power

characterizes political activities and authority characterizes administrative ones.⁹¹ Administrative activity is described as consisting of authorized processes, and being an "inherently hierarchic" type of organization, is devoid of contraposition at any level.⁹² Authority is, on the other hand, defined as an ability to perform certain kinds of action,⁹³ whereas power is the ability of an individual or group to carry out its will, even against the resistance of others.⁹⁴ It may be acquired by the physical, psychological or intellectual characteristics of a person. This distinction is based on the separation of political activities from administrative ones.

Authority therefore according to this approach is of the essence of the administration of justice. This is based on the English notion that the function of the judge is merely declaratory and not creative.⁹⁵ Although this idea has salutary effects, it is today trite that judges do make law within limited confines.⁹⁶ Authority legitimises the application of law in the settlement of disputes. In the traditional black society the legitimacy of the authority is based on custom.

Central to the idea of administration of justice is the principle of treating like cases alike. This is justice in the formal sense. In this area moral and legal rules meet with the purpose of meeting the legitimate aspirations of the litigant.⁹⁷

1.2 STATEMENT OF THE PROBLEM

Political institutions in South Africa in general are facing a crisis of legitimacy. There is a crisis of legitimacy if there is a dispute among various groups as to the political order's worthiness to be recognized.⁹⁸ With a view to resolving this dilemma, commissions have been established to investigate the best possible political and legal dispensation for South Africa.⁹⁹ These investigations have largely been confined to political institutions. The structure and functioning of the courts for instance receive scant attention in the reports of the president's council except incidental remarks on the testing rights of the courts. No explanation is given for this omission.¹⁰⁰ One is merely left to speculate on this. Bekker offers four possible reasons for this reticence : the study of the judiciary is a highly technical matter which belongs to the field of jurisprudence rather than of politics; of all the three branches of government, the judicial branch is, for political purposes, the most unimportant and the weakest; the judicial branch itself is often mistakenly regarded as impeccable and the judges themselves as above reproach. This is further exacerbated by the eulogy of the judiciary by the government officials,¹⁰¹ and academics.¹⁰² Judges themselves often blow their own trumpet¹⁰³ and courts are denied the power to test acts of parliament.

Yet any study of the constitution of a country is incomplete if it ignores the judicial organ because it is one of the government organs and is closely associated with the powers of the other two organs and with the rights and powers of the individuals. 104

Admittedly the structure and functioning of the courts have been the subject-matter of another commission of inquiry. 105 The

commission found, inter alia, that the policy of having separate courts for blacks, with the exception of chiefs' and headmen's courts, is no longer acceptable. Although it expressed some reservations on the proper functioning of the chiefs' courts, it was nonetheless satisfied that chiefs' courts still enjoy a measure of popular support within the black community and that they still have a role to play. 106

The commission consequently recommended their retention and their control under the then Department of Co-operation and Development, although appeals therefrom would lie to the magistrates' courts. 107 It, however, did not specify what should be done to improve the prestige and efficiency of these courts in the administration of justice.

As early as 1968 a commission was appointed to investigate the position and operation of chiefs' courts with a view to improving them for purposes of attaining an unimpeachable administration of justice. 108

This commission made a number of recommendations, but these were never implemented. Moreover, some writers have advocated a radical transformation of the traditional courts in order to bring them in line with modern conditions. 109

All this is necessitated by the fact that blacks are by progressive degrees undergoing a process of acculturation and cultural change. The operation of chiefs' courts often compares unfavourably with the other South African courts. Although chieftainship is a traditional institution, it cannot escape the influence of the changes brought about by westernization. Because of this, some have advocated its abolition because they claim that it is archaic and unsuited to modern conditions. Chiefs are often accused of conservatism, and consequently retardation of progress and their administration is also alleged to be poor.

110

Although some of these allegations are valid, they relate to individual chiefs and not to the institution of chieftainship in general. It must therefore be assumed that with proper training and education these deficiencies and abuses could be eliminated or at least minimized. Admittedly chieftainship as a traditional institution may evoke little sympathy from the elite group the needs of which are better served by the western system of justice administration. Despite the importance of the views of the elite group, it is equally important to take into account the views of the ordinary man. Moreover, the decisions of chiefs' courts are subject to appeal to western courts the procedural approach of which radically differs from that of the traditional courts. This poses its own problems. Unless there is proper co-

111

ordination, conflicts that arise from this might temper with a fair administration of justice. In addition, many chiefs today are also members of the legislative assemblies of the various national or independent states.¹¹² This obviously implies that they cannot pay undivided attention to the administration of justice in their tribes as well as to matters of general tribal administration.

Although for some areas provision is made for the appointment of chiefs' deputies,¹¹³ this may not be entirely satisfactory. Another question may be whether chiefs are adequately trained for the task they have to perform. If in any case they are not properly trained, what sort of training should they undergo? Should the present procedure be modified, or should it be retained as it is?

1.3 RESEARCH

1.3.1 Aim of Research

The aim of this investigation is to determine whether the institution of chieftainship still has a meaningful role to play in the administration of justice and whether its practice and procedure does ensure the proper and fair administration of justice in the modern black society in KwaZulu. It has been

suggested that certain institutions become obsolete and have to be abolished, but others have an elasticity which enables them to be adaptable to altered circumstances. ¹¹⁴ Indeed, as was mentioned above, some do advocate the abolition of the institution of chieftainship. Yet the crucial question is whether there is a viable substitute for chieftainship. The question is further posed whether the judicial functions of the chiefs should not rather be transferred to the magistrates.

In order to ascertain whether chiefs' courts still have a real part to play in the administration of justice, their activities and procedures will be tested against the fundamental principles which ensure the healthy administration of justice. This does not imply strict formalism, but a determination of whether their actions do not patently lead to a travesty of justice. Wherever possible suggestions for reform will be made with the purpose of enabling chiefs' courts to meet the standards of a modern society. Although chieftainship is a traditional institution, it must adapt to the changes in a society it serves if it has to remain relevant. ¹¹⁵

This is particularly crucial because of the historical background to chieftainship. Chiefs were in the past used by white administrators as a form of indirect rule. ¹¹⁶ As a result some blacks still regard chieftainship as a tool of the white establishment even though they are no longer under such control. ¹¹⁷ This owes itself to this background to chieftainship.

A note of caution must be sounded, namely that the proper administration of justice must not be identified with certain institutions or a particular procedural approach. Whether or not justice is done is a question of fact. A constant comparison between the South African approach which represents a loose form of adversarial system and the traditional approach which represents a form of inquisitorial or free system will be made. The benefit of this comparison is that it will conduce greater insight into both.

1.3.2 Scope of Investigation

This investigation will cover a selected area in Southern Africa. Southern Africa may be understood in a narrower or wider sense. In a narrower sense it describes all the territories which formerly formed part of the Republic of South Africa. This view ¹¹⁸ has even been adopted by some writers.

Used in a wider sense Southern Africa denotes the region which includes the independent states like Angola, Botswana, Lesotho, Malawi, Mozambique, South Africa, Swaziland, Zimbabwe and Zambia, ¹¹⁹ plus the newly independent states as well as Namibia. The investigation, however, will be confined to a narrower area in Southern Africa, namely KwaZulu which will often be compared with Bophuthatswana. The choice of these two territories is dictated by the fact that they represent two contrasts, to wit, a country

which still forms part of South Africa and another which is de iure independent. Of importance is the trend which has been pursued by Bophuthatswana after independence. Although these two areas will often be compared, occasional reference to and comparison with other countries of Southern Africa will be made.

1.3.3 Execution of Research

The research included both literature study and limited fieldwork. Available literature on the subject was closely studied and analysed. Fieldwork was conducted in selected areas. The aim of this research was to obtain a representative sample. This was done through oral interviews. The other purpose of oral interviews was to obtain a survey of opinion regarding the operation of chiefs' courts. Consequently a number of magistrates from various areas were interviewed to elicit their views on the desirability or otherwise of chiefs' courts and their efficiency in the administration of justice. Not only magistrates, but also ordinary men were interviewed to ascertain their attitude towards the chiefs' courts. This is important because it is their claims that have to be settled by these courts and it is therefore essential that they must have their approval. A study of the records of cases decided by the chiefs' courts was conducted. These covered four selected areas in KwaZulu namely Lower Umfolozi, Mtunzini, Mahlabatini and Hlabisa.

The main purpose of this was to determine the relative significance of these records and the types of case which chiefs normally hear. Moreover, court hearings were attended in 1983 in the Mkhwanazi chief's court at KwaDlangezwa. This was done with the purpose of assessing the mode of operation of the court and to find out the change in the practice and procedure of the chief's courts and also to isolate the causes of these changes if there be any.

Although reference has been made to the "court", the Black Administration Act,¹²⁰ which provides for the appointment of chiefs as judicial officers, does not create a court. Traditional courts do exist, but these have not received statutory recognition.¹²¹ The act simply grants civil and criminal jurisdiction¹²² to chiefs without constituting a court of law. In practice, however, these are regarded as courts involved in the administration of justice. Thus in the present investigation use will be made of the term chiefs' courts.

1.3.4 Methodology

The recording of customary law has often presented problems regarding methodology. Although there are various methods which have been used in researching customary law, there is no agreement on which of these is best suited to lawyers and

123

anthropologists investigating customary law. The two most important are the ideological or rule-directed method and the trouble-case method. These are outgrowths of positivism and legal realism respectively. It is not necessary for present purposes to go into a detailed discussion of these because here we are not concerned with the recording of customary law, but with the application of customary law by the chiefs' courts. This investigation therefore is critical and evaluative. Suffice it to say that the two approaches are not mutually exclusive, and that the best results can be obtained by their synthesis.

Another controversial issue is the approach to be adopted in dealing with customary law. Basically three approaches can be identified, namely, the jural approach,¹²⁴ the folk system¹²⁵ and the sociological approach.¹²⁶

The jural approach is eminently positivistic although it also has some anthropological and theological underpinnings.¹²⁷ The categories and conceptual framework in terms of which the law is couched or grouped are basically those of Roman-Dutch law. Justification for this is that this approach facilitates comparative analysis. Since one of the objectives of the jural school is to provide specialists working within the national legal system with some knowledge of customary law, it is deemed

appropriate to express these in terms intelligible to lawyers and
 administrators trained in South African law. ¹²⁸

This approach has been criticized on the grounds that it is
 ethnocentrically biased and that it has resulted in the
 artificial and forcible channelling of customary law concepts
 into the conceptual categories of western jurisprudence. ¹²⁹ This
 also leads to the rigid and artificial application of the rules
 which is contrary to the traditional approach. ¹³⁰ For this
 reason Bohannan ¹³¹ advocated the use of the "folk-system" on the
 analogy of the folks etymology.

Bohannan's approach has been debated by both lawyers and
 ethnologists. ¹³² Although there is merit in his contention,
 Bohannan's approach has been criticised on the grounds that it
 limits or even stultifies comparative analysis. ¹³³ As a result
 many lawyers favour the view that terminology used in western
 legal systems should be used consistently even in non-western
 ones to indicate social phenomena of the same kind whatever forms
 this may take, as this has been done fruitfully in the field of
 linguistics. ¹³⁴ Although some may regard this as simplistic, it
 appears quite attractive and is not unprecedented. Thus, while
 careful to indicate differences wherever possible, multivocal
 terms like "ownership", "court", "right", "duty" and "justice"
 could be used to translate customary-law terms of an equivalent
 nature. ¹³⁵ This is the approach followed in this investigation.

The sociological approach has been quite critical of the jural approach for its ardent adherence to positivism with its inaccurate assumptions that law is a system of rules where the judge has merely to find the law and by deductive reasoning arrive at a legal conclusion, and that law only operates in a vertical position while ignoring completely the operation of social controls at a sub-group level.

136

Although there is merit in this contention, the mistake inherent in it is its exaggeration. Exponents thereof overgeneralize on the denial of the existence of rules in favour of processes, and thus inadvertently betray their a priori commitment to realism.

137

It is perhaps better to accept both the existence of rules as well as processes, or that in some cases either rules or processes predominate owing to cultural transition.

138

A synthesis of the approaches discussed above will therefore be pursued in this investigation.

1.4 CONCLUSION

Although law and courts are indispensable for the maintenance of order and stability in society, justice is the one attribute whereby law meets the legitimate aspirations of the members of society and consequently ensures peace and stability. In the administration of justice by whatever institution therefore, it

is absolutely imperative that justice should be done in the real sense of the word. Although the concept of justice may be influenced by the values of each society, there is no doubt that each society has a certain conception of justice. Although the conception of justice in traditional black society has differed from the western one, this is not static, but changes with the values in this society. As a result chiefs' courts may increasingly be expected to adhere to standards of justice administration followed in the western courts. It is therefore essential to analyse some of the fundamental principles which ensure the doing of justice by the western courts.

FOOTNOTES

- 1 "The Causes of Popular Dissatisfaction with the Administration of Justice" in Glueck (ed) Roscoe Pound and Criminal Justice (1965) 57 et seq; Kahn "The Seven Lamps of Legal Humour" 1984 De Rebus 251.
- 2 Pound 57-58.
- 3 Hahlo & Kahn The South African Legal System and its Background (1973) 26; see also Cardozo The Nature of the Judicial Process (1921) 66; Labuschagne "Regsdinamieka: Opmerkinge oor die Aard van die Wetgewingsproses" 1983 THRHR 424, 428.
- 4 Hahlo & Kahn 26-27.
- 5 A Theory of Justice (1972) 4.
- 5(a) Du Plessis "Thoughts on Law, Order and State Security" 1985 TSAR 235-236.
- 6 2 Samuel 8:15; 1 Kings 10:9; Jeremiah 9:24; Ezekiel 33:19; Isaiah 1:10-17; Proverbs 12:12; Deutoronomy 16:18; Proverbs 16:12; Proverbs 29:4.
- 7 Du Plessis "Justice or Judgment? The Biblical Concept of Social Justice Applied in Southern Africa" 1986 Orientation 2.
- 8 Bodenheimer Jurisprudence (1962) 177.
- 9 Hahlo & Kahn 29; Friedmann Legal Theory 5ed (1967) 21.
- 10 178.
- 11 Paton and Derham A Textbook of Jurisprudence 4ed (1972) 100.
- 12 "The Rule of Law" 1962 Acta Juridica 106.
- 13 Paton & Derham 232.
- 14 For a discussion of this see Hart The Concept of Law (1961) 151 et seq; Hart "Positivism and the Separation of Law and Morals" in Dworkin (ed) The Philosophy of Law (1977) 17 et seq; cf Forsyth and Schiller "The Judicial Process,

- Positivism and Civil Liberty" 1981 SALJ 218 et seq; Dugard "Some Realism about the Judicial Process and Positivism - A Reply" 1981 SALJ 372 et seq; see also Dyzenhaus "Positivism and Validity" 1983 SALJ 454 et seq; cf Davis "Positivism and the Judicial Function" 1985 SALJ 103 et seq.
- 15 For a brief discussion of this see Bodenheimer 186 et seq; Hart 152 et seq.
- 15(a) Fuller The Morality of Law (1964) 42; Mureinik "Administrative Law in South Africa" 1986 SALJ 621.
- 16 Hahlo & Kahn 4.
- 17 Lipset Political Man (1959) 77; Boulle "The Likely Direction of Constitutional Change in South Africa over the Next Five Years" in Dean and Van Zyl Smit Constitutional Change in South Africa (1983) 59; Boulle South Africa and the Consociational Option (1984) v; see also Nwabueze Constitutionalism in Emergent States (1973) 24.
- 18 Paton & Derham 79; Hahlo & Kahn 4; Hart 196-199; cf Elias The Nature of African Customary Law (1956) 56 et seq; Allott The Limits of Law (1980) 45-46 states that law cannot compel action, but by various means merely persuades a person to follow a particular course of action.
- 19 Kelsen The Pure Theory of Law 2ed (1960) trans Knight 211; on legitimacy see Kelsen 208-211.
- 20 178.
- 21 Hahlo & Kahn 30 et seq.
- 22 For a discussion see inter alia Pound Justice According to Law (1951) 2 et seq; Bodenheimer 179 et seq; Rawls 3 et seq; Friedmann 345 et seq; Bird The Idea of Justice (1967) 20 et seq; Anderson Liberty, Law and Justice (1978) 8 et seq; Du Plessis Die Juridiese Relevansie van Christelike Geregtigheid unpublished LLD thesis PUCHO (1978) 29 et seq; Van der Vyver Seven Lectures on Human Rights (1976) 1 et seq; Hosten et al Introduction to South African Law and Legal Theory (1977) 20.
- 23 8.
- 24 Plato The Republic trans Lee 180 et seq.
- 25 Aristotle The Nicomachean Ethics trans Ross (1971) bk v; Aristotle The Politics trans Sinclair 118-119, 127-129, 189-190; see also Van der Vyver 1 et seq.
- 26 21.

- 27 Van der Vyver 3.
- 28 Institute 1.1 pr; Dig 1.1.10 : "Iustitia est constans et perpetua voluntas ius suum cuique tribuendi."
- 29 Bodenheimer 181.
- 30 Hahlo & Kahn 35.
- 31 Dugard Human Rights and the South African Legal Order (1978) 55-56.
- 32 Hart 155-158; cf Friedmann 346 on relativity of justice; Du Plessis 24.
- 33 Spencer The Principles of Ethics vol 11 (1897) 61-62; cf Bodenheimer 181.
- 34 The Principles of Ethics 62.
- 35 Kemp The Philosophy of Kant (1968) 85; cf Bodenheimer 182.
- 35(a) 154 et seq.
- 36 12 et seq, 60; cf Dworkin Taking Rights Seriously (1977) 150.
- 37 Barry The Liberal Theory of Justice (1973); Wolff Understanding Rawls (1977); Dworkin Taking Rights Seriously (1977) 151 et seq; Anderson 45 et seq; Van Wyk "Introductory Notes on Rawls' Theory of Justice" in De Beer (ed) The Relevance of Some Current Philosophers 1982 Publication Series of the University of Zululand B No13 48 et seq.
- 38 31.
- 39 Bodenheimer 183.
- 40 184.
- 41 185.
- 42 Bodenheimer 185-6.
- 43 Matthew 7:12; Luke 6:31.
- 44 Matt 22:39; Luke 10:27.
- 45 Cited by Denning "The Traditions of the Bar" 1955 SALJ 43.

- 46 *ibid.*
- 47 Bodenheimer 194-195.
- 48 Bodenheimer 195.
- 49 Juridiese Relevansie 836.
- 50 Gemeinschaft is used for an association which is internal, organic, private, spontaneous, whereas Gesellschaft denotes something external, public, mechanical, formal and legalistic - see Hund & Kotu-Rammopo "Justice in a South African Township : the Sociology of Makgotla" 1983 CILSA 183.
- 51 Rich The Sociology of Criminal Law (1979) 3-4.
- 51 (a) On legal reasoning see MacCormick Legal Reasoning and Legal Theory (1978) 19 et seq.
- 52 Hund & Kotu-Rammopo 201-202.
- 53 Hund "Formal Justice and Township Justice" 1984 Acta Juridica 173 et seq.
- 54 Hund & Kotu-Rammopo 185.
- 55 Ndaki "What is to be said for Makgotla?" in Sanders Southern Africa in Need of Law Reform (1981) 177; Hund & Kotu-Rammopo 185-186.
- 56 "Popular Dissatisfaction" 60.
- 57 Wiechers VerLoren van Themaat Staatsreg 3ed (1981) 328.
- 58 Schreiner The Contribution of English Law to South African Law; and the Rule of Law in South Africa (1967) 96.
- 59 Hahlo & Kahn 4,6; Paton & Derham 73.
- 60 Encyclopaedia Britannica "Courts and the Judiciary" Macropaedia vol 5 (1974) 220.
- 61 Encyclopaedia Britannica *ibid.*
- 62 Allott The Limits of Law 52.
- 63 Sanders "Chieftainship and Western Democracy in Botswana" 1983 Journal of Contemporary African Studies 367.
- 64 Allott *idem* 52.

- 65 Koch "Introduction Access to Justice : An Anthropological Perspective" in Cappelletti (gen ed) Access to Justice (1979) 2.
- 66 "Positivism and Validity" 459-460. According to him a legal system is autonomous as well as being public and positive. It is autonomous because its rules are applied by specialized institutions whose main task is adjudication.
- 67 Brooke "The Changing Character of Customary Courts" 1954 Journal of African Administration 67; Hahlo & Kahn 339 et seq.
- 68 See in general Austin Lectures on Jurisprudence or The Philosophy of Positive Law 5 ed (1885) vol 1 316 et seq; Elias The Nature of African Customary Law (1956) 38 et seq; Visser Die Suid-Afrikaanse Interne Aanwysingsreg Unpublished LL D Thesis UP (1979) 27 et seq; Allott The Limits of Law (1980) 51 et seq; Maine Ancient Law (1894) 113 et seq; Cairns Law and the Social Sciences (1969) et seq; Allen Law in the Making (1964) 67 et-seq; Brand Die Regspleging van die Bantoe in Suid-Afrika Unpublished LL D Thesis UP (1965) 25 et seq; Koch "Introduction Access to Justice : An Anthropological Perspective" in Cappelletti (gen ed) Access to Justice (1979) 1.
- 69 Maine 7.
- 70 Visser 41; Allott (1980) 52-54.
- 71 Sanders "The Characteristic Features of Southern African Law" 1981 CILSA 333-335; see also Seidman "Law and Stagnation in Africa" 1973 Zambia Law Journal vol 5 3.
- 72 Austin 316-7.
- 73 This has become known as the imperative theory of law. Later followers of Austin's theory have realised the untenability of regarding law simply as a command from a sovereign, and have shifted emphasis from enactment of the law to judicial enforcement thereof - see Elias 38-39.
- 74 Austin 316-7. Austin denied the name law to all forms of customary law known to him and thus impliedly African customary law.
- 75 Hart 18 et seq. He also analyses the rules 79-88.
- 76 Hart 89-96.
- 77 Taking Rights Seriously 22 et seq.

- 78 *ibid.*
- 79 24-27.
- 80 *idem* 46 et seq.
- 81 Allott The Limits of Law 2-3.
- 82 Visser 24 et seq discusses these.
- 83 *idem* 3-4.
- 84 Dyzenhaus 459-60.
- 85 Law in Modern Society (1976) 47-86.
- 86 Hamnett Chieftainship and Legitimacy (1975) 9-11; Allen Law in the Making 7ed (1964) 67 et seq; Allott Essays in African Law (1960) 62.
- 87 Hamnett 12-14.
- 88 Brand 25 et seq.
- 89 Allott "African Law" in Derrett (ed) An Introduction to Legal Systems (1968) 136.
- 90 Allott Essays in African Law 62.
- 91 Hamnett 101.
- 92 Hamnett *ibid.*
- 93 Raz The Authority of Law (1979) 7; Wolff In Defense of Anarchism (1970) 4, defines authority as "the right to command, and correlatively, the right to be obeyed". This definition is criticized by Raz 11, as being both inaccurate and perspicuous because authority is a right not only to command, but to do other things like legislating, granting permission, or adjudicating.
- 94 Bodenheimer 232; Raz 18, characterises power as the "ability to change protected reasons".
- 95 Hamnett 102-103.
- 96 Dias Jurisprudence 4ed (1976) 204 et seq; Cardozo The Nature of the Judicial Process (1921) 16; Hosten et al 239; Hanlo & Kahn 306; Kahn "The Development of South African Substantive Law" in Mellet et al (eds) Our Legal Heritage (1982) 136.

- 97 Hart "Positivism and the Separation of Law and Morals" in Dworkin (ed) The Philosophy of Law (1977) 36-37.
- 98 Boulle (1983) 59.
- 99 See Lombard et al Alternatives to the Consolidation of KwaZulu: Progress Report BEPA UP; see also on this Boulle & Baxter (eds) Natal and KwaZulu : Constitutional and Political Options (1981); First Report of the Constitutional Committee of the President's Council (PC 4/1982; Buthelezi Commission Report 1982.
- 100 Rol van die Regsprekende Gesag in 'n Plurale Samelewing HSRC Report (1983) 1.
- 101 Department of Foreign Affairs South Africa and the Rule of Law (1968).
- 102 Van Zyl "Intermediêre Howe : 'n Regsvergelykende Perspektief" 1980 De Jure 220. He states: "Daar is weinig kundiges op gebied van die Suid-Afrikaanse reg wat sal ontken dat die standaard van regspleging wat alhier bedryf word besonder hoog geag moet word. Sommige geleerdes voel selfs aan dat die gehalte van die Suid-Afrikaanse regbank vergelykbaar is met die van Engeland - voorwaar 'n eervolle vergelyking, veral aangesien die Engelse regbank nog altyd as 'n voorbeeld vir die regsbedeling van verwante lande beskou is". Criticism of the court could be perilous in the light of the law of contempt of court - cf S v Van Niekerk 1970 3 SA 655 (T); Estate Pelser v SAAN 1975 1 SA 34 (N) and 1975 4 SA 797 (A). See also Dugard Human Rights and the South African Legal Order (1978) 279 et seq.
- 103 Claassen "Retain the Bar and Side-Bar" 1970 SALJ 25 had this to say : "Our Supreme Court and the members of the Bench enjoy a very high reputation both in this country and beyond our borders ... I am told on good authority that the English judges, who are undoubtedly the most eminent judges in the world, consider only the South African judges as their equals." In similar vein Eksteen "Appointment of Magistrates as Judges" 1971 SALJ 520 "Because of this tradition of fearless independence our judiciary is held in the highest esteem throughout the civilized world and even the most stringent critics of our country readily concede that however much they may dislike our country and its policies our judiciary stands beyond reproach and commands their respect."
- 104 Bekker (1983) 2.

- 105 See Fifth and Final Report of the Commission of Inquiry into the Structure and Functioning of the Courts RP 78/1983 (hereinafter called the Hoexter Commission).
- 106 410.
- 107 412.
- 108 Verslag van die Komitee insake Reorganisasie van Bantoehowe en Aanpassinge in die Bantoeereg 1968 (hereinafter referred to as the Coertze and Mostert Report).
- 109 Wood "Some Reflections on the Bantu Courts : Present and Future" 1966 Speculum Iuris 21.
- 110 These were some of the views expressed before the Commission of Inquiry into Local and Regional Government, the Activation of Traditional Authorities and the Political Structure in the Republic of Bophuthatswana 1982 (hereinafter referred to as the Wiechers Commission) 42.
- 111 Wiechers Commission *ibid.*
- 112 In KwaZulu see s 2 of Kwazulu Constitution Proclamation R70 of 1972. See also s 22(1) of Republic of Transkei Constitution Act 15 of 1976; S 39(1) of the Republic of Bophuthatswana Constitution Act, 1977.
- 113 S 16(1) of the Code of Zulu Law Proc R195 of 1967.
- 114 The then Minister of Native Affairs : South African House of Assembly Debates col 2909, 28 April 1927.
- 115 Sawyer "Introduction" in Sawyer (ed) East African Law and Social Change (1967) 7-8.
- 116 See in general Morris and Read Indirect Rule and the Search for Justice (1972) 3 et seq.
- 117 Wiechers Commission 42.
- 118 Bekker and Coertze Seymour's Customary Law in Southern Africa (1982) has changed the title which was earlier Bantu Law in South Africa. This is in line with recent political developments. Another author who adopts the same approach is Khumalo Civil Practice and Procedure in all Bantu Courts in Southern Africa (1969).
- 119 Encyclopaedia Britannica "Southern Africa, History of" Macropaedia vol 17 (1974) 274.

- 120 S 2(7) of the Act.
- 121 Coertze and Mostert Report 6-7.
- 122 ss 12 and 20 of the Act.
- 123 For a detailed discussion of these see 'De Clercq Die Familie-Erf-en Opvolgingsreg van die AbakwaMzimela met verwysing na prosesregtelike Aspekte Unpublished D Phil thesis UP (1975) 17 et seq; Hoebel The Law of Primitive Man : A Study in Comparative Legal Dynamics (1961) 29; Hund "The Roles of Theory and Method in investigating Primitive Law" 1974 CILSA 208. According to Llewelyn and Hoebel The Cheyenne Way : Conflict and Case law in Primitive Jurisprudence (1961) 20-21 there are three methods, but these can be reduced into two. The ideological and descriptive can be regarded as one method - Hund "Jurisprudence and Legal Anthropology : The Roles of Theory and Method" 1979 CILSA 196; see also Roberts "The Recording of Customary Law : Some Problems of Method" 1971 Botswana Notes and Records 12 et seq; Sanders "Comparative Law, Law Reform and the Recording of African Customary Law" 1983 De Jure 321 et seq.
- 124 The chief exponent of the jural school is Myburgh - see "Law and Justice" in Hammond-tooke (ed) Bantu-Speaking Peoples of South Africa (1974) 301 et seq; Myburgh "Inheemse Reg as Reg" 1981 THRHR 229; see also Myburgh et al Indigenous Criminal Law in Bophuthatswana (1980). Another protagonist of this school is Prinsloo - see "Die Inheemse Administratiefref van 'n Noord-Sothostam" (1981); Inheemse Publiekreg in Lebowa (1983); Indigenous Public Law in KwaNdebele (1985).
- 125 The precursor to this school is Malinowski Crime and Custom in Savage Society (1926); it was further elaborated upon by Bohannan Justice and Judgment among the Tiv (1957) 4 et seq.
- 126 Although sociological thinking on law is not new, the extension of this to customary law has been done by Comaroff and Roberts Rules and Processes (1981).
- 127 On this discussion see Hund "Legal and Sociological Approaches to Indigenous Law in Southern Africa" 1982 Social Dynamics 29. He contends that it is based on the volkekunde tradition, the works of the German comparative jurists Post and Kohler and also on the theological-philosophical writings of Dooyeweerd. On Dooyeweerd in general see Hosten et al 111 et seq.
- 128 Myburgh (1981) 230; Myburgh "University Training in South African Bantu and Native Law" 1963 Codicillus 61-62; see also Hund (1982) 30.

- 129 Bohannan 4-5; see also Pospisil The Ethnology of Law (1978) 4; Sanders (1983) 325-327.
- 130 Hund (1982) 30.
- 131 4.
- 132 Schiller "Law" in Lystad (ed) The African World : A Survey of Social Research (1965) 169; Allott et al "Introduction" in Gluckman (ed) Ideas and Procedures in African Customary Law (1969) 16 et seq; Pospisil (1978) 3-7; Myburgh (1963) 61-62; Myburgh (1981) 229 et seq.
- 133 Allott et al (1969) 17-18.
- 134 Myburgh (1963) 61-62; Myburgh (1981) 230.
135. Allott et al (1969) 18; see also Kerr The Customary Law of Immovable Property and of Succession (1976) 10-12.
- 136 Hund (1982) 30-31; Comaroff and Roberts (1979) 20 et seq; cf Labuschagne (1983) 432-433.
- 137 Hund (1982) 36-37. On realism in general see Hosten et al 81 et seq; Hart 121 et seq.
- 138 Hund idem 38.

CHAPTER II

FUNDAMENTAL PRINCIPLES FOR THE FAIR ADMINISTRATION OF JUSTICE

2.1 INTRODUCTION

Justice would remain no more than a high-sounding ideal with no practical relevance unless there existed certain techniques which transform ideals into practical reality. The courts in the western world have over the past developed certain rules, techniques and procedures for the proper administration of justice and for the better protection of rights. These are commonly referred to as the minimum standards of justice. Coupled with other constitutional guarantees, these minimize the risk of injustice. The aim of this chapter is to analyse some of these principles and to use them as a yardstick to test the activities and procedures of the chiefs in their administration of justice. They will also assist in proposing desirable changes. It must, however, be pointed out that what may be regarded as fundamental or fair and just may largely be influenced by one's philosophy and political theory. Yet an attempt will be made to be as dispassionate as is humanly possible.

This is essential because the institution of chieftainship is not static but should adapt to the ever-changing social and political

climate. The use of these fundamental principles is not to superimpose western ideas on the method of operation of chiefs, but more to assess to what degree they conform with reasonable standards that facilitate the doing of elementary justice. Where the chiefs' courts do not conform to these, however, there may be valid reasons for such deviation. One must not lose sight of the fact that these principles and procedures have been fashioned by certain sociological and political considerations within a specific milieu. Although they have universal applicability, certain aspects thereof may be inappropriate in certain societies.

2.2 FUNDAMENTAL PRINCIPLES IN BROAD OUTLINE

In both the capitalist and socialist countries of the modern world a number of principles fundamental to the proper and fair administration of justice have developed. Basic to the consideration of those principles as fundamental was the notion that they represented "both an essential minimum for any civilized system of administration of justice and also permanent, immutable ingredients of such administration." These were therefore considered valid beyond the limits of space and time - "universal and eternal." Whatever the merits of this view, empirically there are no principles, institutions or values which exist in vacuo and abstractly divorced from the changeable circumstances of history and society.

These principles, especially the "rules of natural justice"⁴ evolved from the theory of natural law. According to this theory there is a higher law, a law of nature which should prevail over any inconsistent positive law, or as it is otherwise formulated, there is an ideal law of nature to which all positive law should conform.⁵ It is clear that the natural law theory has undergone various shades of meaning.⁶ Moreover, it has been the source of many political and legal developments.⁷ Although natural law thinking has occasionally declined, its impact has not completely vanished, but ideals based on the natural law idea have survived or intermittently reappeared.⁸

When natural law conceptions declined in the past, even "basic" principles of judicial administration were "positivized" in statutes and codes. Experience brought many people to the realization that certain values, and guarantees, although susceptible to change like all human designs, should be protected from excessive and easy violation or change. They should only be amended by special procedures, and their infringement should be safeguarded by special sanctions and remedies. This resulted in their incorporation into a newer form of positive law, "higher law that binds, to a certain degree, even the legislature."⁹

This development took on universal dimensions especially after World War II as a reaction against the violation and abuse in

countries that were emerging from dictatorship. This also led to the "internationalisation" of these guarantees and rights.

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From this development three approaches are discernible. These are:

- (a) The negative English approach;
- (b) The intermediate approach of the USSR, France and European People's Democracy; and
- (c) The positive approach in the the USA, Japan and Germany. A few of these countries need closer analysis.

In English law there is no rigid constitution and fundamental rights emerged from tradition, education, and general behaviour than from positive superior law.

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Although in England for instance rules of natural justice are observed, judges have no power to challenge an act of parliament on the ground that it violates these principles.

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From a strictly formal point of view these procedural guarantees in England have no juridical significance at all. Yet it must be remembered that tradition and education can even be more effective instruments in the implementation of these fundamental guarantees than written constitutions, international documents and legal institutions devised for their enforcement.

Nonetheless even in Great Britain people have had second thoughts on whether this precarious tradition can continue to be effectively safeguarded by reliance on the ordinary legislature.¹³

The socialist countries, on the other hand, have adopted written constitutions which are more elevated than and binding upon ordinary legislation for which special procedures and majorities are required for their amendment. These constitutions provide for a number of procedural guarantees.¹⁴

According to the positive approach of the United States and the Federal Republic of Germany, there is both a rigid constitution entrenching procedural guarantees and a system of judicial review of the constitutionality of legislative action.¹⁵ This approach affords the maximum juridical significance to the "constitutionalization" of fundamental rights. Statutes violating the procedural safeguards are null and void.¹⁶ Numerous other countries have adopted this approach.¹⁷

A hybrid solution emerged in 1960 from Canada.¹⁸ Since then fundamental guarantees afforded litigants in Canada fell essentially into three categories. The first guarantees were those protected by the written Federal Constitution against legislative infraction. The second category was that of guarantees which had been evolved

by the common law which were not guaranteed by the constitution,¹⁹ but were generally observed in the proceedings. The third category was that of rights which were incorporated in a Bill of Rights.²⁰

The Canadian Bill of Rights was not an amendment of the Constitution, and was not entrenched. In practice, however, it operated like an entrenched one.²¹ Legislation which was inconsistent with the Bill of Rights was inoperative unless federal parliament specifically provided that it should be effective notwithstanding the Bill of Rights.²² With the enactment of the Constitution Act of 1982, this hybrid situation was altered. Section 52(1) of this Act stipulates as follows:

The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

The 1960 Canadian Bill of Rights, however, can be regarded as an intermediate position^{22(a)} between the absolute rejection of entrenchment of certain fundamental rights and the vigorous approach of the United States of America.

2.2.1 The doctrine of separation of powers

Although the doctrine of separation of powers has nowhere in the world found absolute practical application, and although its influence has waned over the years,²³ it has been regarded as a bulwark against excessive incursions into the liberty of the individual. Despite the fact that the doctrine is not per se a guarantee for the fundamental rights in court proceedings, it is conducive to the maintenance of judicial independence which is a cornerstone for the proper administration of justice in a democratic society.²⁴

Although this doctrine is associated with the French philosopher Montesquieu,²⁵ he took this idea over and modified it from John Locke.²⁶ According to Montesquieu the legislative executive and judicial functions of government must vest in separate state organs whose spheres should be clearly separate and distinct. Where they are separate, they control each other and thus ensure the liberty of the individual. The separation prevents the abuse of power which inhibits the liberty of the individual.²⁷ In its strict application this doctrine precludes judicial officers from being members of the legislative or executive organs of state; members of the legislative or executive organs of government should not also function as judicial officers; courts of law should not perform legislative

or executive functions; and the legislative and executive branches of government must not also perform judicial functions.²⁸

Yet nowhere in the world is there a complete separation of powers because it is often necessary to employ the skills of judicial officers also in the performance of functions of an administrative or quasi-judicial nature.²⁹ However, in the words of Nwabueze:³⁰

Not even the sternest critics of the doctrine of separation of powers deny its necessity as regards the judicial functions. For the rule of law as an element of constitutionalism depends more upon how and by what procedure it is interpreted and enforced. The limitations which the law imposes upon executive and legislative action cannot have much meaning or efficacy unless there is a separate procedure comprising a separate agency and personnel for an authoritative interpretation and enforcement of them.

Courts in a democratic state provide this procedure. Being unaffected by self-interest, they can interpret the statute impartially. Legislation should be made for the generality of the population and be enforced by impartial courts. This will obviate arbitrariness.

2.2.2 Judicial Independence

It is a fundamental principle of a democratic society that the judiciary should be independent from state interference and influence by parties and others outside proceedings. Judicial officers should be impartial and personally disinterested in the dispute they have to try. ³¹ As Beinart ³² once put it, "the law-deciding and law-applying agency must be one in which those whose rights are affected will have confidence, that is confidence that the agency will administer justice according to law and will do so impartially, predictably, fearlessly and as far as possible uniformly - free of outside pressure, governmental, legislative or otherwise".

The rationale for this principle of judicial independence, is to ensure that the interpretation and application of the law should take place objectively without interference or partisanship. ³³

The importance of judicial impartiality has been immortalized in the words of Lord Hewart CJ ³⁴ that:

(i)t is not merely of some fundamental importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done ... Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice.

Impartiality, which is also identified with objectivity, requires that no irrelevant considerations should bear upon one's judgment. Total objectivity, however, cannot be attained. Objectivity is realised by a person's awareness that total absence of preconceptions in the human mind is not possible.³⁵ This calls for their elimination where they are irrelevant.

Financial or proprietary interest in the outcome of an action disqualifies the judicial officer in deciding the issue. It is immaterial that the interest is small or that its existence is extremely unlikely to influence his judgment.³⁶

The independence of the judiciary is secured in various ways in different countries. These include, inter alia, the integrity of the judicial officers,³⁷ manner of appointment,³⁸ security of tenure,³⁹ provision of adequate remuneration⁴⁰ and the protection⁴¹ of the dignity of the court.

Integrity and honesty of the judiciary is an essential ingredient of judicial independence.⁴² Integrity means "immunity against the temptation to do something dishonest or irregular for the sake of personal gain. With judicial officers integrity includes inter alia incorruptibility."⁴³ Integrity, however, is not taught, but is more of an inborn quality although it can be cultivated.

So crucial is the manner of appointment of judicial officers that Bamford ⁴⁴ once said that "... all these safeguards, valuable as they are, touch only the periphery of the problem of judicial independence, without them the good judge remains incorruptible, and, with them, the weak and partial judge can yet deflect the course of justice. The only true and embracing protection to the citizen is a proper method of choosing proper men."

Although there is sometimes room for political appointments, normally appointments of judges are made from experienced advocates. ⁴⁵ Although political appointments have been made, there is no sufficient evidence that after appointment they performed their functions in a partisan manner. ⁴⁶

In most countries the security of tenure of judges is protected. They are often appointed and remain in office quamdiu se bene gesserint. ⁴⁷ In South Africa judges are appointed by the state president from experienced practising advocates and they receive remuneration prescribed by parliament. ⁴⁸ They cannot be removed from office except by the state president on an address of parliament on the ground of misconduct or incompetence. ⁴⁹ Their salaries should not be reduced while in office. Fundamental to this principle is the idea that judges should not remain in constant fear of a reduction of their salaries, nor should they be influenced by a promise ⁵⁰ of an increase in their salaries.

The dignity of the judiciary is safeguarded by the offence of contempt of court which also ensures that the court has freedom to give its decision. Any criticism or conduct which is intended to denigrate the judge or to show disrespect for the administration of justice constitutes the offence of contempt of court.⁵¹ Constructive criticism of the application of law is, however, permissible.⁵² In the words of Lord Atkin:

Justice is not a cloistered virtue; she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men.

The law should always strike a delicate balance between public order and the individual liberty in the administration of justice.

For historical reasons the judiciary in South Africa is in the words of Kahn "schizophrenic - partly public service, partly not."⁵³ The lower courts are manned by magistrates, who are public servants. They try a large number of criminal offences. Regional magistrates deal exclusively with criminal matters, and while the magistrates do have civil jurisdiction, it is limited both as to causes of action and the monetary amount claimed.

The appointment of magistrates differs from that of judges. Whereas judges are appointed from senior practising advocates,

magistrates are public servants, appointed from prosecutors or persons who have passed the Public Service Law Examination or its equivalent. Although their academic qualifications may be similar to those of advocates and judges, their professional background is different. Public servants are under the discipline of the department of justice. This means that not only their promotions, but also their postings from one place to another are determined by the department of justice. Not only is their experience limited to mostly criminal cases, but they are also "conditioned by relative job security, promotion on merit as seen by employers."

Because of this, judges, advocates and academics have expressed serious reservations about the lack of independence of the magistrates. This creates the impression that they have to do the bidding of their seniors. They have, however, conceded that this lack of independence does not necessarily mean that magistrates have no qualities whatever. The difference is that what are good qualities for a good public servant are of necessity not the essential qualities of a good judicial officer. Public servants have to be loyal to the government in power irrespective of their own political views. They have to be responsible towards the government whose policy they must carry out, and to the citizen in respect of whom they carry out that policy. Judges deal largely with principles and individuals,

whereas public servants deal with groups and categories; judges deal with comparisons and differentiations, whereas public servants are concerned with the formation and general application of rules and regulations, judges must be unfettered by matters of
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policy.

Although there was once a suggestion that magistrates should be
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eligible for judgeship, this was vehemently opposed by many judges on the grounds already mentioned. The then secretary for justice took exception to some of the allegations made against
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magistrates in general. Indeed some of his views were not altogether misguided. There is always a danger of eulogizing the fearless independence of members of the Bar. There is no denying that the professional background of advocates encourages more independence, but this is not a perfect situation. In fact Kahn has sounded a note of warning in the following words:

Another question that has seldom been raised is whether the riposte to the contention that magistrates because of their background as prosecutors are too conviction-inclined is not that advocates because of the appearances for the accused are not too defence-orientated. Or, perhaps, the most senior advocates have had too little experience of criminal work and have no acquaintance with the typical type of person who comes up for trial."

There is no doubt, however, that because magistrates and regional magistrates are members of the executive, their independence is suspect. This is a little disturbing because the greatest bulk of cases are decided by them. That there are little or no safeguards for the judicial independence of magistrates was amply demonstrated before the Hoexter commission. As public servants magistrates are often transferred without their consent, and this may cause dislocation and financial hardship for the officers concerned. ⁶² It is obvious that a judicial officer could be manipulated through such a transfer, and this does not enhance the independent and efficient administration of justice.

Magistrates depend on merit assessment for promotion and salary increases. This assessment is made on the strength of reports by the departmental heads, regional merit committees and a central merit committee. The recommendations are submitted to the Commission for Administration for final assessment. The assessment is based on a person's responsibility, insight, organisational ability, human relations and productivity and not necessarily on judicial independence.

Magistrates, like all public servants, are liable to a possible departmental inquiry by the executive and can be found guilty of misconduct. ⁶³ Misconduct includes inter alia disobeying a "lawful order given by a person having authority to give it.", and

commenting in public "upon the administration of any department". If he is found guilty of misconduct he may be discharged or his salary reduced. As public servants therefore, magistrates are exposed to governmental pressures. Mention has been made by a judge of a document which fell into the hands of the Durban legal circle, and which was issued by the department of justice. In this document magistrates were warned that public confidence in the police force may be damaged by general criticisms of it expressed from the bench. Consequently they were enjoined whenever they had adverse comments to make on the conduct of policemen to convey these rather to the responsible officers in official but private communications. They were told to bear in mind the interests of the police when they try cases. ⁶⁴ Although it is important that good relations be maintained between magistrates and members of the police force, because both are involved in the administration of justice and maintenance of law and order, undue intimacy between a magistrate and the police tarnishes his appearance of independence and impartiality and can induce lack of public confidence in that magistrate. ⁶⁵

This has to be attributed to the fact that their roles are somewhat different. As Didcott J aptly put it:

The police, of course, are here to enforce the law. The court is here to uphold the law. The court would

never hamper the police in the proper performance of their duties, any more than the court will allow the police to act outside the law. It seems to me that, if there is indeed a case against the applicant, or grounds, true grounds, reasonable grounds, for believing that there may be a case against the applicant, it is in the interests of justice that such case should be investigated properly, brought to court and decided, and I have no wish whatsoever to impede police investigations which may be designed towards that end. On the other hand, to use a colloquialism, if the police are on the applicant's back for no other reason than harrassment, it is time they got off it, because that is not, it goes without saying, a proper police function.

The remuneration of magistrates has also been regarded as inadequate. The differences in salary between the various ranks of magistrate were considered by the Hoexter Commission as militating against the principle that financial incentive should not play any part in advancement on the judicial ladder. Moreover, the possibility that a magistrate's salary could be reduced if found guilty of misconduct is obviously incompatible with judicial independence. ⁶⁷ From this it is clear that what may be largely responsible for the somewhat lack of independence of magistrates is not simply that they are appointed from the ranks of public servants, but because they remain public servants even after appointment as judicial officers. It would be ideal

that the lower courts enjoy that same measure of independence as the supreme court. There is no sufficient reason why the distinction should be maintained. The argument that the supreme court does maintain control over the lower courts by virtue of review in specific cases and appeal, does not derogate from the independence of the judiciary as a whole.⁶⁸

The Hoexter Commission made fundamental recommendations in relation to the lower courts. Judicial officers who preside in the regional courts will no longer be public servants. Thus it will be possible for attorneys and other lawyers to be appointed to the regional courts. These courts will also be accorded civil jurisdiction (amount R10,000). Their present criminal jurisdiction will be maintained.

The separation of administrative from judicial functions has been suggested for magistrates' courts. The administrative functions will be performed by an official known as the resident magistrate. Judicial work will be done by district courts. Officers of these courts, like those of the regional courts, will fall outside the public service. Lawyers from private practice will now also be eligible for appointment to these courts.

An act of parliament will be required to establish these courts in their new form. The department of justice has already

prepared a bill to this effect. A regional court advisory council consisting of a judge of a provincial division of the supreme court and the chief regional magistrate will be established. This council will inter alia make recommendations to the state president on the appointment of regional magistrates. It is not yet possible to say what procedure the council will follow. It is envisaged that the council will first determine who of the private practitioners will be interested in the appointment. He may first be asked to act with a view to determining his suitability for appointment.

69

Resident magistrates will remain public servants and will render administrative services to the general public. They will also have limited jurisdiction to dispose of smaller cases. More serious cases will be heard by the district courts. The only disadvantage of the new system is that some of the smaller towns will be served by a district magistrate on a circuit basis with the result that cases which cannot be dealt with by the resident magistrate will have to be postponed until the following session of the district court.

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South Africa, like all other African countries which have operated a dual legal system, has been characterised by the dual or plural court structure. There has been a hierarchy of courts that apply South African common law and the other that

71

applies indigenous law. The latter consisted of chiefs' courts, commissioners' courts and appeal courts for commissioners' courts.

Several advantages were envisaged at the recognition of the traditional courts and the creation of the special courts for blacks. These were often couched in lofty terms like, convenient, and inexpensive access to justice, simplicity of procedure and suitability to the psychology of the average black akin to the traditional court to which he was used to submit his disputes. The special courts were also supposed to be manned by experts in indigenous law who would not need the custom to be proved in each case, but who would rely on their personal
72
knowledge.

Most of the advantages envisaged at the creation of the special courts for blacks have not been realized : black clients have often briefed attorneys and advocates and not conducted their own cases; there is no evidence that blacks have generally benefitted from the cheap access to justice; there is also no proof that the assumption that these courts would be manned by experts in indigenous law promoted justice; it has been doubtful whether the training of commissioners really equipped them adequately for their task; it has also been doubted whether the special courts perform a function analogous to that of a chief's

court in old society as it is impracticable to recapture the flexibility of the traditional court owing to the difference in the social structure surrounding the two systems. Many issues raised are technical points of procedure to be contested by lawyers. And the procedure in these courts is not sufficiently simple to be understood by a layman, let alone a tribal African, for whom these courts were created.

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Except for the representative of the then Department of Co-operation and Development, those who made submissions to the Hoexter Commission were critical of these courts, and recommended their abolition. The defensiveness of the Department of Co-operation and Development was based on convenience of black administration by this department if administrative and judicial functions relating to blacks remained in its hands.

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The motivation for a contrary view was based largely on the rapid economic advancement of blacks in the past; the wastefulness of the dual court structure in terms of manpower resources; the training of black lawyers mainly in Roman-Dutch law and their dealing with that law in practice; the fact that some blacks regard the separate court structures as part of the "apartheid policy" which relegates them to an inferior court system; the rejection by blacks of a judicial system which impairs their human dignity; the apparent lack of impartiality in the fair

justice administration if the very department responsible for the policy in respect of blacks were to preside at the trial of a black for offences connected with the implementation of the policy; the diminishing importance of indigenous law except to some extent family law; and the anomalies in the application of indigenous law owing to the existence of separate courts.

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The Hoexter Commission considered other objections to the dual court structure. These include: the duplication of staff and facilities; double standards as regards accommodation, facilities, academic qualifications, practical training and a general policy regarding the administration of justice; inequality before the law as a result of separate courts; problems for the South African Police and Prisons staff; and that the maintenance of separate courts was contrary to the rationalization policy.

76

The commission was satisfied that since the establishment of special courts for blacks, blacks had undergone a fundamental change as regards their standard of living, life-style, family life and education. The urban black was subject to South African common law and statute law in his commercial transactions. To restrict him under the present dispensation to the commissioners' courts in civil litigation would be unrealistic and unreasonable. The subjection of inhabitants of the same country to separate

courts for any offence whatsoever purely on the grounds of race was, in the commission's view, unnecessary, humiliating and repugnant.⁷⁷

The commission consequently came to the conclusion that except for the courts of chiefs and headmen, the dual court structure in South Africa was no longer warranted and should be integrated.⁷⁸ Special courts for blacks have since been abolished.

2.2.3 Access to justice

In various modern legal systems the citizen's right of access to justice is generally recognized.⁷⁹ This may be implicit from the constitution,⁸⁰ or it may be based on the common law.⁸¹ This does not mean that he has a similar right to the consideration by the court of the substance of his complaint.⁸² Moreover, there may be a number of instances where this right may be limited or even non-existent.⁸³ This right may furthermore be restricted by the means of the prospective litigant. Litigation in the modern world is quite expensive.⁸⁴ No one without substantial resources can contemplate litigation.⁸⁵ Thus the right of access is rendered futile by the non-availability of means. In this context the criticism in England that "justice is open to all, like the Ritz hotel",⁸⁶ was not entirely misplaced. One can even localise this expression to the effect that justice is open to all like the Carlton Centre.

In this regard there is a striking difference between the operation of the legal systems in tribal societies and in modern industrialized societies. In tribal societies, access to justice is hardly an issue at all whereas in modern industrialized societies this is quite a crucial problem. This is attributable to the evolution of urban life and industrial economy. These phenomena have created an alienation of a large segment of the population from a country's system of administration of justice. The administration of justice is a professional matter. This unavoidably leads to the professionalization of the law with the effect that gaining access to justice becomes a cumbersome, dilatory and expensive process. Moreover, ignorance of one's rights, inability to secure legal advice, and "hardened language barriers" deprive to a large extent the poor and powerless members of the society of legal redress. In the words of Koch:

It has been recognized that the impediments to redress exist because the problems it (the legal institution) handles are problems defined by the institution, not the society; the solutions it generates are solutions for the institution, not the society. If carried to an extreme, the dispute process becomes wholly involved, hermetical, the exclusive domain of specialists, and comprehensible to them alone.

In traditional society, on the other hand, the position is otherwise as the legal process is characterised by the knowledgeable and informed participation in, and the shared control over, the proceedings by both litigants in a given case. But, as Koch⁹⁰ further points out, "when socio-economic organization brought about by 'development' and by innovations imposed by colonial or national governments bent on modernizing a country's justice administration disturb the traditional legal system, people may find their access to justice impeded. This process generally occurs simultaneously with the decay of the extra-legal social controls."

The most effective way of facilitating access to justice has been the provision of legal aid.⁹¹ This method of helping the indigent has been applauded in that it enables the poorer members of society to obtain legal representation more or less like those who have means without the necessity of nationalising the legal profession and thus curtailing or threatening its independence by⁹² subjection to governmental control.

2.2.4 Fair process

The main attributes of law are reasonableness, uniformity, certainty, impartiality, generality and equality.⁹³ Moreover, the individual must be ensured fair process in disputes with

94

other individuals and the community. Yet just rules in themselves are not sufficient to dispense justice. A system of procedure whereby they can be justly applied is a prerequisite. One should not fall into the illusion that a procedural system can completely exclude the possibility of a miscarriage of justice especially because of the human factor. But there are fundamental principles the observation of which will minimize the risk of injustice occurring.

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It is a fundamental principle in western societies that each party has a right to a fair trial. This requires a system of procedure whereby each person has access to legal advice and representation and to the courts. It must protect him from punishment by the state without trial by a competent court.

According to the rules of natural justice the bench must be impartial and must decide the case without being influenced by irrelevant considerations and must also observe the audi alteram partem rule.

The principle of impartiality of the bench is expressed in the maxim nemo iudex in sua causa. It has already been stated above that a person who has an interest in the case or is likely to be biased because of hostility or friendship or relationship is disqualified from hearing the case.

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The court must decide the issues between the parties in the light only of the evidence presented to it. It should not use knowledge acquired otherwise; it cannot take into account anything which has not been given in evidence before it, except facts which have been admitted or those which are so notorious as to come within the doctrine of judicial notice.

97

The party to a hearing must be given a fair opportunity of presenting his case. This is known as the audi alteram partem rule. Hahlo and Kahn state that:

It is against 'natural justice' that judgment should be given against an accused person in a criminal trial or one of the parties in a civil trial without allowing him to present his side of the case to a bench prepared to listen. Thus in a criminal case accused persons should never be left with the impression that they have had anything but a fair trial. They should never be given cause for feeling that the presiding judicial officer adopted anything but a calm, impartial attitude towards all issues which he is called upon to decide".

The audi alteram partem rule entails that the defendant must have notice before the trial not only that proceedings are being brought against him but also of the nature of the plaintiff's case so that he can make the necessary preparations for the

trial. The plaintiff must also be sufficiently informed of the nature of the defence.⁹⁹ Each party has a right to an adequate

opportunity to present his evidence and argument in court.

Although the judge may sometimes indicate that he does not wish

to hear argument from one of the parties, if without hearing the

party he proposes and does give judgment in his favour, if he

fails to give enough opportunity to one of the parties to present

his case and then gives judgment in favour of the other, the

judgment will be set aside and a new trial be ordered.¹⁰⁰ This

also means that counsel must be free from excessive interference

by the bench in the conduct of his case.¹⁰¹ This is based on the

adversary system and has not much significance in the Continental

approach. It is regarded as a safeguard to the impartiality of

the proceedings. If the judge assumes the examining of the

witnesses, it is felt that he may give the appearance of bias and

the litigant may feel his case was not fairly and fully heard.¹⁰²

Although a judge may intervene and ask questions of a witness or

of counsel if this is necessary for him to clarify his mind, he

is not supposed to deny a party an adequate opportunity to

present his case either by giving a decision prematurely or by

excessive interruptions. His role is to hear and to determine

the issues raised by the parties and not to conduct an

investigation. If he does so, a new trial will be ordered.¹⁰³

The right to a fair trial also includes the right to be

represented by counsel of one's own choice. He must be afforded an opportunity to cross-examine witnesses called by the other party with the purpose of testing the reliability of the evidence given.
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Ideally justice requires the attainment of truth. This is achieved if in a criminal trial the guilty are convicted and the innocent acquitted, and if in a civil action the judgment of the court is based on the true facts of the case. But as Hahlo and Kahn,
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rightly point out:

truth is an elusive goddess, and judges, like other mortals, are not omniscient. An accused person or a party to a civil law suit may fail to avail himself of the opportunity of stating his case or may state it badly; there may have been no witnesses to an occurrence or it may not be possible to find them, or, if witnesses do give evidence, they may be lying or mistaken. Moreover, in the nature of things, on the same evidence one court may convict the accused, another acquit him, one find for the plaintiff in a civil case, another for the defendant.

Yet the cardinal rule is that truth should not be established by resort to improper means, - torture or third degree methods.
106

The rules of evidence lay down what evidence is admissible and which is inadmissible. One of these is a rule against hearsay

evidence. The other which is fundamental to a fair trial is the rule that one cannot be compelled to answer a question if his answer would tend to incriminate him.¹⁰⁷ Every person is presumed innocent until the contrary is proved. The onus is on the one who makes an accusation or alleges facts to prove¹⁰⁸ them.

The trial must take place in open court with the public and the press at liberty to be present. The rationale behind a public hearing is that "the openness of the court is one of the basic safeguards of the right of the individual to a fair and just trial : it has a disciplinary effect on the bench, on counsel and on witnesses."¹⁰⁹ The court may order the trial to be conducted in camera only if privacy is absolutely essential.¹¹⁰ The rule of publicity is aimed not at safeguarding the interests of the individual litigants, but to safeguard the administration of justice itself.¹¹¹

In many countries the judgment of the court must be given with reasons.¹¹² A litigant cannot prepare the grounds for appeal or even decide whether he should or should not appeal if he does not know the reasons for the judge's decision and the reasons therefor.¹¹³

Most legal systems of civilized countries recognize that judges are fallible and consequently provide machinery for appeal and

114
 review. In some countries it is based on common law, in others it is based on statutory law. Although formality and procedure are inseparable, in socialist countries stress is laid on informality of procedure. This means the abolition of unnecessary, harmful formalism that endangers the defence of the parties' rights. It presupposes the preservation of all rational and useful forms of proceedings. Informality facilitates
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 accessibility to the people.

There is also a need for the expeditious disposition of cases.
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 As Stalev puts it, "Delayed justice can be equivalent to denial of justice. The speediness of justice is therefore a precondition for the efficacy of judicial defence."

These fundamental principles have evolved over a long period of time. They were developed to solve problems of injustice within particular societies. In earlier English history, for instance, judges held office during the king's pleasure. The Act of Settlement of 1700 may be taken to have established the independence of the judiciary from control or influence of the Crown. It was this act which laid down that judges' commissions be made quamdiu se bene gesserint and that their salaries be fixed and established. They could only be removed upon an
 117
 address of both houses of parliament.

2.3 CONCLUSION

An exposition of the above fundamental principles in the administration of justice seems to betray a bias in favour of the western approach. The impression may be created that they will be regarded as ideal and any derogation from them will be considered reprehensible. It must, however, be remembered that these principles have developed within particular societies as a creative response to problems in those societies. They undoubtedly were necessitated by other developments in the socio-economic and political spheres. They cannot be properly evaluated in isolation. The institution of chieftainship, which is the subject-matter of this investigation, has grown out of a different society. The principles expounded above are based on the idea of securing the protection of individual liberty. Chieftainship, on the other hand, has developed in a society that mostly emphasised collective interests rather than individual interests. This does not mean that individual interests were entirely neglected, but their recognition and protection had not reached the same level of development as in western societies. Yet the black societies within which the institution of chieftainship has evolved, are not static. The aim therefore is to place chieftainship under a magnifying glass with the object of determining the compatibility of its operation with the modern society. Western ideas, concepts and values have influenced blacks to a greater or lesser extent. Failure of the institution

of chieftainship to measure up to these will obviously alienate the society it serves from it. Moreover, the institution of chieftainship operates in juxtaposition with the western court structure. Appeals from these courts lie to magistrates' courts which follow western formal procedures. Consequently a conflict arises between the approaches of the two courts. It is therefore essential to find ways of minimising or eliminating these conflicts. Moreover, although it is quite possible for benevolent and wise chiefs to dispense justice just like the Turkish judge of old, the *cadi*, who sat under a palm tree and administered justice according to what he deemed fit, the potential for injustice where there are no safeguards is great. It is therefore imperative that the exercise of the judicial functions by chiefs be performed subject to certain minimum guarantees.

It is therefore apposite to analyse models of litigation in traditional and modern industrialised societies. This will ensure that some of the socio-economic and political underpinnings of these are exposed. This is the subject matter of the next chapter.

FOOTNOTES

- 1 Friedmann 3; Habscheid "The Fundamental Principles of Civil Procedure" 1984 CILSA 2.
- 2 Cappelletti "Fundamental Guarantees of the Parties in Civil Proceedings (General Report)" in Cappelletti & Tallon (eds) Fundamental Guarantees of the Parties in Civil Litigation (1973) 664. For a discussion of these principles in respect of criminal trials see Sieghart The International Law of Human Rights (1983) 269 et seq.
- 3 Cappelletti op cit 665.
- 4 Peart A Consideration of Certain Aspects of Customary Law Unpublished LLM dissertation UCT (1981) 20 et seq; Dias Jurisprudence 3ed (1970) 544 et seq.
- 5 Friedmann op cit 96.
- 6 Friedmann op cit 98 et seq for a discussion of this theory by various schools of thought.
- 7 Friedmann idem 95-96.
- 8 Dias op cit 544.
- 9 Cappelletti 665-666.
- 10 The United Nations Charter of 1945, in its preamble and human rights provisions, asserts the need for states to observe fundamental freedoms within their jurisdictions. The Universal Declaration of Human Rights of 1948 contains detailed provisions of these fundamental guarantees. The International Covenant on Civil and Political Rights of 1966 which came into operation in 1976, provides a multi-lateral treaty which contains important civil freedoms. The European Convention on Human Rights and Fundamental Freedoms affords protection to millions of Europeans with an international Bill of Rights; see also Dugard 46; Cappelletti 666; Van der Vyver "The Concept of Human Rights: Its History, Contents and Meaning" in Forsyth and Schiller (eds) Human Rights: The Cape Town Conference (1979) 10; Van der Vyver Seven Lectures on Human Rights (1976) 83 et seq.

- 11 Jolowicz "Fundamental Guarantees in Civil Litigation : England" in Cappelletti & Tallon op cit 173; Cappelletti op cit 669.
- 12 Cappelletti ibid.
- 13 Cappelletti 670. Sornarajah "Bills of Rights: the Commonwealth Debate" 1976 CILSA 161 et seq; Dugard 47; Jaconelli "The European Convention on Human Rights - The Text of the British Bill of Rights" 1976 Public Law 226; Jaconelli Enacting a Bill of Rights: The Legal Problems (1980); Scarman English Law - The New Dimension (1974) 10 et seq; Phillips "Self-limitation by the United Kingdom Parliament" 1957 Hastings Constitutional Law Quarterly 474 et seq; Phillips and Jackson Constitutional and Administrative Law 6 ed (1978) 446 et seq; Silkin "The Rights of Man and the Rule of Law" 1977 Northern Ireland Legal Quarterly 3 et seq; contra Milne "Should We Have a Bill of Rights?" 1977 Modern Law Review 389 et seq.
- 14 Cappelletti 670; Stalev "Fundamental Guarantees of Litigants in Civil Proceedings : A Survey of the Laws of the European People's Democracies" in Cappelletti & Tallon op cit 358 et seq.
- 15 Smit "Constitutional Guarantees in Civil Litigation in the United States of America" in Cappelletti & Tallon (eds) op cit 420 et seq. See Article V of the American Bill of Rights providing for "due process of law". Judicial review in America is not provided for in the constitution but is rather to be traced to the judgment of chief justice Marshall in the Marbury v Madison 1 Cranch 137 (1803) decision; See also the provisions of the Basic Law for the Federal Republic Germany of 1949 which stipulate for a number of such procedural guarantees especially Article 3.
- 16 Cappelletti 676.
- 17 Cappelletti 679.
- 18 Watson "Fundamental Guarantees of Litigants in Civil Proceedings in Canada" in M Cappelletti & Tallon (eds) op cit 191 et seq. Cappelletti 683.
- 19 Watson 191, 217.
- 20 Watson 192, 210.

- 21 Watson *ibid.*
- 22 S 2 of the Canadian Bill of Rights Act 1960. This section was incorporated in s 33(1) of the Canadian Constitution Act of 1982. The earlier interpretation of this section in R v Drybones 1969 9 DLR (3d) 473 was later doubted - see AG for Canada v Lavell 1973 38 DLR (3ed) 481. See also Naidu "The Development of the Protection of Human Rights in Canada" 1986 Obiter 27
23. In the American Constitution the doctrine is applied in its purest form. In the South African Constitution the doctrine has been applied : Minister of Interior v Harris 1952 4 SA 769 (A); see also Wiechers VerLoren van Themaat Staatsreg 3ed (1981) 48 et seq; Hosten, Edwards, Nathan & Bosman Introduction to South African Law and Legal Theory rev ed (1980) 604 et seq. Marshall 97 et seq; Labuschagne "Die Dinamiese Aard van die Wetgewingsproses en Wetsuitleg" 1982 THRHR 403
- 24 Wiechers 51, 327; cf Henkin The Rights of Man Today (1978) 10-11.
- 25 "The Spirit of the Laws" in Ebenstein Great Political Thinkers 4ed (1969) 428 436.
- 26 John Locke in his Second Treatise of Civil Government (1690) in Ebenstein Great Political Thinkers (1969) 401 at 409 et seq classified government powers into three, viz legislative,⁷ executive and the maintenance of foreign relations. Montesquieu modified Locke's classification. According to him the third function is not the maintenance of foreign relations, but the judicial function.
- 27 Wiechers 49.
- 28 Hosten et al 604; Van der Vyver & Van Zyl Inleiding tot die Regswetenskap 2ed (1983) 573.
- 29 For a commentary on this see Hosten et al 604-5.
- 30 Constitutionalism in Emergent States (1972) 14.
- 31 This principle is recognized in most countries both capitalist and socialist. On English law see Jolowicz 130; on Canadian law see Watson 194 et seq; on the European People's Democracies see Stalev 375 et seq; on the position in the United States Smit 445 et seq and Art III of the American Constitution of 1787; on the position in South

- Africa see Wiechers 327-8; Hosten et al 609-610; Hahlo & Kahn 38 et seq. Labuschagne "Regswetenskap, Regpleging en Regsakademie: Enkele Opmerkinge" 1982 De Jure 331; Margo "Reflections on Some Aspects of the Judicial Function" in Kahn (ed) Fiat Iustitia : Essays in Memory of Oliver Deneys Schreiner (1982) 291; Sieghart 283-284.
- 32 Beinart 111.
- 33 Wiechers 328; Labuschagne (1982), 331
- 34 R v Sussex Justice, ex parte McCarthy (1924) 1 KB 256 at 259.
- 35 Du Plessis "The Ideal Legal Practitioner" 1981 De Rebus 425. Margo 291
- 36 Jolowicz 137; Stalev 375-376, 380; Watson 228.
- 37 Jolowicz 139-140; Watson 196; Stalev 377.
- 38 Stalev 377; Smit 445 et seq; Watson 196; Jolowicz 130; see also Hahlo & Kahn 41-47 for various methods of appointment of judges; Labuschagne (1982) 332.
- 39 Jolowicz 130; Watson 195, Smit 445 et seq; Art III of the American Constitution.
- 40 Jolowicz *ibid*; Wiechers 328.
- 41 Wiechers 328. These are provided for in South African law in s10 of the Supreme Court Act 59 of 1959.
- 42 Jolowicz 139-40; Watson 196; Hahlo & Kahn 40.
- 43 Du Plessis (1981) 424.
- 44 "Aspects of Judicial Independence" 1956 SALJ 390.
- 45 Jolowicz 140; s10 of the Supreme Court Act.
- 46 Jolowicz 141; Watson 196; in South Africa a judge who has been criticized for being executive-minded is Steyn CJ: see Cameron "Legal Chauvinism, Executive-mindedness and Justice-LC Steyn's Impact on South African Law" 1982 SALJ 38; cf Van Blerk "The Irony of Labels" 1982 SALJ 365; Dyzenhaus "LC Steyn in Perspective" 1982 SALJ 380; Margo 291.
- 47 Wiechers 328; Jolowicz*130; Watson 195; Art 111 of the American Constitution; Habscheid 17; Taitz "The Administration of Justice and Due Process" in Schrire (ed) South Africa : Public Policy Perspectives (1982) 2.

- 48 S10(1)(a) of the Supreme Court Act 59 of 1959.
- 49 S10(7) of the Supreme Court Act; see also Art III of American Constitution.
- 50 Jolowicz 130.
- 51 Wiechers 329; Habscheid 18; Snyman Criminal Law (1983) 291 et seq; Joubert (ed) The Law of South Africa 6 174 et seq; Hunt & Milton (ed) South African Criminal Law and Procedure Vol 11 2 ed (1982) 178 et seq.
52. Ambard v Attorney-General for Trinidad and Tobago 1936 1 All ER 704 at 709. It is, however, often difficult to draw a clear line between legitimate and moderate criticism and scurrilous attacks on the bench - see Torch Printing and Publishing Co (Pty) Ltd 1956 1 SA 815 (C); Van Niekerk 1970 3 SA 655 (T); Van Niekerk 1972 3 SA 711; cf Van der Walt "Minagting van die Hof - Vereistes - Perke van Akademiese Vryheid van Meningsuiting" 1970 THRHR 302 et seq; Milton "A Cloistered Virtue?" 1970 SALJ 424 et seq; Dugard "Judges, Academics and Unjust Laws: The Van Niekerk Contempt Case" 1972 SALJ 271; Van Niekerk "The Uncloistering of the Virtue: Freedom of Speech and the Administration of Justice - A Comparative Overview" 1978 SALJ 362, 534 et seq.
- 53 "Appointment of Magistrates as Judges" 1971 SALJ 513.
- 54 Kentridge "Telling the Truth About Law" 1971 SALJ 653; Milne "Speech by the Honourable Mr Justice Milne to the Natal Law Society" 1980 SALJ 458.
- 55 Milne 458.
- 56 Eksteen "Appointment of Magistrates as Judges" 1971 SALJ 520; Kentridge 654; Didcott "The Didcott Memorandum and Other Submissions to the Hoexter Commission" 1980 SALJ 60; Milne 458.
- 57 Eksteen 520
- 58 Milne 459.
- 59 The judge president of South West Africa Mr Justice Badenhorst speaking at the opening of the renovated magistrate's building at Tsumeb said that judges should not be appointed only from the limited ranks of advocates but senior and qualified magistrates should be eligible for elevation to the supreme court. The then minister of justice said the matter would be considered.

- 60 The then secretary for justice Mr J N Oberholzer challenged these assertions - see 1971 SALJ 522.
- 61 1971 SALJ 515.
- 62 Hoexter Commission 74.
- 63 S17 of the Public Service Act 54 of 1957.
- 64 Didcott 60-61.
- 65 Ngubane "The Office of Magistrate" 1979 IPSVT Bulletin Vol 3 No 2 48.
- 66 AZAPO v The Control Magistrate, Durban 1984 unreported 9-10.
- 67 Hoexter Commission 76.
- 68 Labuschagne (1982) 332.
- 69 Coetzer "Hervorming van die Struktuur van die Howe" 1984 Proceedings of the 11th South African Law Conference 45.
- 70 Coetzer 46-7.
- 71 Allott New Essays in African Law (1970); Suttner "Legal Pluralism in South Africa: A Reappraisal of Policy" 1976 International and Comparative Law Quarterly 134.
- 72 Stubbs P 1929 (N&T) 3-4; Motaung v Dube 1930 NAC (N&T) 12; Ex parte Minister of Native Affairs : in re Yako v Beyi 1948 1 SA 388 (A).
- 73 Kahn "Recognition of Native Law and Creation of Native Courts" in Hahlo & Kahn (eds) The Union of South Africa: The Development of its Laws and Constitution (1960) 332-333; Suttner "Towards Judicial and Legal Integration in South Africa" 1968 SALJ 444-445.
- 74 Hoexter Report 389 et seq.
- 75 Hoexter Report 394 et seq; see also Kerr "Liability in Delict for Wrongfully Causing the Death of a Native Man Married according to Native Law" 1956 SALJ 402; Kerr "The Application of the Native Law in Supreme Court" 1957 SALJ 313; Kerr "Does a Minor Need Two Natural Guardians in Two Systems of Law to Assist Him at the Same Time?" 1965 SALJ 487; Kerr "Guardianship of Children of Bantu Customary Unions - The Inter-personal Conflict of Laws Problem" 1973 SALJ 4.

- 76 Hoexter Report 404-405.
- 77 Hoexter Report 409 et seq.
- 78 The Special Courts for Blacks Abolition Act 34 of 1986.
- 79 Wiechers 330.
- 80 Jolowicz 142 et seq; Stalev 371; Watson 197; Hahlo & Kahn 51 et seq; Beinart "The Rule of Law" 1962 Acta Juridica 116 says that it is a requirement of the Rule of Law that there must be free access to the courts for all persons whose rights have been infringed; Habscheid 22.
- 81 The Canadian Constitution, for instance does not expressly guarantee a right of access to the courts, but the courts have interpreted the constitution as placing some restrictions on how far the legislatures may go in restraining access to the courts - Watson 197. In the socialist countries a right of access is implicit from the creation of courts as special organs for the administration of justice by the constitution - Stalev 371. On the position in South Africa see Part VII of the Republic of South Africa Constitution Act 110 of 1983 which establishes the judicial branch of government. In the United States of America the Fourteenth Amendment provides that "nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny any person within its jurisdiction the equal protection of the laws" - see Smit 420.
- 82 In England a person has an unqualified right to bring an action before the court - Jolowicz 143.
- 83 The court may not hear the complain for want of jurisdiction. But this does not deprive him of the right to bring an action - Jolowicz 143; Habscheid 21-22.
- 84 Jolowicz 146 et seq. English law does not guarantee a general right of access to the courts in respect of any grievance. The matter is quite complex - Jolowicz 151.
- 85 Jolowicz 152.
- 86 Habscheid 23 n 134 points out that the source of this saying is unknown; cf Jolowicz 153; Economist "English Justice(1): A Legal System under Stress" 1983 De Rebus 483; Economist "English Justice (4): The Slow and Costly Civil Courts" 1984 De Rebus 25.

- 87 Koch "Introduction. Access to Justice : an Anthropological Perspective" in Cappelletti (gen ed) Access to Justice (1979) 2.
- 88 On ignorance of the law see generally Robertson "Popularization of law" 1982 CILSA 1, 158; Furmston "Ignorance of Law" 1981 Legal Studies 37 et seq.
- 89 The gap between society's needs and the routine of legal bureaucracy has confirmed Pound's diagnosis of the "causes of popular dissatisfaction with the administration of justice". In this respect his optimistic prediction that "we may look forward to a near future when our courts will be swift and certain agents of justice, whose decisions will be acquiesced in and respected by all" has not been realized - Koch 2-3.
- 90 3.
- 91 Jolowicz 153. On the position in South Africa see in general McQuoid-Mason An Outline of Legal Aid in South Africa (1982); on England see Economist "English Justice(6) : Should Law be a Luxury?" 1984 De Rebus 165.
- 92 This does not imply, however, that everyone can afford to litigate every reasonable claim he may have - Jolowicz 154.
- 93 Hahlo & Kahn 31 et seq; Beinart "The Rule of Law" 105 et seq; Taitz 10 et seq.
- 94 Hahlo & Kahn 32; Habscheid 15; Sieghart 268 et seq.
- 95 Hahlo & Kahn 38; Beinart 111; Habscheid 15.
- 96 Hahlo & Kahn 48; Taitz 37 et seq.
- 97 Jolowicz 165. On judicial notice see Hoffmann & Zeffertt South African Law of Evidence 3ed (1981) 319 et seq; Van der Merwe et al Evidence (1983) 347 et seq.
- 98 Hahlo & Kahn 49; Taitz 33 et seq. On the contents of the audi alteram partem rule see Corder "The Content of the Audi Alteram Partem Rule in South African Administrative Law" 1980 THRHR 156 et seq.
- 99 Jolowicz 159; Watson 222 et seq; Stalev 391-392; Smit 449 et seq. In criminal trials see Sieghart 274 et seq.
- 100 Jolowicz 162; Stalev 392.

- 101 Watson 232.
- 102 Watson 233.
- 103 Jolowicz 163; Hahlo & Kahn 50.
- 104 Jolowicz *ibid*; Watson 232; Hahlo & Kahn 50; Beinart 119; Smit 452 et seq; Van der Merwe et al 290; Hoffmann & Zeffertt 352.
- 105 Hahlo & Kahn 49; cf Van der Merwe "Accusatorial and Inquisitorial Procedures and Restricted and Free Systems of Evidence" in Sanders (ed) Southern Africa in Need of Law Reform (1981) 141; see also Nicholas "Credibility of Witnesses" 1985 SALJ 32 et seq.
- 106 Hahlo & Kahn *ibid*.
- 107 Jolowicz 164; Watson 233; Beinart 120; Van der Merwe et al 136 et seq; Hoffmann & Zeffertt 195 et seq.
- 108 Beinart 119; Van der Merwe et al 415, 425; Pillay v Krishna 1946 AD 946; Hoffmann & Zeffertt 385 et seq.
- 109 Watson 230; Stalev 406.
- 110 Jolowicz 166.
- 111 Jolowicz 168.
- 112 Jolowicz 168; Watson 235; Stalev 414; Smit 460.
- 113 Jolowicz 169; Watson *ibid*; cf Henkin 10.
- 114 Jolowicz 170; Watson 238.
- 115 Stalev 400-401.
- 116 415; see also Sieghart 281-282
- 117 Jolowicz 124-124.
- 118 Barton "The Effect of English Revolution on Criminal Procedure" 1984 De Rebus 197 et seq.

CHAPTER III

MODELS OF LITIGATION

3.1 INTRODUCTION

In the previous chapter the fundamental principles for the proper administration of justice were outlined. It was also pointed out that much as these principles are indispensable for the fair administration of justice, they may not completely be observed or may be inapplicable to certain societies because of the peculiar features of certain types of society. Even if they are applied there, they may be regarded as incomprehensible. This is because these principles have been evolved as a creative response to certain problems in industrialised societies. It is therefore necessary in this chapter to explore models of litigation in traditional as well as modern industrialised societies. The characterisation of societies as tribal or traditional and western is a broad generalization. There is no society that is purely tribal and the other that is completely modern, but there are many variations between these two poles. Even in modern societies certain rules which have been developed in tribal societies may be applicable. A number of political and sociological factors often account for the development of certain rules in various societies. Yet this distinction is essential for sharpening one's insight into and appreciation of the mode of operation of the traditional courts as against that of the modern tribunals.

3.2 LITIGATION IN TRADITIONAL SOCIETY

Traditional societies have had relatively simple technologies. Few of them have had governmental arrangements that could instantly be recognized, and a majority has entirely lacked the centralized state organization which bears resemblance to modern control institutions. There are no officials like policemen, prosecutors and professional lawyers. However, a degree of order and regularity must be maintained in any human group if the basic processes of life are to continue. Conflicts and quarrels will arise, and this may disrupt the order if they are not resolved or at least contained. Harmony does not imply absolute and quiet harmony. Societies do differ widely as to the amount of friction and disorder which their members seem able to tolerate, but it is necessary that conditions must be such that normal processes of life must continue.

The traditional face-to-face societies are often relatively small. Relationships are multiplex, multi-faceted, affective, based on kinship and lasting. As a result conflict is prevalent, intense, and enduring. Interaction therefore takes place between people who are connected by ties of relationship. The smallness of these societies ensures that a dispute which arises in connection with one relationship tends to affect others in which the individuals concerned are involved. The community as a whole is likely to be concerned in a dispute which involves any member.

Relationships are, however, relatively egalitarian because technology limits the economic surplus that can be amassed. Although conflict may be endemic, it may in turn be moderated by divided loyalties stemming from the overlapping of membership in social groupings. Kinship therefore plays a significant role in securing order in these societies. No doubt there are variations within these societies, but it is not necessary to discuss them here.

Status plays a pivotal role in these societies. It affects rights and transfer of property. Because of society's low technological development, serious injuries seldom occur negligently. Marriage involves the families of both spouses, and these families are vitally concerned in its celebration, subsistence and its dissolution.

The dispute-settlement institutions lack coercive powers and largely depend on the consent of all parties involved, although considerable social pressure may be exerted to obtain it. These tribunals are relatively unspecialized, undifferentiated, and non-bureaucratic. Litigants take part actively in the hearing. The institutions themselves are accessible to litigants and openly welcome their disputes. They provide an expeditious hearing and prompt moral evaluation, which often finds fault and merit on both sides. Legal processes are generally localised

rather than remote. Wherever there is a community, be it a village or an extended family unit, there is machinery of greater or less formality for the settlement of disputes. Allott, referring to the African set-up says:

Every man thus had a court of some kind on his doorstep (perhaps one should say on the threshold of his hut!). To adjudicate or arbitrate in disputes is in traditional African society an essential appurtenance of office, so that not only the chief or village headman but the lineage elder and the father of a restricted family would be expected to settle cases which arose between those subject to their authority.

Remedies are often vague and diffuse and emphasis is on behavioural reform rather than the transfer of specific goods. Judgments are often carried out slowly and partially, not because the institution is inefficient but because the rights and obligations it enunciates are incorporated into a continuous relationship. No judgment is final. The rules employed by the institution are particularistic, flexible, vague, inconsistent, familiar, and supported by widespread agreement.

In these societies disputes tend to be polycentric, and to involve a number of issues. Some of them may have considerable historical depth. This is often caused by the fact that litigants are bound by a continuing relationship which is the

source of the dispute. This relationship is also the source of the dispute, the reason for airing it, and the incentive for accepting the outcome. Litigants bring the dispute to a hearing, advocate aggressively, and are responsible for executing any judgment.¹⁰ Because disputing is high, conflict readily arises, and since disputes are polycentric, numerous other grievances are revealed. Consequently a great number of norms that are violated are corrected publicly although the sanctions imposed are generally lenient. Delicts frequently constitute the subjects of dispute. Unintentional wrongs tend to be forgiven if trivial, and if serious, are interpreted as intentional. Remedies for wrongs are mostly civil. Although no specialized agencies represent the state, victims are capable of seeking redress. Their interests must remain paramount if the relationship between victim and offender is to be preserved.¹¹ Settlement of disputes is not strictly rule bound.¹²

3.3 LITIGATION IN MODERN SOCIETIES

Generalization on the social structure, judicial institutions, and litigation patterns in modern societies is more difficult than the oversimplified version of tribal societies. There are, however, two competing models which have been postulated. The one is an exaggerated contrast with tribal society which

eulogizes modern society, and the other is a modern critique of
13
this view.

The liberal model portrays society as composed of atomized individuals who pursue single, narrowly-defined selfish goals. Their interaction is depicted as transitory, lacking either past or future, and affectively neutral. Although conflict is prevalent, it is simple, superficial, and readily forgotten. The law is geared to regulating interaction among strangers. Emphasis is on the legal equality of all members of society. Each person belongs to a number of varied, special-purpose groups. His loyalties being divided, intergroup conflict is lessened. This pluralism is the basis of the liberal state. Contracts are freely concluded by strangers and real property is a commodity which is held by individuals and is exchanged freely between strangers on the basis of economic advantage. Because of the development of technology and the replacement of interaction
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among relatives, by interaction among strangers, serious wrongs are more frequently caused negligently than intentionally. Family relationships are formed and dissolved at will by individuals who are progressively isolated from extended kin. Relationships between adults are narrowly instrumental and less
15
enduring.

It is, on the other hand, contended that society is composed of

corporate entities linked by enduring multiplex relationships constructed partly from affective ties among the elite. Conflict between those entities, or between an entity and an individual, is endemic, complex, intense and not easy to forget. As conflict cannot be expressed openly, it is repressed and displaced. Interaction among strangers lessens as individuals are more and more incorporated within corporate entities. Corporate entities that interact soon become intimates. Legal equality is rendered nugatory by gross inequalities of wealth, power and status, both between individuals and between individuals and corporate entities. The individual belongs to a corporate entity by ascription rather than by choice. The likelihood is that the individual will belong primarily or even exclusively to one corporate entity. Because his loyalties are united, conflict between such entities will be increased. Contracts are mostly concluded between individuals and corporate bodies and usually conform to standard forms in favour of corporate entities. Contractual relationships gradually include social behaviour and are relatively enduring. Property rights decline in their importance, and owners of property are more rigidly regulated in their use of property.

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Courts in modern societies are specialised agencies in the sense that their sole function is to administer the law in the context of disputes which are brought before them. The appearance of

specialization is reinforced by the fact that disputes are heard in places not used for other purposes and that unique ceremonial procedures are followed in the settlement of disputes. The judges who man the higher courts are generally disallowed to perform other duties at the same time, and are expected not to involve themselves in politics.

Courts are seen as impartial tribunals which must listen to the two sides and then impose a decision from a third-party point of view. In doing this the court relies on legal rules and not on other normative rules. The judge is seen as having little discretion in choosing the rules applicable to the case, the facts themselves determine the rules upon which the decision must be based. This line of reasoning, however, is questionable in that it implies lack of discretion on the part of the judge in selecting rules on which to base his decision "and implies that legal rules form a certain and consistent repertoire of norms."

This view has recently created some controversy in South Africa. The better view is that judges do have a discretion, however limited it may be.

A consequence of the rule-based adjudication is that compromise is not encouraged. The judge is supposed to decide the matter and not act as an arbitrator between the litigants. Although he may suggest that they go and negotiate a settlement, it seldom happens, and if the parties are unwilling, he is bound to reach

his rule-bound decision. Inherent also in this method of adjudication is the view that one party wins and the other loses.
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Once a matter has been handed to the legal specialists, lawyers and the judges, it has to be handled according to a specialized procedure over which litigants have no control. The rules determine what is at issue. Other issues which no legal rules can determine are not justiciable even though the litigants may feel aggrieved thereby. What is relevant is construed narrowly. This requires that the exact issue in dispute be separated from any further complex of relations between the litigants, and must be dealt with apart from other aspects of their relationship. This system is only possible in large complex societies where many incidents from which disputes arise provide the only point of contact between those involved, but is inappropriate in small face-to-face communities.

This system of adjudication is characterised by the use of official enforcement agents, the police, the sheriff and the prison services, to ensure, by force if need be, compliance with the rules and the implementation of the decisions of the court. The elements of the legal system are directly connected to and depend on the specific form of governmental organization created in this society. The special authority enjoyed by legal rules is partly to be ascribed to the authority of parliament as a rule-

21
making body.

The court is highly, although equally, not accessible to litigants. But case overloads are prevalent because of the limited numbers of official courts and judges. This often results in long delays in obtaining a hearing.
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Law is accorded a special differentiated character as a discrete sub-system, separated from society. This is manifest from the specialized nature of the law and the courts. Courts are visited only when there is a dispute. They are presided over by officials who perform their functions in a formalized manner. Access to the system is gained through specialists who themselves through professional training and habit are far-removed from those who employ their services.
23

Immanent in this is the separation between legal and political processes which is exemplified by the doctrine of separation of powers which strongly censures judicial officers from participating in politics. This is often accentuated in official and sentimental utterances of judges and politicians concerning the independence of the judiciary and the sanctity of law.
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It is, however, open to considerable doubt whether there can be a strict separation between the two,
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but the idea that they should be separate is deeply entrenched in the ideology.
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Law is also assigned a special pre-eminence over all other normative rules. Courts are the ultimate authoritative agents for the settlement of disputes. This superior position of the courts is jealously guarded and defended by the courts themselves and by parliament and the executive.²⁷ For this reason the courts have at their disposal contempt procedures, the main purpose of which is to frustrate any other method of settling²⁸ disputes.

This above exposition is open to criticism. Courts acquire power to coerce individuals at the cost of their ability to persuade. Although courts do have power, their power is largely dwarfed by that of large corporate entities whose compliance must be induced. Disputes which involve related individuals or between a large corporate entity and its members, are increasingly dealt with by therapeutic institutions that are unspecialized, undifferentiated and nonbureaucratic. Because corporate entities are professional parties and are represented by lawyers, they find the courts highly accessible. These entities can also make tactical use of the endless delays caused by case overloads. This often results in differential access, where the corporate entities have more use of the courts against non members than is the other way round. This creates the impression that legal rules express the interests of one class at the expense of another.²⁹

Litigation patterns in modern industrialized societies are often depicted as bicentric, involving few narrowly-defined issues with no historical depth. Litigants are either strangers or are prepared to become estranged as persons who wish to preserve their relationship will not litigate. Even legal institutions intended to preserve relationships will either be avoided or will disrupt the relationship despite their purported function.

As individuals are relatively passive toward the court, the responsibility for initiating and conducting hearings, and for carrying out the order of the court, rests upon official actors, such as prosecutors and administrative agencies. Litigation between individuals declines, and conflict is either repressed or displaced. The court becomes less accessible to individuals. Both the parties who can litigate and the issues they can raise are extremely limited.³⁰

The kind of relationship the court is designed to handle is contractual. As a result relationships are framed in contractual form and disputes involving contract increase. Because real property is a commodity about which contracts can freely be made, litigation concerning property also increases. The court is often used to terminate marriage relationships and to adjust rights and obligations between parties who were previously, or have just been made, strangers to each other.³¹

4. CONCLUSION

As was suggested above, the two models of litigation just discussed provide an oversimplified version of tribal society and modern society. Today these are found side by side and have to a large extent influenced each other, or more accurately, the traditional model of litigation has been influenced by the modern one. But when these are compared, they do exhibit certain differences.³² It is an appreciation of these differences which is essential for a better understanding of the two models. One who is steeped in the western model, who may not even be aware of the reasons behind the development of this model may be shocked or misunderstand the traditional model. Current philosophical views also tend to cloud one's perspective. An analysis of the two models is aimed at identifying weaknesses in each model. It is only when one appreciates these that sound recommendations can be made. Recommendations should not just be made to change the traditional institutions and make them the same as western ones. What is of crucial importance is whether in their context their method of operation best serves the interests of justice. It is also important to point out that western dispute-settlement institutions may have something to learn from the traditional ones. The stage has now been set for the consideration of the development of the institution of chieftainship in the Zulu community.

FOOTNOTES

- 1 Roberts Order and Dispute : An Introduction to Legal Anthropology (1979) 11.
- 2 Abel "Western Courts in Non-Western Settings : Patterns of Court Use in Colonial or Neo-colonial Africa" in Burman & Harrel-Bond (eds) The Imposition of Law (1979) 169.
- 3 Roberts 13-15, 30.
- 4 Roberts 14; Abel 170; Van Velsen "Procedural Informality, Reconciliation, and False Comparisons" in Allott, Epstein & Gluckman (eds) Ideas and Procedures in African Customary Law (1969) 138.
- 5 Roberts 15.
- 6 Abel 170.
- 7 Abel *ibid.*
- 8 "African Law" in Derrett (ed) An Introduction to Legal Systems (1968) 135.
- 9 Abel 170.
- 10 Abel *ibid.*
- 11 Abel 171.
- 12 Roberts 15.
- 13 Abel 171; on some of these contrasts see Weber Law in Economy and Society (1954) trans Rheinstein and Shils.
- 14 Abel 171.
- 15 Abel 172.
- 16 Abel *ibid.*
- 17 Roberts 19; Abel 172.
- 18 Roberts 20; see also Comaroff & Roberts Rules and Processes (1981) 4 et seq.

- 19 Wacks "Judges and Injustice" 1984 SALJ 266 questions the thesis posited by Dworkin 22 et seq; contra see Dugard "Should Judges Resign? - A Reply to Professor Wacks" 1984 SALJ 286; see also Wacks "Judging Judges : A Brief Rejoinder to Professor Dugard" 1984 SALJ 295.
- 20 Roberts 20; Abel 172.
- 21 Roberts 21.
- 22 Abel 172.
- 23 Roberts 22.
- 24 See for example Steyn "Regsbank en Regsfakuliteit" 1967 THRHR 101-107; Ogilvie-Thompson Address on the Occasion of the Centenary Celebration of the Northern Cape Division 1972 SALJ 30-34.
- 25 Hoexter "Judicial Policy in South Africa" 1986 SALJ 445.
- 26 Roberts 22.
- 27 Roberts *ibid.*
- 28 Roberts 23.
- 29 Abel 173.
- 30 Abel *ibid.*
- 31 Abel 174. For a critique of this see Abel 174-175.
- 32 Abel 176.

CHAPTER IV

THE RECOGNITION OF CHIEFTAINSHIP

4.1 INTRODUCTION

It has been suggested that in an endeavour to comprehend the growth of institutions "an ounce of history is worth a pound of theory".¹ This may be the justification for going into the historical background of the institution of chieftainship. A detailed history of the Zulu people is not necessary. Only a broad outline of the society in which the institution of chieftainship grew is called for. This will be followed by a discussion of the advent of whites, the influence of western law on the judicial structure of the Zulus and the ultimate recognition of chiefs.

The recognition of chieftainship is closely connected with the recognition of customary law in general so much that it is not possible to separate the two. Yet it is not intended here to have an elaborate exposition of the recognition of customary law in South Africa.² Only those aspects which are of importance to the understanding of the role of chiefs will be adverted to.

It is obvious that whites, possessed of a more "advanced" culture, when they came into contact with the blacks, would have thought that they could supplant the traditional institutions with the new ones and that these would unquestionably be embraced. If in any case the idea was that the blacks had no law, but merely custom, they could not have imagined that they had courts. But as Simons³ put it:

In spite of their technological backwardness, Africans could cope with their environment, and achieved a fair amount of security against famine, disease, disorder and aggression. They had attained a high standard of political and legal organization; observed a strict moral code, and governed themselves with dignity, discipline and self-restraint.

Law is in any case an instrument whereby man controls and creates order in his environment.

The traditional courts are comparable with similar Germanic institutions which formed the foundation of for instance the English judicial system. The Anglo-Saxon shire and hundred moots were superseded by the king's courts although locally justice continued to be administered on a popular basis which ensured the close association of the communities with the administration of justice. They were communal courts of free men or their representatives. They assembled with a president, but the assembly and not the presiding judicial officer were the judges.⁴

These local courts were not manned by professionals, but each person was his own lawyer. There was no mechanism for compelling attendance except outlawry. The trial of offences of violence and theft constituted the greatest bulk of the business of the courts and civil work was limited. There were also similarities of procedure. The courts declared the customs of the people, and acted as arbitration tribunals in the settlement of neighbours' disputes. Very little change came from within the system for quite a long time until there were outside influences. Localised justice continued for a long time even after central justice had developed and a common law of the land had evolved. The local courts continued to play a role.⁵

4.2 TRADITIONAL JUDICIAL STRUCTURE OF THE ZULUS

4.2.1 Historical Background

It would be otiose to make a detailed study of the history of the Zulu people.⁶ In fact time and space do not allow it. Only a few general remarks will therefore suffice with the object of understanding their judicial structure.

Much of the pre-Shakan history of the Zulus is obscure owing to the lack of written accounts by the Zulus themselves before the

advent of whites.⁷ A great portion of what was written later is a matter of conjecture,⁸ and was mostly written by people who could not have been objective and impartial in evaluating the position of the Zulu people.

The name Zulu embraces over two hundred tribes scattered over the whole of Natal and KwaZulu.⁹ King Shaka had consolidated them into one nation during the first half of the nineteenth century.¹⁰ Before that, the Zulus had been one of the small tribes that fell under the sovereignty of Dingiswayo, the Mthethwa chief. The Zulu tribe had been settled primarily in the Mhlathuzi valley under the leadership of Malandela.¹¹ It is his son Zulu,¹² who is regarded as the progenitor of the Zulu tribe from whom they took their name. Zulu came to settle in the area west of Mtonjaneni hill.

Zulu was succeeded by Phunga, and the latter was succeeded by his brother Mageba who took up his heirless widow and raised seed for him among whom was born Ndaba.¹³

Ndaba was the next to rule. He gave birth to Jama. Jama had two wives, the chief wife being Mthaniya by whom he had first twins¹⁴ Mkabayi and Mmama, and later a son Senzangakhona. When Jama died during the minority of Senzangakhona, the throne vested in

the diarchy of Mudli and Mkabayi, grandson and granddaughter of
¹⁵
 Ndaba. It was Senzangakhona's son, Shaka who welded the Zulu
 power together.

When Shaka came to the throne after the death of his father in
¹⁶
 1816, there were more or less fifty independent clans in
¹⁷
 Zululand. All spoke one language and observed the same
 customs. Each clan descended from a common progenitor. All
¹⁸
 together descended from a still more ancient ancestor. From
 these tribes Shaka carved a nation in more or less ten years, a
¹⁹
 truly phenomenal feat. Although prior to him these tribes had
 been autonomous, some had been stronger than others, and although
 some had been involved in internicine wars, relative peace had
 been maintained in those days when "wars between tribes were
²⁰
 almost like the modern sport of javelin-throwing".

King Shaka revolutionized the Zulu army in a variety of ways,
 conquered his enemies, and consolidated his power as supreme
²¹
 ruler of the Zulus. The pre-Shakan tribes were either
 completely wiped out or absorbed by the other tribes, and they
 became more or less homogenous. Under King Shaka's rule a strong
 Zulu-ising tendency set in, that is, the tendency to conform with
 the custom and language of all those tribes that belonged to the
²²
 same culture group. The new military system which required all
 males to belong to regiments facilitated the obliteration of much

non-Zulu language and custom. Yet it must not be understood that King Shaka obliterated everything that had existed before his rule. In some respects the position as it was before had been retained.²³

Roundabout 1824 King Shaka came into contact with English traders who had visited his kingdom. They had, on their way to India, established a settlement at Port Natal to trade in ivory and skins. Impressed, no doubt, by their expertise and merchandise, King Shaka gave them a warm reception and even appointed them as chiefs over the depopulated area around Port Natal.²⁴ The advent of the English traders in Zululand was a prelude to a long period of contact between the Zulus and whites which ushered in a new social set-up. The whites were a community whose technological and economic life was different from that of the Zulu community.²⁵ King Shaka's contact with the whites did not last for long, as he was assassinated in 1828.²⁶

Dingane succeeded King Shaka. It was during the reign of King Dingane that a large party of Boer trekkers arrived in Natal in 1838. Their chief desire was more land and the acquisition of labourers "without equality in Church or State".²⁷ The relations between King Dingane and the Boers soon deteriorated. Fighting ensued. This culminated in the defeat of King Dingane by the Boers with the assistance of his brother Mpande. The Boers

occupied Natal. Already there had been some liaison between them and the English. Mpande became Zulu king, although, as Gibson puts it, he was "acknowledged king of the Zulus and not of Zululand".²⁸

In 1843 Natal was annexed by the British and Advocate Henry Cloete was sent as commissioner to adjust land disputes. In 1845 it was annexed to the Cape. The other portion of Natal was occupied by the Boers. Both these states were occupied by people with a different culture and mode of production from that of the Zulus, and with different motives.²⁹ A clash of cultures was bound to occur which clash was preceded by a clash of arms.

When King Mpande died in 1872, his son Cetshwayo succeeded him as Zulu king. Cetshwayo was fated to be the last independent Zulu king.³⁰ His relationship with his British neighbours was not as cordial as that of his father. He plunged into violent conflict with the British at Isandlwana in 1879, in which encounter the British suffered a severe setback. In 1880 the Zulus were ultimately defeated at Ulundi. King Cetshwayo was arrested and exiled, and thousands of cattle were taken from him by the British as indemnity.³¹ Zululand was divided into thirteen "principalities" under independent chiefs. Each chief had to sign a document with conditions of chieftainship laid down by the British.³² This arrangement proved unsatisfactory.

Conflicts and quarrels, hitherto restrained by national unity, now broke into open conflict. Serious problems resulted from the actions of some chiefs and this necessitated King Cetshwayo's recall.³³ In the meantime he had been to England to put his case before the queen, and it was decided that he should be reinstated. This was done under certain conditions stipulated by the British.³⁴

This half-hearted restoration of the king led to civil strife between the Usuthu tribe under the king and Mandlakazi tribe under Zibhebhu kaMaphitha, a relative of the king and one of the influential chiefs that had the backing of the British. After a protracted period of skirmish and counter-skirmish, violence and intrigue King Cetshwayo died in 1884 and left his son Dinizulu a legacy of trouble.³⁵ Because of the prohibition against the re-establishment of regiments, Zulus were thus freed for labour service.³⁶ Missionaries and traders were granted a lee way.

When Dinizulu succeeded his father, his councillors turned to the Boer farmers who had infiltrated northern Zululand for the support of the 15 year old heir. The Boers recognized the paramountcy of Dinizulu, and showed willingness to help. Zibhebhu appealed to the British, but since the latter were averse from extending their supremacy over Zululand, this was unsuccessful. In the clash that ensued Zibhebhu was defeated. As compensation the Boers proclaimed a "New Republic" over an

area of north-western Zululand. Feelings among the Zulus ran
³⁷ high. King Dinizulu was forced to appeal to the British. The
 British immediately prevented the Boers from annexing a potential
 harbour at St Lucia and arbitrated to reduce the Boer land
 claims. As a result many Zulus became labour-tenants on Boer
 farms. Finally the British decided to terminate the quarrels by
 occupying Zululand in 1887. The subsequent fight between King
 Dinizulu and Zibhebhu led to the banishment of King Dinizulu to
 St Helena. In 1891 he was allowed to return as Government
³⁸ "induna". Zululand was delimited by a land commission and the
³⁹ rest of the country was thrown open to white settlement.

The British administration entered fully into Zulu political and
 social life. Their intervention had a disintegrative effect on
 the Zulu social and political structure. Zululand was further
 drawn into a new industrial and agricultural system of Europe as
⁴⁰ had been the case in Natal.

Thousands of blacks that were settled in the territory annexed by
 the British and Boers presented problems. There was no provision
 for their cultural needs. They were simply regarded as
 foreigners, "intruders" from Zululand. Cloete had the function
 of unravelling these knotty problems. He, however, failed to
 solve the problems and evaded the issue by regarding blacks as
 refugees from the Zulu country. In order to resolve the problem

it was suggested that they be settled in scattered locations.

Thus began the modern black townships in Natal and KwaZulu.

After the Zulus' unsuccessful bid to regain their independence in 1906, King Dinizulu was exiled to the Transvaal where he died in 1913. His son Solomon was recognized as his successor. In 1948 Cyprian Bhekuzulu son of king Solomon was recognized as paramount chief of the Zulus although he was essentially under the control of the white government. His jurisdiction was confined to the Usuthu district and no longer extended over the whole of Zululand. The other chiefs had similar jurisdiction over their respective tribes. Even today the present Zulu king is recognized legally as the head of the Usuthu tribe in Nongoma^{41(a)} although the government recognizes his superior status.

4.2.2 Traditional Judicial Structure

The Zulus, like all the black tribes, had no written⁴² constitution as writing was yet unknown, and in their political⁴³ structure there was no separation of powers. Bearing in mind the underlying reason for the doctrine of separation of powers, which is the protection of individual liberty, this was not an issue in traditional society. In that society emphasis was not so much on the protection of the rights of the individual as on the protection of the interests of the society as a group. Thus

the traditional ruler was seen as the protector of the group, and he personified the father of the tribe.⁴⁴

The traditional judicial hierarchy of the Zulu people was based on the social or kinship system.⁴⁵ This has been defined as "the more or less permanent framework of relationships between the members of a community which manifests itself in an ordered group-life, with reciprocal rights and duties, privileges and obligations of members, determining behaviour patterns for each individual member towards other members, and moulding the feeling, thoughts and conduct of members according to these patterns so that it is only in and through them that the individual can achieve his personal self-realisation and participate in the satisfactions offered by the life of his community."⁴⁶ The social structure is, however, not static but is subject to constant change.⁴⁷

The smallest traditional social unit was the family home or umuzi (with its components indlunkulu, ikhohlo and iqadi and affiliated houses) under the control of the family head or umninimuzi.⁴⁸ As the most senior member in the family home he occupied a position of authority. By virtue of this he settled disputes in an informal manner between members of the family home.⁴⁹ Actually this power was not judicial but belonged to the sphere of family law as he could not enforce his decisions by judicial means.⁵⁰

Appeals from the decisions of the family head would lie to the lineage or umndeni court presided over by the most senior male in the group. ⁵¹ This "court" has no specific name. In this "court" the proceedings would be confidential in order to protect the internal solidarity ⁵² of the group. Whereas the structures discussed thus far were of a private or domestic nature, those that follow hereafter were of a public character.

A number of family homes formed a ward or isigodi with its own administrative and judicial machinery. ⁵³ An isigodi is part of a larger area isifunda with an induna in charge. ⁵⁴ Isigodi is the smallest politico-administrative unit which consists of relatives and non-relatives who are under the control of a specific ⁵⁵ induna. The induna who presided over the district or ward court did not depend on seniority, but on appointment by the chief. ⁵⁶ The function of this court was to hear appeals from the local or lineage "court", although it could also be a court of first instance and could even be a court of enquiry. It had ⁵⁷ limited criminal and civil jurisdiction.

The highest court in the tribe in traditional Zulu society was the chief's court, having both original and appellate ⁵⁸ jurisdiction in all cases. The tribe consisted of a body of persons organized under the rule of an independent chief. Although most of the members claimed descent from a common

ancestor, the tribe developed from a homogenous entity to include other elements. Thus with the passing of time allegiance to the chief rather than purity of birth became the unifying factor in a tribe. Quite often the tribe is named after the chief himself or one of his ancestors.

The chief was the highest judicial officer in the tribe. Yet in the execution of his duties he was assisted by various types of council. As the highest judicial officer in the tribe, the chief was responsible for the protection of the interests of all the members of the tribe. He was the soul of the legal life of the tribe, and on him rested the duty to maintain law and order throughout the tribe by doing justice to the aggrieved and punishing the offenders.

Chieftainship was hereditary, the rightful heir being ordinarily the eldest son of the chief's great wife. This is the wife for whom the tribe contributed ilobolo, and who would be regarded as the mother of the tribe. The heir generally had to succeed after the death of his father. Should he still be too young to succeed, a regent would be appointed who according to the customs of the tribe, would be the senior surviving brother to the deceased chief, and who, while in office, would exercise all the powers, rights and privileges of a chief, to step down only when the heir came of age. Although the regent was supposed to

vacate his position without difficulty when the heir came of age,
65
he sometimes made a show of resistance. In the absence of a son
from the great wife, the son next in line would succeed.
Marriage arrangements in a polygynous establishment ensured that
there would always be a son of the chief entitled to succeed
66
him.

The tendency on the part of the regent to resist the rightful
heir's claim, sometimes successfully, has led certain writers
to contend that when it comes to succession to office what really
counts is not really the existence of clearly defined rules as to
succession, but competition for power forms part of the political
process. The frequency with which accession to political office
deviates from the norms inexorably leads to the conclusion that
this cannot be regarded as an anomaly. It forms part of the
ordinary political process where the repertoire of norms does not
determine the outcome of the process, but this is also influenced
by the individual ability of the incumbent. This tendency is
67
not confined to regency only.

While this view may hold some water, it cannot be accepted at
face value that norms as to succession are of no consequence.
Norms provide a standard, but can be deviated from. In the area
of constitutional law, one often notices that unless strong
sanctions have developed for punishment of deviant conduct in a
particular community, it is possible to contravene the rules with

impunity. This does not mean that such conduct is lawful. It merely indicates that the sanctions are weak.

The chief acquired the knowledge of the laws and customs of his people by instruction by elder men and by attending court sessions during his period of training. If his predecessor lived to the ripe old age, the prospective chief could even be involved in the decision of cases under the direction of his predecessor.⁶⁸ In the absence of writing, memory, would be relied upon to a great extent in remembering the laws of the tribe. He exercised jurisdiction over a variety of crimes and delicts,⁶⁹ and the procedure was mostly informal. No strict distinction was drawn between crimes and delicts especially in matters of procedure.⁷⁰

In the exercise of his judicial functions the chief had no body of police, but made use of his court messengers for summoning or arresting persons for trial, administering punishment and enforcing his decisions. Failure to pay a fine led to seizure of property, chiefly cattle, or in the event of resistance, the dispatching of an armed detachment to bring in all the offender's cattle, and if necessary to destroy his family home and kill him.⁷¹ Such extreme powers, were, however, seldom used as part of the judicial process except if the chief suspected an intrigue against him.⁷²

When King Shaka consolidated the Zulu nation, the various tribes had more or less the same pattern of government. He did not completely destroy the structures. Chiefs and izinduna, some of the hereditary incumbents, others King Shaka's nominees, administered the territorial divisions and subdivisions of the kingdom. Only now threads of authority did not stop at the chiefly level, but the king had the last say. The king was, as it were, minister of justice and chief justice all in one. He was called to decide difficult cases, and with the assistance of his councillors, men skilled in law and debate, dispensed justice.

This is in broad outline the politico-judicial machinery which the Zulus had when the whites came into contact with them. This machinery, judged against the general background of the blacks, was quite adequate for the settlement of disputes in the Zulu community. The advent of whites was to usher in a new era when the traditional institutions would be subjected to severe strains because of conflicting values. As is usual, when two cultures meet, members of the two culture groups often emphasize differences between the two groups. The functional aspect of institutions is often ignored or underestimated. The institution of chieftainship would suffer the same fate under the white administration.

4.3 RECOGNITION OF CHIEFTAINSHIP

4.3.1 Before 1927

From the earlier discussion it is obvious that the institution of chieftainship had to be recognized by the early colonists if justice in the black community had to be done. Yet the recognition of chieftainship, which institution had earlier been disregarded, was not born of a need to do justice according to law in the black community. It was rather necessitated by a desire for effective administration of the black peoples. Owing to the shortage of financial and manpower resources, it was deemed advisable to make use of the system of indirect rule. In British colonial thought this approach of respecting traditional institutions was popularised and systematised in the writings of Lord Lugard⁷⁹ and Sir Donald Cameron and the policy of indirect rule which they advocated was applied in territories such as Nigeria and Tanganyika as it then was.⁸⁰ This policy spread throughout Anglophone Africa. According to this system institutions which the black peoples had evolved themselves were adapted for purposes of local government so that the black peoples might develop in a constitutional manner from their own past, guided and restrained by the traditions and sanctions which they had inherited (moulded or modified as they might be on the advice of British officers) and by the general advice and control⁸¹ of those officers.

Chiefs' courts were recognized by the British administration and
 82
 became the lowest courts in the judicial structure. The
 approach which was current at the time which was derived from
 social anthropologists was that of romanticizing the tribal life
 uncontaminated by western civilization and of eulogizing the
 virtues of traditional institutions. Although earlier
 administrators had seen the practical advantage of using
 indigenous institutions to help them with their limited resources
 of funds and personnel to administer the territories, to their
 successors these institutions had in themselves an inherent
 83
 value. To them the indigenous institutions were the only
 desirable vehicles through which the development of the black
 84
 people might be effected. As Morris puts it:

Free from distorting intrusions of
 western culture, they provided the
 means through which genuine African
 attitudes towards society and
 government might be expressed. No
 longer did the administration's
 image of the ideal African lie in
 the eager aspirant to western
 culture, mission-educated,
 assiduously making his blameless way
 up the ladder of clerical
 employment, with his regular
 devotion at this local church and
 his house impeccably furnished in
 the taste of the lower middle class
 of Victorian England. The ideal was
 now the traditional chief or elder
 who (provided of course, that he was
 co-operative with the administration
 and conformed to its standards of
 efficiency) dispensed fair but firm

justice to his people, whose interests were his primary consideration, and who, for their part, felt for him both affection and respect.

The chief's court was a traditional institution which vitally affected the lives of the whole black population, because the greatest bulk of litigation took place in this court under unwritten customary law. - It was felt that this institution should be retained although at the same time reformed and developed to meet the contemporary needs of the people and of the

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administration. Where chiefs did not exist, they were ✓

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created. Instead of their being traditional rulers, they became civil servants subject to the control of the white

87

administration and received salaries from the government. They

were used not only as judicial officers, but also as local

administrators. ✓ In the course of time these courts were supposed ✓

to develop from simple customary tribunals into systematized

courts of justice, with written records, court officers, and a

procedure closely modelled on that prevailing in the magistrates'

88

courts, although in a simpler form.

France, Portugal and Spain, on the other hand, pursued a policy

of progressive assimilation. Their policy was in essence that if

customary law was ignored, it would gradually disappear. Yet

after an initial period of theoretical assimilation, the French

colonies moved slowly towards this goal. Adaptations were made

to suit prevailing needs. Large parts of customary law and Islamic law were retained for the benefit of the African populations. The result was the creation of a dual legal system "not too dissimilar from that which the British, starting from entirely different premises, had installed in their colonies".^{88(a)}

In Natal the person responsible for implementing the system of black administration was Sir Theophilus Shepstone the Diplomatic Agent.⁸⁹ In adopting this scheme of using traditional leaders, a system which was in conflict with the prevailing colonial policy to Africans, Shepstone predated Lord Lugard's policy of indirect rule by many years.⁹⁰ Shepstone used this strategy despite opposition especially from Cloete, Recorder of the District Court.⁹¹ In the opinion of Cloete the use of traditional chiefs would delay the "improvement" of Africans. Moreover, he believed that chiefs on being recognised, would "set up their own authority in direct opposition to that of the Government", and the prestige of the government would consequently suffer.⁹²

Chieftainship became a vital part of the administrative structure which Shepstone devised. The use of traditional chiefs was not caused by Shepstone's admiration for these leaders. It was a pragmatic step necessitated by the shortage of manpower. Because of the disruption of tribes a "great portion of the Zulu

population had no hereditary chiefs. Where hereditary chiefs could not be found commoners were appointed. Both categories of chiefs were supposed to maintain law and order among their people, but their powers were carefully circumscribed.⁹³ In 1850 the Lieutenant-Governor of Natal was declared supreme chief of the African population of the colony. In this capacity he replaced the Zulu monarch in hearing appeals from chiefs' courts.⁹⁴ The use of chiefs in the administration distinguished Natal's policy from that adopted in the Cape after 1854 by Sir George Grey.⁹⁵

The use of chiefs was more acceptable to the colonists in Natal than in the Cape Colony because tribal organization had been pulverised, and then refurbished through Shepstone's efforts. Because many chiefs were commoners appointed to the office by Shepstone, this made them more loyal to the government. Moreover, in comparison with some of the tribes on the eastern frontier of the Cape, the Natal tribes were small.⁹⁶ But Shepstone's use of chiefs was not necessarily for the welfare of the Africans. Although it did this indirectly, it was more for effective control of the African population in favour of the white government.⁹⁷

In an appendix to the Natal Native Commission of 1881-2 there were 102 tribes under the charge of 173 chiefs or headmen in

Natal. Of these 99 were hereditary, 46 were appointed and 28 were headmen appointed and recognized by the government. These

98

had the same powers as chiefs. The proliferation of chiefs has later been criticised by chief Buthelezi in the following words:

"Shepstone in one of his generous moods even gave chieftainship

99

to some of the chaps who groomed his horses". He was saying

more or less the same thing when he asserted:

We represent the basis for the traditional indigenous government of our people. As a people we were conquered and through that conquest we and our institutions could not hope to emerge unscathed ... when Africa was conquered by imperialists during the last century they seized our institutions, distorted them and used them to serve their own ends. That is the reason why we have such a large number of chiefs today. There are families who have chiefs for several generations, and there are others who are creations of our conquerors. We have no intention of holding witch-hunts to point out which ones of the African potentates gathered here today fall under which category.¹⁰⁰

In spite of his views on the influence of hereditary chiefs,

101

Shepstone intended them to be gradually eliminated. In terms

of Ordinance 3 of 1849 minor judicial powers had been left in the hands of chiefs. They could adjudicate in all civil matters between blacks and in criminal matters of a minor nature

involving blacks. Because of their utility in administration, the Natal government attempted to maintain the prestige of the chiefs by allowing them to retain judicial powers. Shepstone saw the power of a chief in judicial matters as "a proper and harmless jurisdiction (by which) the dignity of the Chief is saved from any rude shock; native ideas of right in such matters are very much guided by their own peculiar customs and habits, and none are better able to understand these than the Chiefs." ¹⁰² The magistrate could rectify any "manifest injustice of any custom", by hearing appeals from chiefs' courts. Chiefs were empowered to summon any of their subjects to appear before them. Refusal to obey the summons was punishable by a fine. If a person was charged with a criminal offence the chief could send his messenger to bring him in, and if he resisted, he could be ¹⁰³ punished. ✓

An attempt was made further to bolster the prestige of the chiefs. Magistrates were instructed not to hear civil suits between Africans unless the parties had first taken the suit before the chief's court. This step was open to considerable ¹⁰⁴ criticism. ✓

Although Shepstone had earlier doubted the wisdom of paying chiefs salaries, as this might confirm in the minds of their subjects that they were petty functionaries of the government and

thereby lower their prestige, it was later decided that they be paid because they had lost their traditional sources of income.
105

The policy of using chiefs in the administration of justice among blacks was continued even after the departure of Shepstone. Some of their judicial powers were limited. Their criminal jurisdiction was taken away from them in 1875. The Native Administration Law of 1875 was aimed at least by some of its framers at gradually abolishing the powers of chiefs and to replace them with white officials.
106

Criticism was often expressed of the quality of justice dispensed by chiefs. Chiefs resented the loss of judicial powers they had suffered in 1875 and agitated to have them restored. Chiefs often exceeded their jurisdiction. It was felt necessary that the 1875 prohibition on chiefs' criminal jurisdiction be more publicised. In 1895 a magistrate of Weenen intimated that chiefs were jealous of their judicial functions and were resentful of the review of their decisions by higher courts. He also noted that some persisted in exceeding their powers by trying criminal cases and then taking the fines for themselves. Chiefs were also accused of bribery, nepotism and of administering arbitrary justice. Many similar accusations were made by magistrates and some magistrates recommended that they be deprived of all their judicial functions.
107

There is no doubt that chieftainship had been perverted and this led to the ebbing of its legitimacy within the black community. Yet the official policy of preserving it remained unaltered. Chiefs symbolised, for the Natal government, the old order which they were anxious to maintain. The administration, like the chiefs, was averse to any disintegration of tribal society and assumed that social change would inevitably bring about lawlessness, demoralisation and a questioning of the white man's rule. To circumvent this, the answer was seen as lying in giving more power to the chiefs so that they could effectively control their people. But despite this valiant effort, the actual use of the chiefs to the administration was on the wane. 108

An attempt was even made to educate chiefs so that they could be superior to their subjects in terms of education. Proposals were made for the establishment of four schools for the sons of chiefs and headmen where they would be taught matters of government and ordinary local laws, and how to conduct themselves towards the government, and those over whom they may have control. This, however, never materialised. To the elite class the chief's lack of education and the entrenchment of traditionalism which they stood for proved rather irksome. 109

Despite its shortcomings the Natal example of using traditional chiefs in the administration of justice among the black

inhabitants of this area did serve a purpose, and it was this example which had to be followed in the rest of South Africa in 1927 when uniform recognition was granted to customary law and the traditional rulers which policy ended the conflicting policies which had characterised the scene in the various provinces.

4.3.2 Recognition of chieftainship in 1927

It was in 1927 that the institution of chieftainship received uniform recognition in the whole of South Africa. ¹¹⁰ The belief had gained ground that blacks knew customary law better than Europeans and it was therefore advisable to leave the task in their hands. ¹¹¹ The law to be applied was customary law in civil disputes between blacks. It was felt that the power of chiefs had been unnecessarily broken down and not left to the gradual growth which kept pace with the development of the blacks. ¹¹²

This breakdown of the power of chiefs had been regarded as premature and this was in marked contrast to the then High Commission territories like Basutoland, and Swaziland. Such a view was regarded by General Smuts as being misguided and short-sighted. ¹¹³ But the recognition extended to chieftainship was partial and the lower courts were not recognised. This partial recognition has been criticised. ¹¹⁴

The recognition of chieftainship on the other hand was criticized by some "as being equivalent to setting up 'anthropological zoos': just as the wild-life was preserved in game-reserves, so the traditional institutions were artificially preserved in the 'native reserves'".¹¹⁵ Others did not condemn it outright.

According to the Native Representative Council: "Our system of Native administration must not therefore be regarded as a kind of procrustian bed into which all Africans must fit, whatever the facts of the situation." Although the committee conceded that it was desirable to apply customary law and recognize the chiefs' courts in appropriate circumstances, in other respects it did not accept the system of separate courts for blacks because this judicial segregation violated the principle of equality before the law, implied that African life was static whereas in fact it was gradually becoming integrated with the general life of the country, and it bolstered up the restrictive laws differentially affecting the blacks. Furthermore, the system of separate courts, had given blacks the impression that they were receiving a different kind of justice.¹¹⁶

The attitude of the black to the institution of chieftainship is particularly important because it demonstrates the level of acceptance of this institution. An attitude of suspicion against the institution of chieftainship has been caused by its use and perversion by the white establishment. This attitude has remained

even though chiefs are no longer controlled by the white government.¹¹⁷ Even some of the criticism against chiefs stems from this. Chieftainship is often perceived as not meeting the needs of today.¹¹⁸

4.4 CONCLUSION

The recognition and use of chiefs in the administration of justice was a two-edged sword. It undoubtedly flattered many blacks and it pleased the white administration. There is no doubt that ethnocentric bias militated against the use of traditional institutions as they were perceived as primitive. But on the other hand it would be more in accord with the dictates of justice to recognize the chiefs because they appreciated the system of values which prevailed within the black community. Justice in any event ultimately rests on the values of a particular society. These values are often a product of the historical development of a particular people. It is nonetheless clear that Natal's policy of recognizing chiefs was not motivated by a desire to see that justice was done in the black community. It was more for the benefit of the white administration. Chieftainship was used as an effective control measure over the restive black population and there was also shortage of personnel and financial resources.

Lack of respect for the traditional chiefs in the administration of justice may also be caused by the imposition on the customary law of highly organised legal systems developed in a completely different environment, motivated by different objectives, adopting procedures at variance with those of African law, and backed up by a different administrative system and military and police forces of the colonising powers.

119

Whatever the demerits of the system of indirect rule, and here the critic's political philosophy plays a role, historically the policy of indirect rule is evidence that not every conqueror "has automatically assumed his institutions to be superior and fit for immediate and total application in his conquered territories, and explains in part the survival of African indigenous institutions to the present day".

120

FOOTNOTES

- 1 Seagle The Quest for Law (1941) 27.
- 2 On the recognition of customary law in general see the following : Garthorne "Application of Native Law" 1929 Bantu Studies 245 et seq; Whitfield South African Native Law 2ed (1948) 1 et seq; Rogers Native Administration in the Union of South Africa 2ed (1949) 200; Holleman "The Recognition of Bantu Law in South Africa" 1955 The Future of Customary Law in Africa Symposium 233 et seq; Stafford & Franklin Principles of Native Law and the Natal Code (1956); Kahn "Recognition of Native Law and Creation of Native Courts" in Hahlo & Kahn (eds) The Union of South Africa : The Development of its Laws and Constitution (1960) 319 et seq; Brand Die Regsopleging van die Bantoe in Suid-Afrika unpublished LLD thesis UP (1965) 173 et seq; Rubin "Customary Family in Southern Africa : Its Place and Scope" in Anderson (ed) Family Law in Asia and Africa (1968) 255 et seq; Rubin "The Adaptation of Customary Family Law in South Africa" in Kuper & Kuper (eds) African Law : Adaptation and Development (1965) 196 et seq; Welsh "The Cultural Dimension of Apartheid" 1972 African Affairs 35 et seq; Olivier "Artikel 11(1) van die Bantoe Administrasiewet, Wet 38 van 1927" 1976 De Jure 284 et seq; Olivier "Artikel 11(1) van die Bantoe Administrasiewet, Wet 38 van 1927" 1977 De Jure 141 et seq; Visser Die Suid Afrikaanse Interne Aanwysingsreg unpublished LLD thesis UP (1979) 21 et seq; Olivier Die-Privaatreg van die Suid-Afrikaanse Bantoe-taalsprekendes 2ed (1981) et seq; Burman "Use and Abuse of the 'Modern' versus 'Traditional' Law Dichotomy in South Africa" 1979 Verfassung Und Recht in Ubersee 129 et seq; Bekker & Coertze Seymour's Customary Law in Southern Africa 4ed (1982) 1 et seq; Bennett Application of Customary Law in Southern Africa (1985) 39 et seq; Olivier Regspluralisme in Suid Afrika unpublished LLD thesis UP (1987)
- 3 Simons African Women : Their Legal Status in South Africa (1968) 15.
- 4 Brooke 67; Hahlo & Kahn 354.
- 5 Brooke *ibid.*
- 6 For more information on the history of the Zulus see the following: Bryant Olden Times in Zululand and Natal (1929); Ritter Shaka Zulu (1962); Gibson The Story of the Zulus (1911); Bryant (1967); Brookes & Webb A History of Natal (1965); Brookes (1974); Wilson and Thompson The Oxford History of South Africa (South Africa to 1870) vol 1 (1969); Lindsay-Young "The Native Policy of Benjamin Pine in Natal 1850-55" Archives Yearbook for South African History (1951); Welsh, The Roots of Segregation (Native policy in Colonial Natal) 1845-1910 (1971); Krige The Social System of the Zulus 2 ed (1974); Binns The Warrior People : Zulu Origins, Customs and Witchcraft (1974).

- 7 The art of writing was practically unknown. Before that the history and traditions of the Zulu people were passed to posterity by word of mouth.
- 8 Bryant (1929) 1 et seq; Krige (1974) 1; Bruwer 13; Brookes & Webb 1 et seq; Bryant (1967) 2 et seq.
- 9 Krige 5. The Zulus are a sub-group of the Nguni and in particular the Ntungwa-Nguni - see also Bryant (1929) 4.
- 10 Bruwer Die Bantoe van Suid-Afrika (1956) 16.
- 11 Bryant (1929) 13. Although mutual jealousies did exist among these tribes these were largely peaceful times.
- 12 Bruwer 16; Bryant (1929) 19.
- 13 Bryant idem 36.
- 14 Bryant idem 40; Krige 9.
- 15 Bryant idem 46.
- 16 Krige (1974) 10.
- 17 These included inter alia Mthethwa, Mdwandwe, Zulu, Buthelezi and Khumalo. On the Buthelezi see Buthelezi "The early history of the Buthelezi clans" in Argyle & Preston-Whyte (ed) Social System and Tradition in Southern Africa (1978) 19 et seq.
- 18 Bryant (1929) 73; Ritter 3.
- 19 Reader Zulu Tribe in Transition (1966) 3; Krige 11; Wilson 342; Ritter 3 et seq.
- 20 Buthelezi 19.
- 21 Gibson 40; Wilson & Thompson 343; Krige 11.
- 22 Van Warmelo A Preliminary Survey of the Bantu Tribes of South Africa (1935) 70.
- 23 Wilson & Thompson 345; Krige 11.
- 24 Gluckman Analysis of a Social Situation in Modern Zululand (1968) 35.
- 25 Gluckman (1968) 36. See also Venter "Perspectives on the Constitutions of Transkei, Bophuthatswana, Venda and Ciskei" in Vorster Wiechers and Van Vuuren (eds) Constitutions of Transkei, Bophuthatswana, Venda and Ciskei (1985) 2 et seq.

- 26 Bryant (1929) 662; Krige 17; Ritter 349.
- 27 Gluckman (1968) 36; contra Venter 2.
- 28 Gibson 90.
- 29 Gluckman (1968) 36; Venter 2.
- 30 Gibson 105; Krige 19; M Gluckman "The Kingdom of the Zulus" in Fortes & Evan-Pritchard (ed) African Political Systems (1964) 26.
- 31 Brookes & Webb 146; Wilson & Thompson 262; Gibson 170; Gluckman (1964) 26; Krige 20.
- 32 Gibson 218; Wilson & Thompson 264; Krige 20; Gluckman (1964) 26; Gluckman (1968) 37.
- 33 Certain groups in Britain, which were opposed to the Government intervention in African affairs, obtained Cetshwayo's restoration in 1883.
- 34 Brookes (1974) 150; Gibson 236; Krige 20.
- 35 Gluckman (1964) 27; Gibson 266; Wilson & Thompson 266.
- 36 Gluckman (1968) 37.
- 37 Wilson & Thompson 266; Gibson 273; Krige 20.
- 38 Wilson & Thompson II 345.
- 39 Gluckman (1968) 38.
- 40 Gluckman (1968) 39.
41. Simons (1968) 17.
- 41(a) Gluckman (1968) 27, 52; Bruwer 17; Brookes 155.
- 42 Schapera Government and Politics in Tribal Societies (1956) 40, 68.
- 43 Bruwer 185; Brooke 67; Myburgh "Law and Justice" in Hammond-Tooke (ed) The Bantu-speaking Peoples of Southern Africa (1974) 288.
- 44 De Clercq Die Politieke en Judisiële Organisasie van die AbakwaNzuza van Mtunzini unpublished MA dissertation UP (1969) 145; Schapera (1956) 42 et seq; Schapera "Political Institutions" in Schapera (ed) The Bantu-speaking Tribes of South Africa (1966) 177; Rubin (1965) 196.

- 45 Bruwer 182; Krige 23 et seq; De Clercq Die Familie-Erf en Opvolgingsreg van die AbakwaMzimela met Verwysing na Proses-regtelike Aspekte unpublished D.Phil thesis UP (1975) 50.
- 46 Hoernlé "Social Organization" in Schapera (ed) The Bantu-speaking Tribes of South Africa (1956) 67.
- 47 Hoernlé ibid; Krige 35, 217.
- 48 Krige ibid; Bruwer 183; Breytenbach Die Familiereg van die Usuthu-Zulu van Nongoma unpublished MA dissertation UP (1971) 81, 93; De Clercq (1969); De Clercq (1975) 74, 101; Coertze & Mostert Report 18, 281.
- 49 De Clercq (1969) 124; De Clercq (1975) 101; Schapera (1956) 31; Coertze & Mostert Report 281-2; contra see Breytenbach 83; Cronje "Enkele Opmerkings Rakende die Tradisionele Howe van die Swartes Met Besondere Verwysing na die Tswana" 1982 PU vir CHO Regsfakulteitslesings 1980 97.
- 50 Coertze & Mostert Report 282; De Clercq (1975) 96, 101.
- 51 De Clercq (1969) 102 et seq; De Clercq (1975) 97; Coertze & Mostert Report 283.
- 52 De Clercq (1975) 96.
- 53 Hoernle 70; Breytenbach 77; Bruwer 183; Krige 218; De Clercq (1969) 114; De Clercq (1975) 63 et seq; Coertze & Mostert Report 285.
- 54 Krige 218; De Clercq (1969) 92-3; De Clercq (1975) 65; Reader 264.
- 55 De Clercq (1969) 39; Myburgh (1974) 290.
- 56 De Clercq (1975) 65.
- 57 Coertze & Mostert Report 286.
- 58 Coertze & Mostert Report 289 et seq; Krige 218.
- 59 Krige 217; Schapera (1966) 173.
- 60 Schapera (1956) 42; Schapera (1966) 174; Myburgh (1974) 289.
- 61 De Clercq (1969) 83; Schapera (1966) 178; Myburgh (1974) 288.

- 62 Schapera (1966) 174; Bruwer 183; Hoernle 124. Lestrade "Some Notes on the Political Organisation of Certain Xhosa-speaking Tribes in the Transkeian Territories" 1937 Transaction of the Royal Society 294; Myburgh (1974) 288.
- 63 Whitfield 272; Schapera (1966) 175; De Clercq (1969) 72-6.
- 64 Schapera (1966) *ibid*; Hoernlé 175-6; De Clercq (1969) 77 et seq; Myburgh (1974) 288.
- 65 Schapera (1966) 176.
- 66 Bruwer 183; De Clercq (1969) 74-76.
- 67 See Gluckman Politics Law and Ritual in Tribal Society (1965) 138, 164; Comaroff "Rules and Rulers : Political Processes in a Tswana Chiefdom" 1978 Man 1 et seq; Comaroff & Roberts 36 et seq.
- 68 Myburgh (1974) 289.
- 69 Krige 228 et seq; Myburgh (1974) 297.
- 70 Schapera (1956) 103; Krige 228-229; Reader 299.
- 71 Schapera (1956) *ibid*.
- 72 Schapera (1956) *ibid*.
- 73 Wilson (1969) 345; Gibson 40 et seq.
- 74 Bruwer 183.
- 75 Gluckman (1970) 33.
- 76 Burman Chiefdom Politics and Alien Law (1981) 17 et seq.
- 77 For a discussion of chieftainship among the Tswana see, Coertze & Mostert Report 367 et seq; Coertze Die Famielie-Erf-en Opvolgingsreg van die Bafokeng van Rustenburg (1971) 135 et seq; Cronje 89 et seq; Ashton "Notes on the Political and Judicial Organization of the Tswana" (1937) Bantu Studies 67 et seq. On the North Sotho see Coertze & Mostert Report 295 et seq; Prinsloo Inheemse Publiekreg in Lebowa (1983) 33 et seq; 62 et seq. On the position among Venda see Coertze & Mostert Report 319 et seq. On the position among the Xhosa-speaking groups see Coertze & Mostert Report 251 et seq; Mqeke The Traditional and Modern Law of Procedure and Evidence in the Chiefs' Courts in Ciskei unpublished LLM dissertation Rhodes University (1985) 13 et seq; Erasmus Die Staatsregtelike Ontwikkeling van Transkei unpublished LLD thesis University of South Africa (1984) 36 et seq.

78. Allott (1968) 138; Welsh The Roots of Segregation (1971) 20, 111; Gower Independent Africa : The Challenge of the Legal Profession (1967) 7 et seq; Allott "What is to be Done With African Customary Law?" 1984 Journal of African Law 58.
79. The Dual Mandate in British Tropical Africa 4ed (1929) 193 et seq; see also Elias The Nature of African Customary Law (1956) 187.
80. Allott (1968) 138.
81. Lugard 194; Morris "Framework of Indirect Rule in East Africa" in Morris & Read (eds) Indirect Rule and the Search for Justice (1972) 3; Allott (1969) 138.
82. Allott (1968) 138; Allott (1984) 58.
83. Morris 14.
84. Morris 15-16.
85. Morris 131.
86. Welsh 20, 112.
87. Morris 131; Welsh 118, 273.
88. Welsh 19.
- 88(a) Allott (1970) 12-13; Allott (1980) 182; Elias 184-185; Visser 13.
89. Welsh *ibid.*
90. Bennett 43.
91. Spiller A History of the District and Supreme Courts of Natal (1846-1910) (1986) 2.
92. Welsh 15.
93. Welsh 93, 111.
94. Bennett 44.
95. Welsh 29.
96. Welsh 111.
97. Welsh 112-113.

- 98 Welsh 114.
- 99 1978 KwaZulu Hansard 380.
- 100 Unpublished speech delivered on 2 June 1978 to the 2nd Conference of Chiefs.
- 101 Welsh 115.
- 102 Welsh 116.
- 103 Welsh *ibid.*
- 104 Welsh 117.
- 105 Welsh 125.
- 106 Welsh 273.
- 107 Welsh 278-279.
- 108 Welsh 284.
- 109 Welsh 286.
- 110 S2(7) of the Black Administration Act 38 of 1927.
- 111 Lewin : Studies in African Native Law (1947) 96.
- 112 The then Minister of Natives Affairs 1927 House of Assembly Debates vol 9 cols 2906-2907.
- 113 General Smuts 1927 House of Assembly Debates cols 2917-2918.
- 114 De Clercq (1975) 156-157.
- 115 Allott (1968) 138.
- 116 Adjourned Eighth Session 1945, Proceedings vol iii, Annexure "G" 225-7. The dual court structure and the dual system applicable to blacks has also been regarded as being liable to subvert legal certainty and equality of treatment and consequently to be incompatible with the protection of human rights - Van der Vyver "Human Rights Aspects of the Dual System Applying to Blacks in South Africa" 1982 CILSA 312 et seq.
- 117 This view was also found by the Commission of Inquiry into Local and Regional Government, the activation of Traditional Authorities and the Political Structure in the Republic of Bophuthatswana 1982 (hereinafter called the Wiechers commission) 42.

118 Wiechers Commission *ibid.*

119 Allott (1968) 137.

120 Allott *idem* 138-139.

CHAPTER V

APPOINTMENT AND JURISDICTION OF CHIEFS

5.1 INTRODUCTION

In an earlier chapter it was pointed out that the method of appointment of judicial officers is an essential element which ensures their independence.¹ In this chapter it is intended to discuss the method of appointment and jurisdiction of chiefs in KwaZulu and to answer the question whether these do ensure the independence of chiefs in the administration of justice. The method of appointment of chiefs has been largely influenced by the political history surrounding the office of chief. It did not develop as a result of the dictates of justice, but it was determined by what seemed beneficial to the custodians of power at the time. The jurisdiction of chiefs was similarly affected.

By jurisdiction is commonly meant the power or competence of the court to hear and determine an issue between the parties.² The appointment of chiefs is governed by the provisions of the Black Administration Act.³ Regulations which prescribed their duties, powers and privileges were contained in proclamation 110 of 1957⁴ which was repealed by the KwaZulu Chiefs and Headmen's Act and their duties, powers and privileges are now contained in this act.

5.2 APPOINTMENT

The state president, and in the case of the national states like KwaZulu the cabinet, is empowered to appoint any person as a chief of a tribe, and chief includes a paramount chief.

Theoretically this means that anyone can be appointed as chief irrespective of his descent. In practice, however, effect will be given to the customary law of succession. Yet as early as Shepstone's times it was made clear that chieftainship did not depend on hereditary succession, but upon appointment by the supreme chief, and that whereas the supreme chief was willing to appoint sons of deceased chiefs, where those sons were fit and proper persons for such appointment, the supreme chief could depose a son of a chief and appoint somebody more fit in his place. This means that the chief's heir cannot succeed to his father's position without due appointment.

This situation may create unnecessary friction as the rightful heir might resist if the position is given to somebody who is not supposed to succeed according to customary law. Fortunately, few such instances have taken place. Yet this possibility is undesirable. It is a further indication that the recognition of chiefs has been partial and not complete as succession has been tempered with. This could lead to an imposition of a chief who is not acceptable to the tribe concerned, and is open to

8
considerable criticism.

But the provisions of the KwaZulu Act stipulate that for purposes of general succession as defined in s81, the heir to the hereditary chief shall be the person whom the cabinet appoints or recognizes for appointment under s2(7) of the act as successor to chieftainship.⁹ This provision, however, does not state that the cabinet will appoint or recognize the appointment of the hereditary heir. It merely stipulates that the person who will be entitled to succeed to the property of the deceased chief will be the one already appointed by the cabinet.¹⁰

Section 10(2) of the KwaZulu Act provides that if the cabinet suspects that a dispute may arise as to who should succeed, it may instruct three advisers selected on account of their special knowledge of the Zulu language, laws and customs to inquire into the matter and to report thereon to it via the secretary.¹¹ In performing this task they have power equal to that of a magistrate's court to summon witnesses, examine them under oath and to compel the production of documents. The secretary is also empowered to inquire into all cases of disputed chieftainships or succession to chieftainships, of tribal quarrels or dissatisfaction and of friction between chiefs or tribes.¹² In this case he has all the powers vested in a magistrate's court to summon witnesses, examine them under oath and to compel the

13

production of documents.

These provisions create the impression that despite the wide ambit of section 2(7), the state president or the cabinet as the case may be, will take cognizance of customary law of succession. Moreover, the provisions of the later act will override those of the earlier one. It will only be for good and sufficient reasons that the claims of the customary heir will be disregarded.

Another problem which arises from the appointment of chiefs is that no distinction is made, especially in respect of judicial powers, between an ordinary chief and the king. This is unsatisfactory to many members of some tribes because it amounts to undermining the superior status of the Zulu king. It may bring about division and conflict. The fact that the cabinet has to appoint the paramount chief or king appears to be anomalous because the king has a status superior to that of the chief minister or ministers. Specific provision is made by legislation that if the king is present at a ceremonial occasion of the legislative assembly, the king enjoys pre-eminence over the chief minister and ministers except in matters directly concerning the business of the legislative assembly.

14

The successor's educational qualifications play no part in his fitness for appointment. Chiefs' range from those who are illiterate to those who have matric or who have degrees.

Extremely few chiefs hold degrees. In KwaZulu as a whole few chiefs have university qualifications. Some chiefs can hardly write their names. In a purely traditional society this posed no problems because people occupied more or less the same cultural level. Moreover, the chief did not act individually but with the assistance of his councillors. Today, however, this leads to the somewhat lowering of the prestige of the chief's court especially in the eyes of the educated. This is undesirable as it is essential that all members of the society should have respect for the judicial machinery of the tribe. Furthermore, this leads to some feeling of suspicion between the educated and the chiefs. Some of the educated people interviewed were of the opinion that uneducated chiefs are generally biased against educated blacks. They intimate that as a result a chief will give a decision against an educated person simply because he wants to demonstrate his authority over him. Fortunately there is a possibility of appeal. Yet some chiefs do not take kindly to such appeals especially if the appeal is reversed.

It was probably to circumvent some of these objections that in 1978 the KwaZulu legislative assembly passed a resolution, which was moved by a chief, to the effect that any heir to chieftainship should pass at least standard 10, unless there are good and sufficient reasons why he cannot attain that standard, such as natural causes. ^{14(a)} Although this is a commendable step, the legal effect of this resolution is doubtful. It is

submitted that it is merely persuasive and not peremptory.

Besides formal education, it is doubtful that chiefs are sufficiently equipped for their judicial functions. Today it cannot be taken for granted that chiefs possess enough knowledge of the law they are supposed to apply. Whereas this could be so in traditional society, it cannot be said that chiefs are experts in customary law today. From the popular survey made, the majority of tribal persons interviewed appeared to be satisfied with the chiefs' knowledge of the law. Many were prepared to take their cases to the chiefs' courts because they are of the view that chiefs know customary law better than the magistrates who only know book law and not the living law of the people. From the other groups, it did transpire that chiefs, unless properly trained, could tend to apply the traditional law instead of the law as amended. This is so especially in an area like KwaZulu where there has been a drastic amendment of the code of Zulu law. Unless this is properly checked, it could give rise to a conflict situation especially if the appeals from the chiefs' courts are constantly reversed.

In the past the chief also relied on his councillors for legal knowledge. The chief himself was the presiding judicial officer. Certain senior persons regularly attended court sessions. All participants in the court proceedings learnt the law in the court, and as time went on a man's knowledge and wisdom grew. In

the process the knowledge of law of one generation was transmitted to the other. This applied equally to the chiefs as well as councillors and the ordinary members of the tribe. The presence of a number of older council members in the chief's family home ensured continuity in the transmission of legal knowledge despite the change of chiefs. The chief's court was thus not only an organ for the maintenance of law and justice, but also a traditional law school. This ensured both the proper transmission of legal knowledge and the creation of law.¹⁶ Under the present circumstances where everyone has to work for a living, the court sessions are poorly attended, and the chief has to do judicial work with a weakened body of councillors. Although knowledge of customary law still lives in the memory of the elderly men, the healthy transmission of legal knowledge is on the wane. The decimation and the systematic disappearance of knowledgeable personnel in the chief's court creates a serious problem and leads to legal uncertainty in the community, and to the tarnishing of the status and prestige of the court. This is aggravated by the continuous amendment of customary law by a spate of legislation and by decisions of the higher courts. This causes such confusion that even experts in law are no longer certain of the position.¹⁷

The courts have no jurisdiction to question or pronounce upon the validity of an appointment by the supreme chief.¹⁸ The state president or the cabinet has the power to depose a chief.¹⁹ In

Minister van Naturellesake v Monnakgotla the then minister of Native Affairs, dismissed a chief from office without affording him an opportunity to answer to the accusations alleged against him. The court held that there is neither express nor implied exclusion of the audi alteram partem rule and that the chief therefore should have been informed and afforded a hearing before his deposition. This decision is to be preferred because it is a general principle of administrative law that when the rights and interests of an individual will be adversely affected by the decision of an official, he must be given a hearing.²¹ It is in pure administrative acts, where the official concerned has no discretion, that the audi alteram partem rule may be dispensed with.²²

Unless deposed, or for any other reasons retires prematurely, the chief continues in office for life. This ensures that in his administration of justice there is continuity and security of tenure is to the advantage of the administration of justice.

5.3 JURISDICTION

Both civil and criminal jurisdiction is conferred on certain chiefs.²³ This conferment of jurisdiction apparently does not have the effect of creating a court, but it is conferred on the chief personally. In the case of Tsautsi v Nene²⁴ it was decided

that a chief or headman presiding over a civil claim does not constitute a court of law, but that within his limited sphere he exercises powers similar to those of a court of law and his judgment, subject to the right of either party to appeal therefrom, is binding and becomes res judicata. But in other cases it has also been clearly asserted that courts in the real sense are created. ^{24(a)} This is the better of the two views especially because there has been a general trend towards fuller recognition of the customary courts.

It appears that the jurisdiction conferred by the act is personal. ²⁵ Although this is theoretically so, in practice the chief does not exercise his powers as an individual but jointly with his council. Moreover, s 4(3) of the Black Authorities Act ²⁶ provides that no judgment, decision or direction given or order made by a chief or headman, or the deputy of a chief in the exercise of his jurisdiction conferred upon him by law, is invalidated on account of its having been given or made by the chief, or headman or deputy acting on the advice or with the consent or at the instance of a tribal authority and any judgment decision or direction so given or order so made is for all purposes deemed to have been given or made by the chief, headman or deputy.

This provision demonstrates that although the earlier provision

had emphasized the personal nature of the jurisdiction of the chief, it was later recognized that at customary law the chief is not a dictator, but he acts with his council. The tendency to accentuate the personal nature of the chief's powers would also have the effect of estranging the chief from his councillors. Moreover, it would lead to a number of problems as it places a heavy burden on the judicial officer concerned because he is obliged to supervise everything personally. Where no deputy is appointed, and the chief is ill or absent, this could cause a delay to litigants and lead to a feeling of frustration and the consequent loss of respect for the chief's court. Consequently they would go to the magistrate's court which has concurrent jurisdiction. This also causes a misapprehension of the judicial duty of the councillors. According to customary law the chief's court consists of the chief and his council. The councillors find the law by discussion and the chief or his deputy delivers the judgment. Even if the chief was absent, among some tribes he can deliver judgment as if he was there. Under traditional circumstances councillors played a significant role in the administration of justice. But if the judicial power is closely connected with the person of the chief, this would lead to a tendency among some younger chiefs to ignore their councillors and to give judgment without their co-operation. This would create conflicts among members of the tribe and would not be conducive to the maintenance of good relations, healthy tribal

management and the maintenance of law and order. ²⁷

5.3.1 Civil Jurisdiction

According to section 12 of the Black Administration Act the chief or headman recognized in terms of s2(7) or s 2(8) of the act can be empowered to hear and decide certain civil cases between blacks resident in his area of jurisdiction. This power can be withdrawn. ²⁸

A chief has no jurisdiction in matters falling under the common law only. Thus where a plaintiff married by Christian rites sued in a chief's court for damages for adultery and on appeal to the commissioner's court the plaintiff's claim was dismissed, the commissioner having applied common law, the appeal court for commissioners' courts held that a marriage by Christian rites excluded customary law and only common law principles could be applied. The action for damages for adultery had therefore to be decided according to common law, and the chief had no jurisdiction to hear a case of this nature. ²⁹

This view is to be preferred because the chiefs are granted jurisdiction to decide matters based on customary law and not common law. They are mostly ignorant of the common law or their knowledge of the common law is superficial. Even if it is possible for a chief to acquaint himself with the provisions of the common law, it would amount to his exceeding his jurisdiction ³⁰ if he heard a case based on common law. A chief's court is a creature of statute and can exercise no greater jurisdiction than that conferred by the said statute.

From an examination of the records of chiefs' judgments in four separate districts in KwaZulu it became quite clear that chiefs often hear not only cases based on customary law, but also on common law or even statutory law. These include inter alia, claims for professional services rendered, failure to pay instalments for a tractor sold, claim for money lent and advanced and many others. This means that chiefs generally exceed their civil jurisdiction as far as the type of case in question is concerned. In respect of customary cases their jurisdiction is unlimited.

5.3.2 Criminal jurisdiction

In terms of s 20 of the Black Administration Act chiefs have limited criminal jurisdiction. Their jurisdiction is limited to black persons residing in an area under their control in respect of any offence at common law or customary law other than an offence referred to in the third schedule to the Act, and any statutory offence other than an offence referred to in the third schedule to the Act. These include serious criminal offences like treason, sedition, murder, rape and fraud. But the chief cannot try a criminal case where one of the parties is not a black or in respect of property belonging to a person who is not a black other than property belonging to the South African Black Trust or held in trust for a black tribe or a community or

aggregation of blacks or a black. Neither may a chief inflict punishment which involves death, mutilation, grievous bodily harm or imprisonment nor impose a fine which exceeds forty rand or two head of large stock or ten head of small stock.³¹ In Bophuthatswana, Gazankulu and Lebowa the amount has been raised to R200.³² This was a reasonable step as the amount of R40 is unrealistically small and has no bearing on the current value of two head of large stock or ten head of small stock. Similarly³³ in KwaZulu the maximum fine was in 1979 raised to R160. Although this is slightly lower than the maximum fine fixed by the other national and independent states, it is far better than the meagre fine of R40.

From a survey of some court records it appeared that chiefs generally exceed their criminal jurisdiction. This is undesirable for similar reasons as those advanced in respect of civil jurisdiction. From some magistrates interviewed it also transpired that chiefs are generally prejudiced against an accused.³⁴ Some informants said that they prefer the chief's court because it does not distinguish between civil and criminal cases, but it deals with both the civil and the criminal aspects of the case in one action. This is both convenient and economical. But it has been decided that a chief has no power to impose a fine in a civil case as this is irregular.³⁵ A layman, however, does not appreciate why separate actions have to be brought based on the same facts.

Some people interviewed are in favour of the chief's criminal jurisdiction being increased to include the hearing of crimes like arson, stock theft, assault and rape. This is based on the fact that many blacks stay far from the police stations and the machinery of justice grinds slowly before the case is tried. Moreover, there is a strong retributive element in the sentences of a chief unlike the "too lenient approach" adopted by western courts. Thus it is felt that this latter approach favours the criminal rather than the complainant. This view is based on the traditional approach to crime, where the judicial officer is supposed to express society's strong indignation at the commission of the crime. Emphasis is on the individual and not on the crime as such. The main aim is to prevent the disruption of relationships and to make it possible for the members of the community to live together amicably in future.

The chief has power to mete out corporal punishment on unmarried males below the apparent age of 30. Some informants are in favour of the retention of this, whereas others are not. Those in favour feel that corporal punishment is a more effective deterrent than imprisonment. Some interviewees are of the opinion that corporal punishment is desirable where the payment of a fine is going to prejudice others who are dependent on the accused, and in the case of people who cannot pay their fines. Corporal punishment is viewed as an effective corrective for

those who commit assault. Those who commit this crime may be charged in a magistrate's court, plead guilty, ask for mercy and receive a light sentence. This creates a lot of concern in the black society, and the chief is helpless to combat this.³⁹ The objection against this form of punishment is that some chiefs mete it out arbitrarily, not only on the said males but also on women. Moreover, the western courts adopt a negative attitude towards corporal punishment.⁴⁰ Even, the words "apparent age of thirty" are misleading. They can prejudice a healthy man of forty who looks like a young man of less than thirty. The use of the word "unmarried" is unsatisfactory. It implies that a man of say twenty-two years of age is exempt from this type of punishment if he is married. But if his wife dies or he divorces her before he reaches the age of thirty, this exemption lapses and there is no justifiable reason for this.⁴¹

Although a chief generally does not have jurisdiction in respect of a white person, he may exercise jurisdiction in the case of contempt of court committed by a white because such jurisdiction does not require that the chief should have jurisdiction concerning the matter in dispute or over the person who appears before him.⁴²

5.4 LAW DISPENSED

The law which a chief's court has to apply is customary law. As

regards crimes there must be certainty on the customary crime in question. In Dumezweni,⁴³ Steyn CJ said: "It is eminently desirable that there should be a precise definition of an offence and that its elements should not be uncertain."

Joint criminal liability is not permissible. In Jokwana⁴⁴ the court declared:

Whatever the customs may be among natives, it is quite clear that in the criminal law we cannot countenance any such doctrine. It would be monstrous and in conflict with all our accepted notions to saddle this appellant with criminal liability for the acts of his daughter.

Rules as such are not fundamental to the system of justice administered in the chief's court. The formal law model of linking 'facts' to 'rules' and deductively to arrive at a legal decision does not necessarily apply. Decisions rest heavily on the individual character derived from participants' knowledge and impressions of a person's behaviour and attitudes. The justice that is administered is more popular than formal.⁴⁵ Emphasis is not so much on what a person has done but on what kind of a person he is and what can be expected of him in future.⁴⁶ It is also on the peace-keeping and social harmonizing function of law. Punishment and the settlement of disputes also accentuate the

law's function in expressing the will and traditions of the community. The distinction between moral and legal issues is blurred⁴⁷ and little distinction is made between criminal and civil cases. At times the chief's court does not make a distinction between civil disputes and administrative complaints.

Although chiefs are supposed to settle civil disputes only according to customary law, they even deal with cases involving common law. Their knowledge of this is doubtful. The only saving factor may be that in such cases as are heard by the chief's court, there are no complicated questions of law involved, but they involve merely questions of fact which may be established by evidence.

From the records of the decisions of chiefs, it is extremely difficult to determine the law applied. These records are cryptic and barely contain the claim and the amount awarded as well as costs. No elaborate arguments on points of law are included. This apparently does not worry the litigants as the matter is thoroughly thrashed out orally.

From the court sessions attended it appeared that in many cases the law applied to a particular set of facts is not even stated. It is presumed that the parties know what the law is. The councillors discuss the issues, and the chief pronounces the

verdict. The decision is mostly based on customary law or at times merely on common sense. There is no checking and cross-checking of the correctness of the decision in the light of the current law.

48

What accounts for this is that customary law is often expressed in simple language and citizens take part in its making and administration. The popularisation of the law derives from the fact that legal processes are generally localized rather than remote. Consequently according to the traditional set-up each community unit has some machinery of some greater or less formality for the public to settle disputes.

49

At times the chiefs do not make a distinction between what is pure custom and what is customary law. A case in point that was related from empirical research was that of a widow who was fined by a chief's court a beast for failing to wear mourning clothes after the death of her husband. Although the widow had correctly contended that this was not the law and that there was no one generally accepted type of garment worn by widows, her contention was rejected and she was fined one beast on the grounds that her action would cause inclement weather and consequently the destruction of crops. Her guilt therefore lay in her failure to conform to custom.

A few more cases extracted from the records will illustrate the position. A number of cases that come before the chief's court relate to the claim for damages for pregnancy. The amount claimed often varies from tribe to tribe. Some demand two head of cattle while others demand three or even four. These are referred to as ingezamagceke, ingquthu, imvimba and inhlabathi. The plaintiff's damages are mostly in the form of cattle on the hoof. In exceptional cases the plaintiff would claim damages sounding in money.

Some other claims involve destruction of crops by animals belonging to somebody else, defamation and insults like imputing witchcraft to a person or calling his wife a prostitute, unlawful ploughing of the graves of somebody else's forefathers, ploughing somebody's fields, claims for sisa cattle, claims for return of ilobolo and other minor causes of action based both on customary law and common law.

As regards damage caused by animals, research revealed that civil disputes in the sugar cane areas mostly concerned the destruction of sugar cane plantations by cattle. The plaintiff would often claim monetary compensation here. In some cases cattle, goats, sheep, or donkeys would be alleged to have destroyed mealies, sweet potatoes or beans. Here the plaintiff's claim would read: "The defendant's donkeys ate my mealies, so I want six bags of

mealies." It appeared that the court does not often consider itself bound to give judgment for the plaintiff in the form of damages as prayed for by the plaintiff. Even if the claim specifically stipulates that the plaintiff claims so many cattle or bags of mealies, the court in its discretion would simply give judgment sounding in money or cattle or their monetary equivalent. In some cases the plaintiff would omit to state the damages he suffered as a result of the defendant's wrongful conduct; the court would mero motu fix the damages to be awarded to the plaintiff. This is irregular. All damages are accompanied by a stipulation as to the value of costs the defendant must pay. The chief's judgment is executable by the chief who sends out his messengers (the tribal constables) to attach from the judgment debtor the exact amount of the judgment debt; out of this the chief pays himself his fee for hearing the case, which is entirely in his own discretion and which usually consists of a smaller, but nevertheless fairly substantial part of the property recovered. The balance is handed to the successful party.

The research also revealed that the costs awarded by the chiefs' court are in certain cases out of all proportion to the damages awarded to the plaintiff. It is contended by the community that the costs are the chief's fees for hearing the matter. This tendency is open to criticism and may be interpreted as a travesty of justice.

Actions based on defamation of character take various forms like imputing witchcraft to a person, calling a person's wife a prostitute, or alleging that the plaintiff killed one's dogs. It is interesting to note that some writers suggest that the only form of defamation recognised in black traditional law and practice is imputing of witchcraft.⁵⁰ All forms of utterances normally regarded a defamation by the law of the land, are also treated as such by traditional customary law in these chiefs' courts.

There are miscellaneous actions which have been found to be rather common before the chief's court for example "damages for unlawfully ploughing my forefathers' graves"; bringing isishimeyane to another's kraal; coming into another's kraal armed. These actions appear to be founded on the undesirability of these practices. The Black Administration Act authorises the chief's court to hear matters emanating from black customs and practices only.⁵¹ But actions such as a claim for professional services rendered, failure to pay instalments in respect of a tractor sold, claim for money lent and advanced, can hardly be said to be based on traditional customs, but come frequently before the chief's court. This is clearly a case of exceeding jurisdiction.

The chief's court does not make a distinction between civil disputes and purely administrative matters. If a member of the

public comes to report a complaint he is invariably advised to open up a case thus rendering him liable for suing fee (inkundla fee). Matters such as that the defendant ploughed the plaintiff's late father's fields; defendant has cut down trees on a piece of land belonging to the plaintiff, would be solved administratively, without the need for instituting an action. It is interesting to note, however, that the chief's court finds it difficult in purely administrative matters to give judgment for either party sounding in actual damages. The judgment would almost always read "for plaintiff for R16,50 costs." It is also to be noted that it is still difficult for this court to draw a fine distinction between civil disputes and criminal matters. Matters such as failure to pay dog tax are per se criminal, but quite a number of them are brought before the chief as civil disputes. The plaintiff in one such case was the tribal constable. The court said "judgment for plaintiff for R30 plus R6 costs." There is an apparent misunderstanding as to the language used in criminal matters and that used in civil disputes. The court's judgment in a purely civil matter would read, "Elijah Mbatha, I find you guilty because Jiyane told this court that you did this or that".

In one 1978 case which came before the chief's court in Lower Umfolozi, the plaintiff instituted an action alleging among other things that he prayed for compensation from the defendant who,

without his authority, stripped his motor vehicle and stole many parts. The judgment portion of the written record read "Mbatha, I find you guilty because Sibiya told the court he did not steal any of your car parts - the owner of the kraal where you parked your car told the court that you came with another man and you sold to him the parts of your car." Mbatha was in fact the plaintiff in the action but he now stood convicted. This is obviously attributable to an attempt to adopt the foreign procedure. The use of the English language in the records is also to a certain extent accountable for this confusion. In cases written in Zulu, one gets a better understanding on the issues involved in the proceedings.

In the cases dealt with it is obvious that whenever an action has been instituted by the plaintiff, the court will invariably give judgment for the plaintiff plus costs. It is only in a few cases that judgment was clearly for the defendant. The reason may perhaps be found in the saying that there is no smoke without fire. In other words, the reasoning appears to be that the plaintiff would not have instituted an action against the defendant if he were in fact innocent. There are, however, a limited number of cases where the record would merely reflect: "Plaintiff's case dismissed". But this dismissal is never with costs. The defendant is still liable for costs, an unusual set up in the western sense.

In those cases where the plaintiff stipulated the quantum of damages he suffered, the damages were almost always in the form of beasts on the hoof or rarely the monetary value thereof. In actions which one would ordinarily regard as trivial like "hitting my dog for no reason", the plaintiff's prayer for damages would read "So I want a goat".

Chiefs' courts are supposed to be bound by the decisions of the magistrates' courts or even the supreme court according to the operation of the precedent system. These judgments, however, hardly reach the chiefs, and even if they did, the chiefs would not have insight into western legal reasoning so that they can apply those principles in their courts. In fact chiefs are of the opinion that they know customary law better than western courts. Moreover, the decisions of magistrates' courts are not written. They only give reasons for judgment if there is a further appeal to the supreme court, just as chiefs are supposed to give reasons for judgment when there is an appeal to the
52
magistrate's court.

5.5 POWER TO PUNISH FOR CONTEMPT OF COURT

A chief's court would not be a court in the real sense if it did not have the power to ensure respect for and dignity of the proceedings of the court. In exercising their lawful judicial

functions, chiefs and headmen are entitled to the privileges of a court of law in respect of disobedience of their orders or contempt of court and may impose a fine not exceeding four rand⁵³ for any such offence. The amount of R4 appears to be trivial⁵⁴ by present standards and ought to be increased. In Majozi a chief had fined an accused R20 for contempt of court. It was held that as the chief was acting under s20(1) of the Act the fine imposed was a proper one and that s20 of the code does not apply in this case. It would therefore appear that the judge conceded that a chief has inherent jurisdiction to punish for contempt. In one tribe the research revealed that fifty percent of the cases were for contempt of court. It would appear that this court was strict in ensuring respect for its operation and obedience of its orders.

It is immaterial whether the court exercises civil or criminal⁵⁵ jurisdiction or whether it has operated within or outside its⁵⁶ jurisdiction. The chiefs may fine a person in facie curiae or⁵⁷ after warning to appear. Failure to obey an order to appear in⁵⁸ court is not contempt in facie curiae. Where a person has⁵⁹ committed contempt of court in facie curiae the court may⁶⁰ summarily try and punish him after informing him of the misconduct which constitutes the offence. But the wrongdoer must be afforded an opportunity to give reasons why he should not be convicted, especially if his action is not so unequivocal as

61

to demonstrate utter contempt.

The summary procedure in contempt of court in facie curiae is a drastic procedure which should be resorted to only with utmost caution⁶² because the judicial officer is here prosecutor, witness and judge and the hearing is usually emotionally charged.⁶³ This procedure has been severely criticised because it may lead to arbitrary results.⁶⁴ It is doubtful whether the chiefs' courts adopt any circumspection when exercising this power. In the tribe where almost fifty percent of the cases were for contempt, the impression gained was that the chief was too zealous to protect the dignity and authority of his court.⁶⁵

A chief has jurisdiction over those resident in his ward. His jurisdiction is territorial and not personal. But if a defendant does not object and accepts and submits to his jurisdiction, he cannot subsequently complain. The court will, however, not lightly assume that a litigant has submitted himself to the jurisdiction of the court.⁶⁶

5.6 CONCLUSION

Although the appointment of chiefs is no longer strictly based on customary law of succession, in practice the customs of the people will be followed unless there are cogent and sufficient

reasons for deviating from custom. This method of appointment has in practice not led to the position of chief being seriously affected in his administration of justice. The main drawback in the appointment of the chief according to custom is that his appointment is not based on his legal expertise or educational qualifications, but on fortuitous birth. The only saving factor is that he does not act as an individual but depends on his councillors.

Although the jurisdiction of chiefs is limited in criminal cases, it would appear that chiefs often exceed their jurisdiction. This may be attributed to their ignorance of the scope of their jurisdiction or it may be attributable to the chief's reluctance to declare that he has no jurisdiction in the matter. Such a step would lower his prestige in the eyes of his tribe. This is because in the traditional set up the chief is the highest judicial officer in the tribe. In other instances the bringing of cases before the chief, although they fall outside his jurisdiction, may be caused by the fact that this court attends to such cases expeditiously - especially in places which are distant from magistrate's court.

Even in civil cases chiefs do exceed their jurisdiction by hearing matters based on common law. This may also be due to the fact that these courts settle these disputes timeously whereas in the magistrate's court a long time would elapse before the case

is finally decided. Moreover, when tribesmen submit some of their disputes to the chief and this falls beyond his civil jurisdiction, the chief might be loathe to confess that the matter does not fall within his jurisdiction.

While a substantial portion of the findings from empirical research give one the impression that the chiefs' courts are actually not worthy to exist, this judgment is often superficial because one looks at these courts through western spectacles. The fact of the matter is that these courts reflect the sociological and cultural history of the society they serve. What is uppermost in these courts is that a dispute must be settled and harmony must be restored.

FOOTNOTES

- 1 Chapter 11.
- 2 Forsyth and Bennett Private International Law (1981) 130; see also Taitz The Inherent Jurisdiction of the Supreme Court (1985) 1.
- 3 S2(7) of Act 38 of 1927.
- 4 Act 8 of 1974.
- 5 S2(7) of Act 38 of 1927.
- 6 S35 of Act 38 of 1927.
- 7 Welsh 118.
- 8 De Clercq (1969) 147.
- 9 S10(1) of Act 16 of 1985; see also S10(1) of the Natal Code of Zulu Law Proc R151 of 1987. If s10(1) of the Code was not enacted the person recognized by the state president would not be the heir of the deceased chief. In Sigcau v Sigcau 1944 AD 67 75, Watermeyer CJ said:
 "The Government in making an appointment is not bound to appoint the man who would be chief according to Native Custom, and it could not be seriously suggested that a custom has grown up since 1927 of giving the property of the man who would be Chief by Native custom to the Chief appointed by the Government if they were not one and the same person."
 (see also Ratsialingwa v Sibasa 1948 3 SA 781 (A)).
- 10 In Miya v Miya 1946 NPD 445, the court decided that a chief appointed in terms of s2 of the Act succeeds to the kraal property of his predecessor unless such property has been bequeathed by will to somebody else. Olivier Die Privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes (1981) 483 doubts whether the proviso in Miya's case is reconcilable with the provisions of s2(7) bis of the Act. Section 2(7) bis provides that when recognising or appointing a person as chief of a tribe, or at any time thereafter or when any person is or has been recognised or appointed as the chief of a tribe, the state president may, in his discretion and after a public enquiry by persons having knowledge of the language, customs and laws of the tribe concerned, as he may appoint for the purpose, make an order awarding to, or imposing upon, the person so recognised or appointed as chief such of the property rights or obligations of the

previous chief, whether deceased or deposed, as in his opinion were acquired or incurred by the previous chief by virtue of his office and as he may deem just.

- 11 S10(2) of Act 16 of 1985. See on the provisions of S10(2) of the Code Buthelezi v Minister of Bantu Administration 1961 3 SA 256 (N) confirmed in 1961 4 SA 835 (A).
- 12 S11(1) of Act 16 of 1985; S11(1) of the Code. In Natal the the district officer is involved.
- 13 S114(2) of the Code; S11(2) of Act 16 of 1985.
- 14 Verslag van die Komitee insake Reorganisasie van Bantoehowe en Aanpassinge in die Bantoeereg 1968 (hereinafter called the Coertze en Mostert Commission Report) 87. This lack of distinction is of no significance to many non-traditionalists. See S25 of the National States Constitution Act 21 of 1971 read with S2 of Act 8 of 1974.
- 14(a)Buthelezi (1978) 5.
- 15 Proc R151 of 1987, the KwaZulu Act on the Code of Zulu Law 16 of 1985.
- 16 Coertze & Mostert Commission Report 90.
- 17 Coertze & Mostert Commission Report 90-91.
- 18 Mzimela v Mzimela 1938 NAC (N&T) 246.
- 19 S2(7) of Act 38 of 1927. This is criticised by De Clercq (1969) 148.
- 20 1959 3 SA 517 (A). See also Mathibe v Lieutenant-Governor 1907 TH 557.
- 21 Dabner v SAR and H 1920 AD 583; Wiechers Administrative Law (1985) 210.
- 22 Wiechers 115, 125.
- 23 Ss 12 and 20 of Act 38 of 1927.
- 24 Tsautsi v Nene 1952 BAC (S) 73.
- 24(a)Makapan v Khope 1923 AD 551; Khumalo 1952 1 SA 381 (A); Majozi 1971 1 SA 794 (N).
- 25 Mamitwa v Mashabula 1937 NAC (N&T) 46.

- 26 Act 68 of 1951; See also S3(1) of the KwaZulu Chiefs' and Headmen's Act.
- 27 Coertze & Mostert Commission Report 85-86.
- 28 S12(2) of Act 38 of 1927.
- 29 Yeni v Jaca 1953 NAC (N-E) 31; Mkize v Mnguni 1952 BAC (N-E) 42; see also Matshamba v Mbundu 1956 NAC (S) 39.
- 30 Bekker "The Judicial System of Transkei" 1978 CILSA 37; see also Mkize v Mkize 1949 NAC (N-E) 39.
- 31 For a discussion of these see Labuschagne "Strafregsprekersbevoegdheid van Bantoe kapteins en Hoofmanne in Suid- en Suidwes-Afrika" 1974 De Jure 38 et seq.
- 32 This information was obtained from an informant from Gazankulu. In Lebowa S20(2) of Act 38 of 1927, has been amended to raise the amount to R200 by s1 of the Lebowa Amendment Act on Administration of 1977; See also s7(1) of the Bophuthatswana Traditional Courts Act 29 of 1979.
- 33 S1 of KwaZulu General Law Amendment Act of 1979.
- 34 See also Bekker Die Rol van die Regsprekende Gesag in h Plurale Samelewing (1983) 64.
- 35 Tshabalala v Zwane 1946 BAC (N&T) 91.
- 36 See also Coertze & Mostert Commission Report 101-2.
- 37 Hund & Kotu-Rammopo 188. See also Ndabandaba "Punishment in African Society, Past and Present" in Sanders (ed) Southern Africa in Need of Law Reform (1981) 151 et seq; Myburgh (ed) Indigenous Criminal Law in Bophuthatswana (1980) 43 et seq.
- 38 S20(2) of Act 38 of 1927; Myburgh idem 45; Labuschagne (1974) 42.
- 39 See also Coertze & Mostert Commission Report 103.
- 40 Masondo 1969 1 PH H58 (N); Jooste 1977 2 PH H207(C); see also Rabie & Strauss Punishment : An Introduction to Principles 4ed (1985) 234 et seq; Bekker (1978) 42 criticizes the provision allowing the chief to impose corporal punishment on the ground that it is vague.
- 41 Labuschagne (1974) 42.

- 42 Labuschagne idem 42. In Makapan v Khope 1922 AD 551 561, Kotze JA said:
 "An inherent power is vested in every court of justice to punish an offence of this kind to its dignity and authority quite apart from the question whether the Court had jurisdiction or not in the particular instance ... The Court would then be powerless to deal with the matter and uphold its dignity and respect, which are so essential for the maintenance of its authority and the public administration of justice. Such a view cannot prevail. It is contrary to both sound reason and the law." See also Vass 1946 1 PH K 9 (GW).
- 43 1961 2 SA 751 (A) 757; cf Ntsele 1971 1 PH 2 (N).
- 44 1947 2 SA 1026 (ECD) 1027; cf Mogapi v Gopani 1963 BAC (2) 62; Labuschagne (1974) 40.
- 45 Hund & Kotu-Rammopo 186.
- 46 Hund & Kotu-Rammopo 187.
- 47 Hund & Kotu-Rammopo 201; Ndabandaba 153 et seq; Rich The Sociology of Criminal Law (1979) 3-4.
- 48 Comaroff & Roberts Rules and Processes (1981) 70 et seq.
- 49 Allott (1968) 135.
- 50 Bekker & Coertze 376.
- 51 S12 of Act 38 of 1927.
- 52 Bekker "The Future of Indigenous Courts in Southern Africa" in Sanders (ed) op cit 191.
- 53 Makapan v Khope 1923 Ad 551; Kumalo 1952 1 SA 381 (A); Butelezi 1960 1 SA 284 (N).
- 54 1971 1 SA 794 (N).
- 55 Makapan v Khope supra 562; Nxane 1975 4 SA 433 (O) 435.
- 56 Makapan v Khope supra 556; Snyman 295.
- 57 Mbata v Mbata 1941 NAC (N&T) 62.
- 58 Butelezi supra 285-286.
- 59 A-G v Crockett 1911 TPD 893, 901, 911, 922.

- 60 Mkize 1962 2 SA 457 (N). Snyman 296.
- 61 Mkize supra 461.
- 62 Ngcemu 1964 3 SA 665 (N).
- 63 Mkize 1962 2 SA 457 (N); Snyman 297.
- 64 Taitz "Are Summary Proceedings for Contempt of Court in facie ceriae Absolutely Necessary in our Law?" 1980 SACC 60 61 et seq.
- 65 Silber 1952 2 SA 475 (A); Nxane supra 435.
- 66 Zulu v Mbata 1937 NAC (N&T) 6.

CHAPTER VI

THE PROCEDURE AND EVIDENCE IN THE CHIEF'S COURT

6.1 INTRODUCTION

Procedural law is important because it gives real meaning and effect to the rules of substantive law. In the words of Van der Merwe:¹ "It has often been said that substantive law might just as well not exist if there were to be no procedural machinery which could constantly translate or transform the rules of substantive law into court orders and actual executions."

The law of evidence forms part of the procedural machinery because it deals with proof of facts in court. Its main function is to determine facts admissible for proving the facts in issue. It also determines the method of adducing evidence, the rules for weighing the cogency of evidence, and the burden of proof to be discharged before a party can succeed. But the law of evidence is sometimes so closely connected with practice and procedure that they are inseparable.²

Procedural and evidential rules in various systems are an honest attempt at discovering and protecting the truth. The differences in the methods adopted in reaching this goal can be understood in the light of the history "because the main principles of

procedure and evidence are not the products of scientific observation, but rather embody and represent a system of values shaped by the sometimes curious course of the political, sociological and cultural history of a people, country or sub-³continent."

This by no means implies that these rules are illogical or irrational. It simply means that they were not produced in a laboratory but were a creative response by certain people to specific circumstances in their history. Oliver Wendell Holmes once declared that "the life of law has not been logic; it has been experience"⁴. By this he did not imply that logic should be completely disregarded, but he was emphasizing the fact that certain rules have been fashioned by historical events and this may account for their irrationality when seen in proper perspective.

One institution which has considerably influenced the development of the South African law of procedure and evidence is the jury. The rigorous exclusion of certain types of evidence like hearsay, character and opinion evidence can be understood in the light of an appreciation of the role of the jury. Without this appreciation it is easy to castigate any different approach as unjust and to take the western one as the ideal from which no derogation may be justified.

The common-law judges feared that the jury who had to decide matters of fact, might unduly rely on certain types of evidence regarded as being notoriously unreliable.⁵ No doubt more rational reasons for the exclusion of hearsay evidence exist today.⁶ Even the discharge of the accused at the close of the case for the prosecution is to be traced to the English law of procedure which originally developed for the purpose of enabling the judge to control the jury.⁷ The origin of the cautionary rule is also attributable to the jury.⁸ With reference to the exclusion of evidence of the bad character of the accused, Paton and Derham⁹ say it was excluded so that the jury should not "give a dog a bad name and hang him".¹⁰

Those continental countries which did not experience a long period of trial by jury follow a different course. In many other countries the introduction of the jury system did not meet with success.¹¹ As Van der Merwe puts it: "When the English jury system was introduced in Canada in the early 1760's, the French Canadians were astonished even alarmed - to find that the English preferred tinkers and tailors to judges".

Although trial by jury was abolished in 1969 in South Africa,¹² the South African law of procedure and evidence, which is largely based on the English procedural law, still retains the greatest bulk of the rules which evolved from the jury system.¹³ It is

from the point of view of this law that many South African lawyers would look at the practice and procedure in the chiefs' courts.

Procedural and evidential systems can broadly be categorised as accusatorial or inquisitorial, and free or restricted. Accusatorial procedures and restricted systems of evidence are found in the Anglo-American common law while the inquisitorial procedures and free systems of evidence generally characterise the civil law or continental systems.¹⁴

The characterisation of the procedure as inquisitorial or accusatorial and the evidence as free or restricted is a broad generalisation for purposes of convenience. Systems often present a mixture of the two.¹⁵ The plea procedures in criminal trials in South Africa provide an example of this combination,¹⁶ although the South African law of procedure is generally regarded as accusatorial in nature.

6.1.1 The nature of the accusatorial process

The accusatorial procedure has two main features: the judge plays a passive role; and the two opposing parties are responsible for presenting their respective cases.¹⁷

Although the judge in the adversarial system must be restrained from interfering too often into the case for the parties, he is not completely an umpire simply to ensure that the game is played according to the rules. In this context Snyman has the following illuminating comment to make:

To describe the judge in the Anglo-American system as merely a passive referee, and deciding merely on issues and considerations presented to him by the parties, are to oversimplify the system's basic character to the extent perhaps of even distorting it. It is also in these systems the task of the court or judge to ascertain the truth and to do justice according to law ...

Curlewis JA was stating the same thing when in Hepworth he declared:

A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides. A judge is an administrator of justice, he is not merely a figure-head, he has not only to direct and control the proceedings according to recognized rules of procedure but to see that justice is done.

In general the accusatorial judge must not proceed on his own initiative, but must respond to and resolve questions which are

presented to him. But occasionally an accusatorial judge will probe areas not properly covered by the parties. The purpose of this is to prevent the accusatorial fact-finding process from being hampered by the incompetence of one or both of the parties or by a party's shrewdly manipulating the truth by merely covering areas which are favourable to his case.²¹ Similarly a judicial officer may recall witnesses, and in some instances he ought, on his own, to summon a witness not called by either the prosecution or the defence.²² In many countries which mainly follow the accusatorial procedure, the court is expected to assist an illiterate and unrepresented accused in presenting his defence.²³ In those circumstances the court will normally more thoroughly examine the witnesses for the prosecution. Nonetheless the accusatorial procedure imposes restraint on judicial examination especially excessive interruption.²⁴ The reason for the relatively passive role of the judicial officer is based on there being two opposing parties, who each must present its own case and cross-examine witnesses called by its opponent.²⁵

The adversarial system is not completely above criticism. It may be criticized on the basis that it presupposes that the parties are equal, and when this is lacking, the "truth" mostly becomes merely the view of the powerful. Its very essence of the opponents' being involved in a forensic duel can create unnecessary conflict which may not conduce the settlement of a

dispute. Moreover, much of the outcome of a case is dependent upon the "ability, wit, energy, ruthlessness and even permissible rudeness which the cross-examiner might display". The "selfish" and partial way in which the parties are permitted to present evidence and the fact that the adjudicator may only in circumscribed instances call witnesses, may inevitably result in a situation where the "procedural" or "formal truth" can be promoted at the expense of the "material truth".²⁶

6.1.2 The nature of the inquisitorial process.

The inquisitorial procedure, on the other hand is characterised by the more active role played by the judicial officer in the course of the trial.²⁷ The trial is not seen merely as a contest between two opposing parties, but essentially as an inquiry to establish the truth.²⁸ Judicial examination is accepted as being the fundamental mechanism in the process of fact-finding. In general all questions to witnesses are put by the judge and he has a free discretion in receiving evidence.²⁹ There is no distinction between examination-in-chief and cross-examination.³⁰ In fact continental lawyers consider cross-examination as a method of compelling an honest witness to contradict himself³¹ whereas Anglo-American lawyers, regard cross-examination as a fundamental fact-finding process. The emphasis placed on cross-

examination in the accusatorial system is attributable to there being two opposing parties who generally present evidence that is only favourable to their respective cases.

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Although Anglo-American lawyers perceive the duties of the continental judge as being psychologically irreconcilable, continental lawyers see the justification of the active role of the judge as being that he is supposed to search for the truth in order to prevent the trial from degenerating into a duel where much of the fate of the accused depends upon the relative ability, wit, energy and ruthlessness which the prosecutor or defence counsel might display. There is much to commend this.

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In the words of Devlin:

The essential difference between the ... (adversary and inquisitorial) ... systems ... is apparent from their names: the one is a trial of strength and the other is an inquiry. The question in the first is : Are the shoulders of the parties upon whom is laid the burden of proof ... strong enough to carry and discharge it? In the second the question is : What is the truth of the matter? In the first the judge or jury are arbiters; they do not pose questions and seek answers; they weigh such material as is put before them, but they have no responsibility for seeing that it is complete. In the second the judge is in charge of the inquiry from the start; he will of course permit

the parties to make out their cases and may rely on them to do so, but it is for him to say what it is that he wants to know.

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Devlin further continues:

The English say that the best way of getting at the truth is to have each party dig for the facts that help it; between them they will bring all to light. The inquisitor works on his own but has in the end to say who wins and who loses. Lord Denning denies that the English judge is 'a mere umpire' and says that 'his object, above all, is to find out the truth'. The real difference is, I think, that in the adversary system the judge in his quest for the truth is restricted to the material presented by the parties, in whose production he has played no part and which he cannot augment, while in the inquisitorial system the judge can find out what he wants to know. Put in a nutshell, the arbiter is confined and the inquisitor is not.

The procedural and evidential differences emphasize the important truth that there is more than one way of solving the fact-finding

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problem. But there is much common ground despite the peculiar historical origins and ideological preferences that each system

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might display. This may be reduced to the following, as Van

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der Merwe states:

First, it is a universal principle that protection of the truth cannot be sacrificed for the sake of mere simplicity, speed and convenience. Secondly, presentation of evidence in the adjudication of disputes must of necessity proceed in an orderly fashion : a lawsuit is essentially a proceeding for the orderly settlement of a dispute between litigants. Thirdly, resolution of legal disputes must be done in such a way that reasonable litigants leave court with the feeling that they were given a proper opportunity to state their respective cases, that their cases were presented in the best possible light and manner, and, furthermore, that the issues were decided by one impartial trier. Fourthly, the law of procedure and evidence must at all times maintain a certain level of efficiency and effectiveness in order to ensure that the rules of substantive law - however impressive and all-embracing they may be - are not for all practical purposes relegated to the ranks of unenforceable norms.

The inquisitorial system, however, is a more natural method of fact-finding in the sense that it dispenses with technical rules and is applicable to our everyday activities. That in court a different approach is followed is largely due to historical reasons.

6.2 PROCEDURE IN THE CHIEF'S COURT

The procedure in the chief's court can be described as

inquisitorial,⁴⁰ flexible,⁴¹ informal and simple. The system of
 evidence is free and devoid of technical rules of exclusion.⁴² In
 the words of Allott:⁴³

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

Further characteristics frequently alleged to typify traditional African judicial procedures are: "simplicity and lack of formality; reliance on 'irrational' modes of proof and decision ---; the fact that the parties (and often the judges too) are normally involved in complex or multiplex relations outside the court-forum, relations which existed before and continue after the actual appearance in court, and which largely determine the

form that a judicial hearing takes; a common-sense as opposed to a legalistic approach to problem-solving; the underlying desire to promote reconciliation of the contesting parties, rather than merely to rule on the overt dispute which they have brought to court; and the role of religious and ritual beliefs and practices in determining legal responsibility.⁴⁴"

The indigenous procedures have been compared to a domestic inquiry which explains why the proceedings have an inquisitorial flavour. Their ideological foundation can be regarded as similar to that used by the father on his children.⁴⁵ Bentham⁴⁶ considered the parental model as the most nearly perfect tribunal but it is important not to stretch this analogy too far.

Formality is a relative rather than absolute quality. It may be used to distinguish, within a single system, parts that are interdependent and yet essentially different from one another. One measure of the difference between formal and informal settlement of disputes is the degree to which established rules of procedure are adhered to. Formal methods are more rigid in this regard whereas the informal methods are more flexible. Another basic difference relates to personnel and setting; the informal is more diffuse while the formal process emphasizes specialization.⁴⁷

The flexibility of procedure operates to widen the scope of a conflict management process. Rigid rules tend to restrict it. The flexibility of procedure expresses a basic functional difference between an informal from a formal legal process. While both are ultimately concerned with total social relationships, the informal process deals with them directly, and the formal does so only indirectly through the narrow abstractions. When parties to a case must establish or redefine a continuing modus vivendi as individuals, the flexible procedure permits unique factors relevant to the particular case to be considered.⁴⁸ Strict adherence to substantive rules or precedent on the other hand would impede the adjustment of their complex relationship. Yet if each party primarily represents a class or a particular social position, precedent and rule may be of seminal importance.⁴⁹

There is, however, a connection between rigid, exclusionary procedure and the importance of established substantive rules, or precedents in legal proceedings. A basic principle of justice is that like cases must be treated alike. Yet sorting out the like from the unlike presents difficulties. Formal procedure facilitates the reduction of the infinite variety of individual conflict cases to standard, uniform units to be handled expeditiously and with demonstrable fairness. It is only by the exclusion of irrelevant factors that an instance can be shown to

be like a precedent or a present fact situation like that portrayed in an established rule. Informal processes, by contrast, do not seek to avoid the complexity of conflict cases but rather attempt to deal with the total relationships and total social personalities, and thereby admit the unique feature of every case.
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Although the flexibility of informal procedure presents difficulties for its study, it is nonetheless essential to understand it because it is difficult to understand a substantive rule without knowing how it is enforced. Therefore the starting point in the study of any system of binding rules is an understanding of the recognized ways of action that are open to an individual whose rights under that system have been infringed.
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It is conceded that the informal procedure is so flexible that it may be difficult for an outsider to specify the precise steps to be taken in an effort to protect particular kinds of rights. No one factor determines the action to be taken. This may vary from dispute to dispute because of differences in the kind of injury involved, the relationship between the parties, or the sequence in which it appears in combination with other procedures.
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Despite the inflexibility and informality, the traditional court proceedings have been regarded as achieving the same forensic

ends to those achieved for advanced courts by counsel or counsel's preparation of pleadings. The informality pervades the way in which litigants present their cases, in the manner they adduce evidence, and the role which the court plays. Usually evidence is heard from both litigants before the plaintiff's witnesses are called to substantiate his case. The plaintiff is allowed a great latitude to say many things which are apparently irrelevant, but which may turn out later to be crucial. As a person without the advice of a lawyer he can feel that he has not been properly treated, and that justice cannot be done unless he is allowed to say what he wants to say. Complicated rules of evidence make it difficult for ordinary witnesses to comprehend why they are allowed to say some things and not others which may well be felt relevant by the witnesses. This tends to create a distance between the people and the courts. The informality and flexibility of procedure therefore enable both the litigants and the witness to feel that justice is done and therefore instil the litigants' confidence in the decision arrived at by the court. This is essential for social stability and harmony.

Unlike in restricted systems of evidence, evidence in the chiefs' courts, which follow the free system, is not excluded by rigorous exclusionary rules. Thus hearsay evidence is not necessarily excluded or frowned upon. Although not everything that is

hearsay is admissible, it is not the type of evidence that is emphasized, but rather its cogency. There is no general theory of relevance and admissibility. The court is given a free hand to attach whatever weight to the evidence of witnesses irrespective of its admissibility or inadmissibility.⁵⁹ Similarly evidence of character,⁶⁰ opinion evidence⁶¹ and unsworn evidence is admissible.⁶² The English principle of judicial ignorance does not apply.⁶³ The evidence is given orally⁶⁴ although real and circumstantial evidence is also admissible.⁶⁵ These proceedings⁶⁶ have no doubt been regarded as an orderly search for truth.

Various sociological and historical reasons have been advanced for the simplicity and informality of procedures and the free systems of evidence coupled with the inquisitorial approach. Firstly, it is the absence of the written word in traditional black society which has accounted for customary law's freedom from technicalities.⁶⁷ It is therefore inconceivable that a traditional or chief's court can give a decision on technical procedural grounds.⁶⁸ The battle cry of Anglo-American lawyers that it is better for a hundred guilty to go free than that one innocent person should go to prison does not apply. This is in marked contrast to the accusatorial and restricted system where sometimes justice is accorded a back seat or even sacrificed on the altar of technicality. Secondly, black societies have traditionally had relatively simple technologies with little

specialization or economic differentiation. Consequently there were no classes or categories "with critically opposed economic or political interests", and the cultural values were to a large degree homogenous. Most interactions took place in small areas with permanent relationships serving a variety of purposes. As

69

Van Velsen aptly points out:

Within a multiplex relationship, a disturbance in, say, the political relationship is likely to affect the economic and domestic relationships. Where multiplex relationships prevail, judges and litigants, and the litigants among themselves, interact in relationships whose significance ranges beyond the transitoriness of the court or a particular dispute. Today they are disputing in court, tomorrow they may be collaborating in the same work-party. Frequently judges combine their judicial with administrative duties. Gluckman has pointed out that among the Barotse the judges try to prevent the breaking of such relationships so that the parties can continue to live together amicably; and therefore the courts tend to be reconciling in such disputes. To do this, they have to broaden their inquiries to cover the total history of the relations between the parties, and not only the narrow legal issue raised by one of them. Hence the conception of 'relevance' is wide, because many facts affect the settlement of a dispute in multiplex relationships, while the conception of 'relevance' is narrower in simplex relationships.

This applies to rural face-to-face societies with multiplex relationships. Yet it must be pointed out that although chiefs generally operate in rural areas with fairly traditionalist societies, these societies can no longer be regarded as homogenous. From empirical research it was clear that the societies where there are tribal chiefs are a mixture of traditionalists and non-traditionalists with varying predominance of each element. Thus although the majority of the members of these societies accept the role of chiefs, others derive little satisfaction from these courts especially because they do not allow legal representation. They are more enamoured with the western courts with their formality and appearance of dignity. Moreover, appeals from chiefs' courts to the magistrates' courts are a further sign that not all litigants are satisfied with the operation of the chiefs' courts. The incidence of appeals, however, cannot be taken simply as an indication of the dissatisfaction of certain members of black society with the operation of the chiefs' courts as appeals are also allowed in western courts. Moreover, from research it appeared that there are not many appeals from chiefs' judgments (approximately 20%) and not all of them are reversed.

Although many writers emphasize the conciliatoriness, informality and flexibility of the procedure of the chiefs' courts, this may be liable to exaggeration. It may create the mistaken impression

that these elements are totally lacking in all western courts.

On the contrary, magistrates' courts in England and small claims courts in America and South Africa bear the same features. ⁷⁰

Moreover, tribal courts themselves are today not so idealistic in their achievement of reconciliation and restoration of harmony.

It has been argued that although cases are conducted according to a less formalized and less detailed procedure than is the case in western law, with a different concept of relevance than in a lawyer's process, and the use of a different method by the judge or bench with respect to interpretation and application of law, legal decisions are handed down and distinctions are made between social and moral norms on the one hand and legal norms on the other, and reconciliation and arbitration are not essential to

⁷¹ the settlement of the conflict. These courts themselves are not immune to the influence of western courts and ideas. Both their presiding officers, chiefs, and litigants that appear in these courts are influenced and emulate the approach of the western courts.

Various writers have related cases where the chiefs' courts have decided cases not according to the traditional approach but more in accordance with the western approach although to a less formal extent. ⁷²

This view was also confirmed by empirical research. Although it is often said that chiefs' courts do not administer the oath, the

court which we attended did that, obviously following the western court. This may not be general practice, but it is a demonstration of the change. The chief himself is a person who has passed standard ten and no doubt seeks to improve the image of his court. Moreover, the court appeared more intent to reject hearsay evidence. This may be attributed partly to the influence of western courts and also to some Zulu radio programmes like Isigcawu senkantolo (literally meaning the place where the court sits) something like "Consider your verdict" of the English radio service which the chiefs may try to emulate. Another interesting feature of the court was its partition into the plaintiff's enclave and that of the defendant which is akin to the dock and the witness box in the magistrate's court.

Traditional assertions on the customary law of procedure and evidence therefore, although containing important elements of truth, may be an oversimplification. They often ignore the adaptability of customary law to its changed socio-economic circumstances. As a result customary law can only be called traditional because it has had no sharp break with the past, but it "has become law in a state of progressive development",

73

particularly in recent decades. These development changes have been material, intellectual and spiritual and have resulted from

74

western influence.

For this reason Keuning offers the following illuminating comment:

It seems to me no longer possible in rural areas to leave the maintenance of social and legal order 'between members of a family, of a village, or a tribe' to traditional institutions. These traditional institutions no longer have the same meaning and influence in the social system that they formerly had. The position - and even more the role - of chiefs and elders has changed now that they and their communities have become part of a larger political, social and legal order. The solidarity felt by kinship groups, villagers, or members of a broader traditional community has also become less strong and there is less need for it, for one thing because peace and order are now maintained over a much larger area than formerly, which has led to far greater social mobility, more inter-group contacts, and increased individualism. The sanctions wielded by the traditional institutions - the chief's position of authority, the force of public opinion, the threat of social ostracism - have lost much of their power, albeit not to the same extent for everyone and perhaps most of all for the younger generations.

It has also been contended that to leave the administration of justice in rural areas completely in the hands of traditional institutions would imply that while those in the rural areas are

subject to customary law, those in urban areas will be subjected "to a new law and be freed from customary or traditional law." This presumes a chasm between urban and rural black societies which does not exist except for a small group of westernized elite.⁷⁶ Yet the matter is not as simple as that.

There is little difference between criminal procedure and civil procedure. This accounts for the practice in the chiefs' courts of exacting both a fine and awarding compensation in the same action. The award of damages is also accompanied by a stipulation as to the costs payable by the defendant. While this is convenient and inexpensive, it may lead to some problems. But to the ordinary person it is perfectly reasonable and acceptable.

There is no doubt that the simplicity of procedure in the chief's court is congenial to the parties and witnesses. The expeditious manner in which cases are dispatched is conducive to justice being done. Delays often result in justice denied. Moreover, the relaxed atmosphere reassures the litigants and their witnesses. This is unlike in western courts where they are exposed to a different procedure. And in the words of Koyana:⁷⁷

"In the hands of learned and well-trained practitioners these people are sometimes not only cross-examined but also examined crossly. They make bad impressions on the learned judicial officer and quite often an undeserving party achieves victory."

It has been contended that customary courts often place the onus of proof on the defendant-accused in civil and criminal trials. This attitude is apparently based on a presumption of guilt in line with the saying that there is no smoke without fire. This is a mistaken impression expressed by those used to the adversary system where the judge presides over a contest between counsel. This presumption is bound to arise where the judicial officer's duty is to discover the truth himself, "since it is only possible to check evidence under cross-examination by formulating questions as if the cross-examiner assumed the person to be lying".⁷⁸

Besides these changes, the chiefs' courts are also regulated by rules of procedure which they have to follow.⁷⁹ Concededly these rules stipulate that the procedure to be followed in the trial before a chief's court must be in accordance with the recognized customary laws of the tribe.⁸⁰ Thus a commissioner's criticism of the procedure followed in a chief's court was rejected on the ground that he overlooked the fact that the chief followed the custom of his tribe which differed from the common law, and that such procedure was in fact sanctioned by s 1 of the rules governing the courts of chiefs and headmen.⁸¹ A brief consideration of some of the provisions is necessary.

6.2.1 Chiefs' and headmen's civil court rules.

These rules provide for minimum standards of procedure, but they are often not followed. Some of them are either contrary to customary law or are a modification of the customary procedure. Moreover, these rules provide inter alia for the hearing and judgment in the absence of the parties, impartiality of the chief, prohibition of legal representation, compiling of written record, registration of judgment, execution, appeal against the chief's judgment, furnishing of reasons for judgment by chiefs, hearing of the appeal, and the scale of fees.

6.2.1.1 Granting of default judgment.

The chief is entitled to give default judgment if he is satisfied that there is no appearance by or on behalf of the defendant at the time and place fixed for the hearing of the action; the plaintiff must have made a request for such judgment; the notice of the action must have been given to the defendant personally; and the defendant must, at the time of the receipt of such notice, be within the area of the chief.

The amount should not exceed that claimed by the plaintiff. Any party to an action in which default judgment is given may apply

to the chief who gave such judgment within two months after judgment has come to his knowledge for the rescission of the judgment. ⁹³ An appeal against default judgment is competent only after the application to rescind has been refused. ⁹⁴ If there is an unreasonable delay in applying for rescission of a default judgment, this raises a presumption that the judgment was acquiesced in. ⁹⁵ Default judgment is something foreign to customary law.

6.2.1.2 Impartiality of the chief.

The rule that a chief should not hear a matter in which he has a pecuniary or personal interest is the well-known rule of natural justice to ensure the impartiality of the chief. It is aimed, in the famous words of the English judge Lord Hewart CJ ⁹⁶ to ensure that "justice should not only be done, but should be manifestly and undoubtedly be seen to be done." From empirical enquiry, however, many magistrates complained that some chiefs often commit irregularities by hearing matters in which they are interested. This creates the impression in the minds of the people that chiefs are biased, and consequently their decision is not acceptable. The only saving factor is that the chief is not sitting alone, but with other members of the court. For this reason it has been decided that the simple fact that the chief is related to the parties does not necessarily mean that he should

recuse himself. Although jurisdiction is conferred on him alone, it is well known that he is not alone when trying cases and his judgment must be considered as being a judgment of his ibandla.⁹⁷

Before it can be said that a chief has personally an interest in the matter before him because of relationship to one of the parties, it is necessary that the full particulars relating to the relationship must be placed on record. The fact that surnames are the same is not sufficient evidence of relationship.⁹⁸

6.2.1.3 Prohibition of legal representation.

Although the rule that prohibits legal representation is understandable in that legal representation would introduce a foreign element in the proceedings of the chief's court, and would lead to undermining the prestige of the court of the chief as he is a layman, it may also lead to some problems. This is because litigants often do not know their rights. According to one case found from research the widow was fined one beast for failing to wear mourning clothes. This was patently wrong. The widow, ignorant of her right to appeal to the commissioner's court, did not appeal nor did she pay. The beast was consequently attached. The commissioner could not come to her aid because she had not appealed. A chief's judgment can only be upset by appeal and not by bringing a fresh action in the

99

magistrate's court. Nor is there provision for the abandonment of a judgment in the rules for chiefs' courts. A litigant that is dissatisfied can only have recourse to an appeal to the magistrate's court if he wants the judgment to be altered.

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6.2.1.4 Written record.

Although a chief's court is not a court of record, a chief is supposed to have prepared a written record in quadruplicate immediately after the pronouncement of judgment. This record should contain particulars relating to the parties, the claim, the defence, the judgment and date of judgment. The record must be signed by or on behalf of the chief and two members of his court. The original of the written record should, within one month from the date of the judgment, be addressed and posted to the magistrate of the area where the defendant resides. One copy should be handed to the successful party, and a further copy to the other party. Either of them may, within two months from the date of judgment, deliver it to the magistrate of the area where the defendant resides. The chief must retain another copy for record purposes. If by reason of illiteracy a chief is unable to complete the written record or cause it to be completed on his behalf, he may supply the particulars of any action heard by him to the clerk of the court, verbally or through a messenger. The clerk should then complete the record.

101

This section has been regarded as peremptory and should be
 observed strictly by the chiefs.¹⁰² This is because the written
 record forms the criterion in so far as the pleadings and
 judgment in a chief's court are concerned. Unless its
 correctness is challenged, the particulars reflected therein must
 be accepted as true.¹⁰³ Where the correctness of the chief's
 record is not challenged, the defendant's admission in the
 chief's court for instance stands.¹⁰⁴ If one of the parties
 wishes to challenge the correctness of the written record,
 application for its correction must be addressed to the
 magistrate's court.¹⁰⁵ An absolution judgment is not known in
 the chief's court.¹⁰⁶

There was a general complaint from commissioners and magistrates
 that chiefs often do not provide written records of the judgments
 or that they are poorly done by secretaries who are often not
 trained to compile these records. This complaint was borne out
 by empirical research. From a survey of some of the records it
 did become clear that many of them do not comply with the
 requirements of rule 6 and others are barely intelligible. This
 may be attributed to the fact that many chiefs are not
 sufficiently educated. This should not be a serious setback
 because it is not a requirement that the records should be
 compiled in English. The record may be completed in Zulu. It
 is only when there is an appeal that these reasons may be
 translated into one of the official languages.¹⁰⁷ In fact the

records which were completed in Zulu were much more intelligible and complete than those compiled in English.

Failure to complete a record may entail serious consequences as the provisions of rule 6 are meant to facilitate the application of rule 7 which requires the registration of the judgment. Failure to register a judgment may result in its lapsing. Not only an administrative action may be taken against a chief who fails to act in terms of the rules or who acts contrary to the rules of his court, but may also be held liable in damages. 108

From the provisions of rule 6 it is obvious that the written record must speak for itself and must contain all the necessary particulars concerning the case. In the case of Mbutho v Cele 109 the court found the written record of the chief's court extremely vague in that it simply recorded that, "Plaintiff claims the defendant for making her daughter pregnant". To this the defendant replied equally vaguely that the girl had rejected him ten months previously. The chief simply stated that he gave judgment against the defendant without stating exactly what the judgment was which was given in favour of the plaintiff.

It is most probably for these reasons that the compilation of the written record has been regarded by some commissioners and magistrates as serving no useful purpose because they never look at it. One magistrate even asserted that it is undesirable

that chiefs' courts should become courts of record because magistrates would have to review their records and thus inundate them with a lot of work as they already have other administrative duties. As already pointed out, however, the compilation of the written record is important because it facilitates the implementation of the requirement of registration in terms of rule 7.

6.2.1.5 Registration of judgment.

In addition to the preparation of a written record, the judgment of the chief must be registered by the clerk of the magistrate's court.¹¹⁰

If after two months the written record has not been delivered, the judgment lapses.¹¹¹ This has serious consequences as the plaintiff for whom judgment was given may sue the chief in that instance, and the chief will be personally liable to him.

In the case of Bhengu v Mpungose¹¹² it was held that the provisions of rules 6 and 7 are preremptory, and they impose a duty on the chief to bring the judgments to the notice of the clerk of the court and to see to it that they are registered or bear the responsibility for any loss suffered by third parties as a result of his omission.

This decision has been criticized in that it leads to an undesirable state of affairs and is contrary to customary procedure.¹¹³ It is for this reason that in Bophuthatswana the

validity of the tribal court's judgment is no longer dependent on registration thereof with the magistrate. ¹¹⁴ This approach is better than the one that enables a plaintiff to sue the chief for the lapsing of the judgment. This creates problems because the chief is not only a judicial officer, but also a ruler of his people. It may create enmity between the chief and the plaintiff, and it may render the plaintiff's stay in that tribe both precarious and uncomfortable. Moreover, the fines imposed by the chief no longer accrue to him personally as was the case before the advent of colonial rule, but are paid into a trust account which is subject to the control of the magistrate. From empirical research it was intimated that plaintiffs find it difficult to sue the chief. Some magistrates are even reluctant to issue summons against a chief. One attorney related a story where the commissioner was hesitant to issue summons against a chief who was also a cabinet minister in KwaZulu Government at the time. Some other commissioners related stories where chiefs simply send people to burn the house of a person who wants to sue the chief. This is obviously not conducive to the maintenance of law and order.

6.2.1.6 Execution:

Provision is made in the rules that the execution of a chief's judgment should be in accordance with the recognized customs and

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 laws of the tribe. Chiefs often experience problems in the enforcement of their judgments when judgment debtors do not have property or aver that they have none. In that instance they have to solicit the assistance of magistrates. Some chiefs dislike this. It is for them unpleasant to have especially a white official as an intermediary in maintaining their authority over

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 their subjects. In a criminal case a judgment debtor can be arrested and brought before the magistrate's court. The magistrate must convince himself that the fine is lawful. He can then issue an order for the payment, and in the failure thereof, he can arrest him and sentence him to a maximum of three months'

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 imprisonment. This gives chiefs the impression that magistrates have greater powers than them and it does not lead to the enhancement of the prestige of the chief's court.

From a survey of the records of the chiefs' courts there was ample evidence that many people fail to pay in the chiefs' courts. The act provides that the chief is entitled to attach the property of the judgment debtor according to customary law. This leads to problems of attachment. When a messenger of the chief's court must attach property of a judgment debtor and in the execution of his duties meets resistance which can possibly lead to the disturbance of the peace, he must report this to the judgment creditor. The judgment creditor can then, if he chooses, apply to the clerk of the magistrate's court for the execution of the judgment.

118
 The authority of the chief's court

is thus such that a plaintiff whose claim succeeds in the chief's court cannot obtain redress through this court. This is a public demonstration of the impotence of the chief, especially in criminal cases, to maintain discipline as head of his tribe without the interference of magistrates. Just as in civil cases the chief's court is also handicapped in respect of criminal cases and is incapable, as the highest authority in the tribe, to enforce law on his subjects.

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6.2.1.7 Appeal against chief's judgment.

In the olden days the judgment of a chief was final and no appeal would lie against it. Nowadays any party dissatisfied with the judgment of the chief's court may, within two months from the date of its pronouncement, appeal against such judgment to the magistrate's court having jurisdiction by notifying the clerk of the said court either personally or through a legal representative.

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The time within which to appeal may be extended by the magistrate if the appellant gives good and sufficient reasons for the delay in noting the appeal. But lack of funds and an unsubstantiated allegation of illness are not sufficient grounds for condonation of late noting of an appeal

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against the judgment of a chief. An appeal need not be noted in writing, and no formal or written application for condonation of the late noting of appeal is necessary.

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If an appeal has lapsed it cannot be revived or restored on the roll. The only

remedy is to note a fresh appeal and apply for the condonation of
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 its late noting.

The clerk of the magistrate's court has to record the noting of
 the appeal, fix the time and date for the hearing of the appeal,
 inform the appellant and respondent of this and notify the chief
 who heard the case and call upon him to furnish reasons for his
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 judgment. The chief must furnish the clerk of the court,
 either personally or through his deputy, with the reasons for his
 judgment within fourteen days after notification. If they are
 not in writing the reasons shall be recorded by the clerk of the
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 court. It is essential that this rule be strictly complied
 with. Only after the required steps have been taken can the
 magistrate dispense with the chief's reasons, and he must note on
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 the record his reasons for such dispensation.

The plaintiff may, not less than seven days before the date for
 the hearing of the appeal, file with the clerk of the
 magistrate's court and serve upon the defendant, a written
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 statement amplifying his claim in the chief's court.
 Similarly, the defendant may within the same period file with the
 clerk of the court and serve the plaintiff a written statement of
 his defence to the claim and may also raise a counter claim
 notwithstanding that such claim was not raised in the chief's
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 court. These may be recorded even though not submitted within
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 the stipulated time.

Some chiefs have complained of the actions of some attorneys who assist persons to appeal against their decisions. Although they are not competent to appear in a chief's court, some attorneys sometimes write letters wherein they question the validity of the chief's decision. Other chiefs allege that some persons who lose cases in a chief's court or even admit guilt, later refuse to carry out the judgment obligations and even frustrate attachment by seeking the help of an attorney. The case is tried in a magistrate's court where the decision of the chief is set aside. These chiefs feel that if an attorney is not allowed to appear on behalf of a client in a chief's court, he should not be allowed to appear in the magistrate's court on appeal.

Various problems arise from appeals from chiefs' courts to the magistrate's court.¹³¹ When a person appeals from a chief's court to that of the magistrate, the case must be heard de novo¹³² in that new evidence can be led. This prompts the questions¹³³ as to whether there can be a change of parties or even a reformulation of the cause of action. In a number of cases it was decided that the change of the cause of action on appeal is not allowed.¹³⁴ It may happen that the decision of the chief may be altered or even set aside on the grounds of new evidence. The decision in the chief's court may have been based on hearsay evidence. On appeal to the magistrate's court hearsay evidence is not admissible. Moreover, the procedure followed in the magistrate's court is different from that followed in the chief's

court. Thus the magistrate should allow cross-examination and
re-examination of witnesses. Failure to do that is irregular. 135

The need for the reformulation of the cause of action on appeal to the magistrate's court may be caused by the peculiar nature of the trial in the chief's court. The action in the chief's court is brought by parties who have no advice from experts trained in the common law. When their action has to be brought before the magistrate's court, the parties have the opportunity to reformulate this according to the common law. 136

Various other problems arise in connection with appeals from the chiefs' courts to the magistrates' courts. The question has been posed as to whether or not the magistrate can have recourse to the evidence led in the chief's court, and whether the chief can be called to testify as to what happened in his court. 137 As the chief's court is not a court of record, the magistrate may not have recourse to the evidence adduced in the chief's court. He is supposed to re-hear and re-try the case as of first instance. 138 It has also been decided that it is highly irregular that the chief should be called upon to testify in an appeal from his judgment as a witness of the proceedings before his court. 139 An exception not taken in a chief's court may be raised in the magistrate's court when the case has been taken on appeal. 140

A further question is whether the appeal from a chief's court is a proper appeal seeing that the case has to be re-heard and re-tried as if it were a case of first instance. For this reason it has been held that it is irregular that the defendant should give evidence first. ¹⁴¹

It has been regarded as advisable that at the commencement of the hearing of an appeal the magistrate should call upon the plaintiff for a statement of his claim and the defendant for a statement of his reply so that at the beginning it is clear what matter is in dispute. This is necessitated by the fact that issues in cases taken on appeal from chiefs' courts to magistrates' courts are often not clearly formulated on the record of the proceedings furnished. ¹⁴²

Although the magistrate has to try the case de novo it still remains an appeal so that the court in delivering its judgments in those appeals should indicate whether or not the appeal is upheld. ¹⁴³

Empirical research revealed that some chiefs resent the reversal of their decisions on appeal. This owes itself to the fact that in the olden days chiefs had the final say in matters relating to members of their tribes. Today this is no longer the case. Others have come to accept this position. Those who still resent it feel that the prestige of their courts is undermined because it creates the impression that their subjects lack confidence in their integrity, competence and authority, which has the effect of embarrassing them. ¹⁴⁴

Some of these problems have been eliminated in Bophuthatswana : once a matter falls within the jurisdiction of a tribal court, the tribal court has exclusive jurisdiction in the matter unlike in South Africa where magistrates' courts have concurrent jurisdiction;¹⁴⁵ appeals now must be lodged with the tribal court and not with the magistrate; new evidence cannot be introduced on appeal;¹⁴⁶ and the chief's court is now a court of record. Some of these improvements are worth emulating.

6.2.1.8 Scale of fees

The fees payable and recoverable in connection with proceedings in a chief's court should be in accordance with the recognized customs and laws of the tribe.¹⁴⁷ Where there is no customary tariff prescribed by customary law, the tariff set out in rule 13(2) applies. The chief is given the discretion to apply the simple customary law of the tribe which he and his councillors¹⁴⁸ are competent to expound.

6.2.2 Chiefs' and headmen's criminal court rules.

Although in terms of customary law no strict separation is made between criminal and delictual aspects of the matter especially in the sphere of procedure,¹⁴⁹ under present legislation separate regulations for criminal cases have been laid down.¹⁵⁰

A person is warned either orally or in writing to appear before the chief at a fixed place, date and time either by the chief concerned or by his messenger. In giving the warning the messenger should put the nature of the charge to that person.

Failure to appear constitutes an offence punishable by a fine of not more than fifty rand.

Trying a person in his absence is prohibited. Legal representation is not allowed. Similarly in Bophuthatswana subject to the law and customs applicable to the tribe concerned legal representation is generally allowed except in criminal proceedings.

At the trial the charge must be put to the accused at the beginning, and the accused must clearly plead guilty or not guilty to the charge. The chief has to hear evidence of the commission of the offence, and the accused is free to adduce evidence in his own defence and to call witnesses for that purpose. In general the procedure at the trial is supposed to follow the laws and customs of the tribe concerned.

At the conclusion of the trial, a written record should be compiled in triplicate in the prescribed form. This record should be signed by the chief. The original of this record must be delivered, within one month after the conclusion of the trial, to the clerk of the magistrate's court who should record the

particulars contained therein in the prescribed register. The duplicate should be delivered to the accused after the conclusion of the trial, and the triplicate should be retained by the chief. Failure to comply with these requirements within a period of two months from the date of the conclusion of the trial will lead to the lapsing of the conviction and sentence, and any fine paid in terms of that conviction and sentence should be refunded to the accused. The accused should not be charged with the same offence again in any chief's court.

160

Provision is made for the imposition of the punishment of whipping and the procedure that should be followed in meting out such punishment : the whipping should not exceed eight strokes with a cane; it must be administered in private by a person and at a place designated by the chief; the maximum number of strokes is eight even where a person is sentenced on the same day in more than one case; the whipping must only be inflicted over the buttocks and over no other part of the body; the chief or his appointee should be present at all times when whipping is administered and he should order the infliction of further punishment to be discontinued if it appears that the person concerned is not in a fit mental condition or state of health to receive further punishment; a parent, guardian or family head, as the case may be, of the said person may be present when whipping is being administered, and the chief should notify such person if present in court when a whipping is imposed, of his

right to be present when it is inflicted; the sentence of whipping should be executed as soon as is practicable after the imposition of the sentence, but not later than the day following upon the day on which the sentence was imposed; the cane used should be a smoothly trimmed green switch cut from a tree or a pliable cane of not more than one hundred and twenty centimetres in length and one centimetre in diameter; the chief must satisfy himself that the person concerned is in a fit state of health to receive whipping; should the person not be fit to receive whipping, the chief may amend the sentence accordingly, although the sentence may not be altered where a whipping has been commenced and then abandoned; if there is an appeal the infliction of whipping should be suspended pending the result of the appeal; but if the person concerned fails to note an appeal within the prescribed period or, after he has noted an appeal, withdraws the appeal, the sentence should be executed.

161

If a party is dissatisfied with a decision of the chief he may appeal to the magistrate's court. Before the abolition of commissioners' courts, the appeal lay with the commissioner's court. This created an anomaly because a commissioner's court had no criminal jurisdiction. For this reason a commissioner's court was deemed to be a magistrate's court in the exercise of criminal jurisdiction. An appeal against any conviction and sentence should be noted by notifying the clerk of the court within one month from the date of conviction and

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sentence. This magistrate has the discretion to extend the
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period within which an appeal may be noted. After receiving
the notice of appeal, the clerk of the court should consider the
appeal as having been properly noted. But if the conviction and
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sentence subsequently lapse the appeal also lapses.

After receiving the notice of appeal, the clerk of the court has
the duty to record in the register that an appeal has been noted
in the case in question; he has to fix time and date for the
hearing of the appeal; he must also prepare a notice of hearing
of appeal in the prescribed form and take the necessary steps to
ensure that the notice is served on the accused and the chief
concerned; this he does by delivering a copy thereof by a duly
authorised person; the copy to the chief must be sent by
registered post; the clerk of the court should also deliver a
copy of the notice to the public prosecutor; he must issue a
notice to the chief who heard the case informing him that an
appeal has been lodged against his decision, and calling upon him
to furnish reasons for his judgment; this he must do as soon as
possible, but not later than fourteen days after receiving
notice; the magistrate may in his discretion proceed with the
hearing without the reasons for judgment having been
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furnished.

If the magistrate is unable to conclude the proceedings on the
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same day, he may adjourn the proceedings to a later date. The

presiding magistrate may hear evidence under oath and record the proceedings fully. ¹⁶⁸ The clerk of the court has the duty to record the result of the proceedings in the register. ¹⁶⁹

The pertinent question is whether we are dealing here with a real appeal or with the hearing of the case as if it were of first instance.

¹⁷⁰
In the case of Kaleni the view was held that the magistrate has to try the accused de novo. Consequently the proceedings before him are not only a re-hearing of the matter, but they are a re-trial. This is because the magistrate does not have to test the correctness of the chief's conviction in the light of the evidence adduced before the chief but must come to his own independent decision on the evidence led before him. He must hear and record "such available evidence as may be relevant to any question in issue". For this reason it is incorrect to regard the proceedings as an appeal in the technical sense. They are much more an application for relief than an appeal to a court of law.

Although the proceedings before the magistrate's court have certain features of a retrial, there is no doubt that the magistrate deals with an appeal. ¹⁷¹ Yet it is a peculiar appeal in that issues not raised before a chief may be raised before the magistrate, evidence not heard by the chief may be led, and the

magistrate may set aside the sentence and impose another which
 the chief could not have imposed. ¹⁷² But the accused is not
 supposed to be required to plead before the magistrate. ¹⁷³ If a
 person is asked again by the magistrate to plead he can, if he
 has already been found guilty by a chief, plead autrefois
convict. The magistrate will therefore no longer retry him. The
 chief's court, although not a court of record, has original
¹⁷⁴ jurisdiction.

6.3 CONCLUSION

Although the procedural and evidential approaches adopted by the
 chiefs' courts differ from those followed by the western courts,
 they do provide an orderly way of eliciting and protecting the
 truth. Moreover, the informality and flexibility that pervade
 the whole process do commend themselves to the understanding of
 the ordinary man. There is no doubt that substantial justice is
 done. Yet the conflict that exists between the approach followed
 by the chiefs' courts and that followed by the western courts
 needs to be resolved. The introduction of the civil and criminal
 court rules for chiefs' courts has resulted in some form of
 foreign intrusion into the customary procedure. The
 interpretation and application of these regulations lead to
 technicalities unknown in customary law. This further implies
 that the rule that the court has to follow the customary

procedure of the tribe must be understood to imply the customary procedure as amended by legislation. The introduction of these rules and regulations further renders the proper training of chiefs imperative.

FOOTNOTES

- 1 Van der Merwe et al Evidence (1983) 4; Paton & Derham 590; Van Loggerenberg "Die Aard en Funksie van die Burgerlike Prosesreg" 1986 Obiter 5 et seq.
- 2 Van der Merwe et al idem ibid; Hoffman and Zeffertt 4-5; Schmidt Bewysreg 2ed (1982) 1; Van Loggerenberg 19-20.
- 3 Van der Merwe "Accusatorial and Inquisitorial Procedures and Restricted and Free Systems of Evidence" in Sanders (ed) op cit 141; Glanville Williams Proof of Guilt 3ed (1963) 37; on the influence of history on procedure and evidence see Barton "The Effect of the English Revolution on Criminal Procedure" 1984 De Rebus 197 et seq.
- 4 Cited by Cardozo The Nature of the Judicial Process (1921) 33.
- 5 Paton & Derham 599; Van der Merwe et al (1983) 8.
- 6 Van der Merwe et al Evidence 160-162; Hoffman and Zeffertt 93-94.
- 7 Hoffman & Zeffertt 392; Skeen "The Decision To Discharge An Accused at the Conclusion of the State Case: A Critical Analysis" 1985 SALJ 286; see also s 174 of the Criminal Procedure Act 55 of 1977.
- 8 Hoffman & Zeffertt 449; Van der Merwe et al Evidence 10-11.
- 9 599.
- 10 Van der Merwe et al Evidence 11; Den Hollander "Impressions of a Dutch Lawyer of the Administration of Justice in South Africa" 1975 Acta Juridica 332 at 350.
- 11 Van der Merwe (1981) 141.
- 12 Abolition of Juries Act 34 of 1969.
- 13 Van der Merwe et al Evidence 11.
- 14 Dugard Introduction to Criminal Procedure (1977) 117; Herrmann "Various Models of Criminal Proceedings" 1978 SACC 3; Sanders "The Characteristic Features of the Civil Law" 1981 CILSA 206; Commission of Inquiry into Criminal Procedure and Evidence RP 78/1971 (hereafter Botha Report) para 101; Eckard "Die Hof vir Klein Eise - Inkwisitoriese en Bewysregtelike Aspekte" Paper read at Unisa's Conference on Small Claims Courts (1984) 2 et seq.

- 15 Van der Merwe (1981) 142; Snyman "The Accusatorial and Inquisitorial Approaches to Criminal Procedure: Some Points of Comparison between the South African and Continental Systems" 1975 CILSA 101.
- 16 Van der Merwe idem 143; Van der Merwe et al Plea Procedures 19 et seq; see also Hiemstra "A Move Towards the Inquisitorial Process" 1978 CILSA 326 et seq.
- 17 Van der Merwe (1981) 142; Van der Merwe et al Plea Procedures 11; Eckard 4.
- 18 Van der Merwe (1981) ibid; Van der Merwe et al Plea Procedures ibid.
- 19 110.
- 20 1928 AD 265 at 277.
- 21 Glanville Williams 28, Van der Merwe et al Plea Procedures 11.
- 22 Van der Merwe et al Plea Procedures 11; Herrmann 1978 SACC 3 et seq.
- 23 Herbst 1980 3 SA 1026 (E); Thomas 1978 2 SA 408 (BT); Hiemstra 1978 CILSA 326, 328. Van der Merwe et al Plea Procedures 11-12.
- 24 Glanville Williams 16.
- 25 Van der Merwe et al Plea Procedures 12; Eckard 5 et seq.
- 26 Van der Merwe "The Inquisitorial Procedure and the Free System of Evidence in Small Claims Courts : An Examination of Principles" 1985 De Rebus 447.
- 27 Van der Merwe et al Plea Procedures 12 and the authorities cited in footnote 64; Richings "German Criminal Trials: Some Notes and Impressions" 1978 SACC 254.
- 28 Van der Merwe et al Plea Procedures 12; Van der Merwe 1985 De Rebus 447; Richings 255.
- 29 Van der Merwe et al Plea Procedures 13; Van der Merwe 1985 De Rebus 447; Richings 254.
- 30 Snyman 1975 CILSA 109.
- 31 Herrmann 1978 SACC 4; Snyman 1975 CILSA 109.

- 32 Van der Merwe et al Plea Procedures 13.
- 33 Snyman 1975 CILSA 108; Herrmann 1978 SACC 6; Van der Merwe et al Plea Procedures 13.
- 34 Devlin The Judge (1979) 54.
- 35 At 60-61.
- 36 Van der Merwe 1985 De Rebus 445.
- 37 Erasmus "Hervorming van ons Burgerlike Prosesreg" 1982 THRHR 1 at 4; Van der Merwe 1985 De Rebus 445.
- 38 1985 De Rebus 445.
- 39 Van der Merwe 1985 De Rebus 447.
- 40 Van der Merwe (1981) 141-142; Van Niekerk "Principles of the Indigenous Law of Procedure and Evidence as exhibited in Tswana Law" in Sanders op cit 130 et seq.
- 41 Allott Epstein & Gluckman "Introduction" in Gluckman (ed) Ideas and Procedures in African Customary Law (1969) 22; Ollenu "The Structure of African Judicial Authority and Problems of Evidence and Proof in Traditional Courts" in Gluckman (ed) op cit 117 et seq; Van Velsen "Procedural Informality, Reconciliation, and False Comparisons" in Gluckman (ed) op cit 137 et seq; Van Niekerk 130 et seq; Bekker & Coertze 19 et seq; Myburgh Papers in Indigenous Law in Southern Africa (1985) 70.
- 42 Allott et al 22; Van der Merwe (1981) 147; Van Niekerk 136 et seq.
- 43 Allott (1968) 145.
- 44 Allott et al 22.
- 45 Van der Merwe (1981) 146; Ollenu 116.
- 46 As quoted by Van der Merwe (1981) 147.
- 47 Arno "A Grammar of Conflict : Informal Procedure on an Island in Lau Fiji" in Cappelletti (ed) Access to Justice vol iv (1979) 42.
- 48 Arno 43.
- 49 Arno 44.

- 50 Arno *ibid.*
- 51 Arno *ibid.*
- 52 Arno 49-50.
- 53 Allott et al 23.
- 54 Cf Van Niekerk 133-34; Allott et al *ibid.*; Myburgh (1985) 70-71.
- 55 Allott et al 23.
- 56 Van der Merwe (1981) 147.
- 57 Van der Merwe et al (1983) 6, 159 et seq; Myburgh (1985) 75; Mqeke Traditional and Modern Law of Procedure and Evidence in the Chiefs' Courts of the Ciskei Unpublished LLM dissertation Rhodes University (1985) 30.
- 58 Van der Merwe (1981) 147; Ollennu 111; cf Allott et al 24; Shack 159-160; Myburgh (1985) 75; Mqeke (1985) 30.
- 59 Van der Merwe et al (1983) 6-7; Myburgh (1985) 75.
- 60 Myburgh (1985) 75.
- 61 Mqeke (1985) 31.
- 62 Myburgh (1985) 75; Mqeke (1985) 29.
- 63 Allott (1968) 137.
- 64 Myburgh (1985) 70; Mqeke (1985) 29.
- 65 Myburgh (1985) 75; Mqeke (1985) 31-32.
- 66 Van der Merwe (1981) 147.
- 67 Van der Merwe (1981) 146.
- 68 Van der Merwe (1981) *ibid.*; Myburgh (1985) 70.
- 69 Van Velsen 138.
- 70 Van Velsen 139; Van der Merwe (1985) 445 et seq.
- 71 Keuning "Some Remarks on Law and Courts in Africa" in Ife Integration of Customary and Modern Legal Systems in Africa (1964) 58-59 interpretes this as a misunderstanding of the African reality with its courts of chiefs and elders in the

past and its customary courts in the present. See also van Velsen 144-149; Shack "Guilt and Innocence : Problem and Method in the Gurage Judicial System" in Gluckman (ed) op cit 153. see also Prinsloo Inheemse Publiekreg in Lebowa (1983) 237 et seq; Myburgh & Prinsloo Indigenous Public Law in KwaNdebele (1985) 111 et seq.

- 72 Keuning 59; Gluckman The Judicial Process among the Barotse of Northern Rhodesia (1955) 172 et seq; See also Schapera A Handbook of Tswana Law and Custom (1955) 1179 et seq; Van Velsen 140 et seq.
- 73 Keuning 61.
- 74 Keuning 62.
- 75 Keuning *ibid.*
- 76 Keuning *ibid.*
- 77 Koyana The Judicial Process in the Customary Courts (1983) 36.
- 78 Allott et al 23-24.
- 79 Rules of Court of Chiefs and Headmen in Civil Matters published in GN R2082 or in Reg. Gaz 887 of 29 December 1967, which apply throughout the Republic and in some recently independent states like Transkei - see also KwaZulu's Chiefs' Criminal Courts (KwaZulu) KwaZulu Govt. Notice 12 of 1979.
- 80 Rule 1.
- 81 Nombona v Mzileni and Another 1961 NAC (S) 22; see also Mogale v Mogale 1912 TPD 92; Makapan v Khope 1923 AD 551; see also Olivier et al Die Privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes (1981) 575.
- 82 Rule 2.
- 83 Rule 4; Zulu v Mdletshe 1955 NA (N-E) 89; Monnakgotla v Monnakgotla 1967 BAC (S) 49.
- 84 Rule 5.
- 85 Rule 6; Kumalo v Kumalo 1953 NAC (N-E) 43; Dimaza v Gxalaba 1955 NAC (S) 94; Malufahla v Kalankomo 1955 NAC (S) 95; Am v Kuse 1957 NAC (S) 92; Qwabe v Qwabe 1961 NAC (N-E) 3; Kunene v Madonda 1955 NAC (N-E) 75; Magubane v Nzimande 1963 BAC (N-E) 4; Jiyane v Jiyane 1966 BAC (N-E) 12.

- 86 Rule 7; Xulu v Xulu 1971 BAC (N-E) 67; Bhengu v Mpungose 1972 BAC (N-E) 124.
- 87 Rule 8; Butelezi v Mgabi 1947 NAC (N&T) 99; Mazibuko v Kumalo 1955 NAC (N-E) 70.
- 88 Rule 9; Mbata v Mdhlalose 1952 NAC (N-E) 21; Sibisi v Mtshali 1953 NAC (N-E) 153; Ngxolo v Samuel 1954 NAC (S) 40; Pantshwa v Betyeni 1954 NAC (S) 106; Nxumalo v Ndwandwe 1956 NAC (N-E) 79; Mtiyane v Gumede 1956 NAC (N-E) 92; Mangwanya v Mapupa 1958 NAC (S) 21; Zungu v Zungu 1960 NAC (N-E) 35; Jiyane v Jiyane 1963 NAC (N-E) 44.
- 89 Rule 11; Gumede v Nxumalo 1953 NAC (N-E) 1955; Gazu v Ndawonde 1954 NAC (N-E) 143; Zulu v Zulu 1955 NAC (N-E) 65; Myeni v Myeni 1955 NAC (N-E) 79; Mtimkulu v Mtimkulu 1956 NAC (N-E) 157.
- 90 Rule 12; Dhlahdla v Dhlahdla 1934 NAC (N&T) 36; Biyela v Mutwa 1953 NAC (N-E) 58; Mdluli v Mbuyane 1953 NAC (N-E) 286; Ncapalala v Ncapalala 1954 NAC (N-E) 115; Hlongwane v Hlongwane 1956 NAC (N-E) 86; Zulu v Zulu 1957 NAC (N-E) 6; Gumede v Mkwanzazi 1959 NAC (N-E) 24; Dada & Dada v Mdladlambe 1959 NAC (N-E) 51; Nxumalo v Mlungwana 1959 NAC (N-E) 6; Jeni v Xinabantu 1961 NAC (S) 62.
- 91 Rule 13; Ntanzu v Zulu 1956 NAC (N-E) 81; Nxumalo v Nxumalo 1957 BAC (N-E) 23.
- 92 Rule 2.
- 93 Rule 2(3).
- 94 Kulu v Mtembu 1954 NAC (N-E) 5; Mchunu v Mchunu 1955 NAC (N-E) 72; Gumede v Mkhwanazi 1959 NAC (N-E) 24; Zungu v Mtshali 1967 BAC (N-E) 58; Mkhabela v Ndlangamandla 1974 BAC (N-E) 404.
- 95 Nkosi v Kumalo 1954 NAC (N-E) 123.
- 96 R v Sussex Justice, ex parte McCarthy (1924) IKB 256 259.
- 97 Ntsele v Ncube 1972/1974 ACCC (N-E) 386.
- 98 Mchunu v Ndebele 1975/77 ACCC (N-E) 77.
- 99 Mangweli v Sgwene 1942 NAC (N&T) 73; Mereotle v Tsele 1951 NAC (CD) 63.
- 100 Mahlangu v Motshweni 1955 NAC (N-E) 155.
- 101 Rule 6.

- 102 Khumalo 40.
- 103 Kumalo v Kumalo 1953 NAC (N-E) 4; Qwabe v Qwabe 1961 NAC (N-E) 3; see also Kunene v Madonda 1955 NAC (N-E) 75.
- 104 Malufahla v Kalankomo 1955 NAC (S) 95; Gambushe v Makhonya 1980 ACCC (N-E) 10.
- 105 Am v Kuse 1957 NAC (S) 92; Ntshingili v Mncube 1975 BAC (N-E) 100; Khalankomo v Xaba 1981 ACCC (N-E) 25.
- 106 Jiyane v Jiyane 1966 BAC (N-E) 12.
- 107 Mtimkulu v Mtimkulu 1956 NAC (N-E) 157.
- 108 Mbokazi v Mpungose 1975/77 ACCC (N-E) 40.
- 109 1977 ACCC (N-E) 247.
- 110 Rule 7(1).
- 111 Rule 7(2); Ncanana v Xulu 1971 BAC (N-E) 67.
- 112 1972 BAC (N-E) 124; see also Mbokazi v Mpungose 1975/77 ACCC (N-E) 40.
- 113 Mqeke "Chiefs' Civil Court Rules" 1983 De Rebus 400; Mqeke (1985) 92.
- 114 This has been effected by the Bophuthatswana Traditional Court Rules GN 8 of 1982 amending GN R2082 of 1967.
- 115 Rule 8(1).
- 116 Cf Coertze & Mostert Commission Report 96.
- 117 S20(5) of Act 38 of 1927.
- 118 Rule 8(3); Mbambo v Bele 1969 BAC (N-E) 15; Mazibuko v Shabalala 1953 NAC (N-E) 243.
- 119 Coertze & Mostert Commission Report 99.
- 120 Rule 9(1).
- 121 Mbata v Mdhlalose 1952 NAC (N-E) 18; Sibisi v Mtshali 1953 NAC (N-E) 153; Jiyane v Jiyane 1963 BAC (N-E) 44.
- 122 Zungu v Zungu 1960 NAC (N-E) 35.

- 123 Mtiyane v Gumede 1956 NAC (N-E) 92.
- 124 Rule 10; Nxumalo v Ndwandwe 1956 NAC (N-E) 79.
- 125 Rule 11.
- 126 Myeni v Myeni 1955 NAC (N-E) 79; Gazu v Ndwandwe 1954 NAC (N-E) 142; Zulu v Zulu 1955 NAC (N-E) 64; Gumede v Nxumalo 1953 NAC (N-E) 195; Sibiya v Zwane 1965 BAC (N-E) 60.
- 127 Rule 12(1).
- 128 Rule 12(2).
- 129 Rule 12(3).
- 130 Coertze & Mostert Report 107.
- 131 For a full discussion of these see Swanepoel "Appelle vanaf Kapteinshowe na Bantoesakekommissarishowe in Siviele Sake" 1977 De Jure 350 et seq and 1978 De Jure 113 et seq.
- 132 Mdluli v Mbuyane 1953 NAC (N-E) 286; Khumalo The Civil Practice of all Courts for Blacks in Southern Africa 3ed (1984) 45; Blaine Native Courts Practice (1931) 163; Tabata v Sidinana 1959 BAC (S) 5.
- 133 In a number of cases it was decided that the substitution of parties in the commissioner's court is not permissible - Kekana v Bodiba 1939 NAC (N&T) 82; Ngobela v Mathonsi 1939 NAC (N&T) 76; Madlala v Madlala 1961 BAC (N&T) 6; Thabede v Nkomonde 1980 ACCC (N-E) 70.
- 134 Zwane v Myeni 1937 NAC (N&T) 73; Ndhlovu v Ntobela 1938 NAC (N&T) 167; Tusini v Xaba 1939 NAC (N&T) 33; Mhlanze v Tshibase 1943 NAC (N&T) 38; Makoba v Makoba 1945 NAC (N&T) 92; Ngcobo v Ngcobo 1946 NAC (N&T) 14; Zakhile v Gobidolo 1958 BAC (S) 76; Mdlalose v Sikakane 1959 BAC (N-E) 67; Xulu v Sikakane 1964 BAC (N-E) 111.
- 135 Msani v Mgcece 1978 ACCC (N-E) 47; Mqeke (1985) 191-11.
- 136 Swanepoel 357. This is more acceptable than the reasons given in Mdlalose v Sikakane 1959 BAC (N-E) 67; Tengela v Madi 1964 BAC (S) 35.
- 137 See Swanepoel (1978) 114 et seq.
- 138 Rule 12(4) Mdluli v Mbuyane 1953 NAC (N-E) 286.

- 139 Hlongwane v Hlongwane 1956 NAC (N-E) 86; Gumede v Mkwanzazi
1959 NAC (N-E) 24.
- 140 Dhladhla v Dhladhla 1934 NAC (N&T) 36.
- 141 Nxumalo v Mlungwana 1959 NAC (N-E) 6.
- 142 Zulu v Zulu 1957 NAC (N-E) 6.
- 143 Khumalo 46; Mqeke (1985) 110.
- 144 Coertze & Mostert Report 93.
- 145 S5 of the Bophuthatswana Traditional Courts Act 29 of 1979.
This differs from the position under Act 38 of 1927.
- 146 Rules 4 to 26.
- 147 Rule 13(1).
- 148 Khumalo 46.
- 149 Myburgh & Prinsloo (1985) 129.
- 150 KwaZulu Chiefs' Criminal Courts Regulations, KwaZulu
Government Notice 12 of 1979, made under S20(9) of Act 38 of
1927.
- 151 Reg 2(1).
- 152 Reg 2(2).
- 153 Reg 2(3),(4).
- 154 Reg 3(1).
- 155 Reg 3(2).
- 156 Rule 17.
- 157 Reg 3(3).
- 158 Reg 3(4).
- 159 Reg 3(5).
- 160 Reg 4 and reg 6.
- 161 Reg 5.

- 163 Kaleni 1959 4 SA 540 (ECD); Ntwana 1961 3 SA 123 (ECD).
- 164 Reg 7(1).
- 165 Reg 7(2).
- 166 Reg 7(3)-(4).
- 167 Reg 8(1).
- 168 Reg 8(3).
- 169 Reg 8(4).
- 170 Kaleni 1959 4 SA 540 (ECD).
- 171 Mbanlo 1963 1 SA 224 (ECD); cf Ngidi 1969 1 SA 411 (N).
- 172 Dumezweni 1961 2 SA 751 (A).
- 173 Sibiya 1952 2 SA 206 (N); Labuschagne (1974) 44-45;
Myburgh & Prinsloo (1985) 132.
- 174 Labuschagne (1974) 45.

CHAPTER VII

THE VALUE OF CHIEFS' COURTS

7.1 INTRODUCTION

In the previous chapter the procedure that is followed in the chiefs' courts was analysed. It became clear that although the approach which these courts adopt differs from that pursued by the western courts, this does not automatically lead to a travesty of justice. Moreover, this approach does not conflict with the views of justice held by the members of the communities which the chiefs' courts serve. The actual issue to be addressed in this chapter is whether chiefs' courts still have a meaningful role to play in the administration of justice in KwaZulu today. This will be determined by assessing the legitimacy of these courts and the amount of work which these courts perform. The necessary implication of this is that if these courts are unacceptable to the majority of citizens they are supposed to serve, they may have to be abolished. If they have no work to do, they will die a natural death.

7.2 THE LEGITIMACY OF CHIEFS' COURTS

The attitude of Blacks to the role of chiefs in the administration of justice is particularly important because it

indicates the element of legitimacy of the institution. Legitimacy, however, is not static, but it is rather variable and is dependent on the attitudes, values and interests of the community.¹ Attitudes and values change. In the Black community, not all persons are in favour of the retention of chieftainship because of altered attitudes to the administration of justice.

From empirical research it did become clear, however, that the majority of people in certain areas of KwaZulu are in favour of the retention of the role of chiefs in the administration of justice. This is because the decisions of chiefs' courts result in lesser costs; the proceedings are expeditious and there are no endless postponements; the procedure is simple, flexible and informal and commends itself to the understanding of the ordinary man; a free system of evidence is followed; more substantial justice is done; compensation is awarded to the complainant in criminal cases; chiefs' courts are more practical in their approach to issues rather than technical, and chiefs' courts are still seen by some members of the community as a cultural heritage. The doing of justice facilitates social stability. Courts in any society are a means of social control aimed at the preservation of peaceful co-existence of the members of a community despite conflicting interests.² A similar investigation in Bophuthatswana revealed similar results.³

There is no doubt that chiefs' courts relieve the backlog in the magistrates' courts by hearing a number of cases that would otherwise be heard by the magistrates' courts. Delays in the magistrates' courts are a common problem and these lead to society's loss of confidence in the administration of justice. Loss of evidence, the fading of memory and endless waiting all contribute to justice not being properly done. Hearings in the chiefs' courts, on the other hand can be negotiated. Even for those people who are absent and work far from home an arrangement can be made to hear the case on a Saturday. This would not be possible with the magistrate's court.

The recent establishment of the small claims court in South Africa is evidence that magistrates' courts are often inundated with a lot of work they cannot handle expeditiously. Moreover, these courts are aimed at facilitating access to justice to ordinary men who have small claims which it would be expensive to settle in the magistrates' courts. ⁴ Very often the cost of litigation is so high that it is often not advisable to pursue a claim for less than R750. The amount where Blacks are involved is frequently lower than this. Consequently it is usually not worthwhile for a Black person to pursue a civil claim in the magistrates' court. The game is just not worth the candle.

The need for the existence of an inexpensive ^uform to facilitate access to justice and to ensure the simple, expeditious and

informal settlement of disputes has been felt all over the world. The establishment of small claims courts in various parts of the world has been seen as fulfilling this important need.⁵ Despite the role played by the small claims courts, there has been no uniform approach to them. Steele states that:

the courts that handle small claims have been viewed sometimes as the vanguard of the legal system as its point of contact with the life of the ordinary citizen and sometimes as 'lower' courts that must, as quickly and efficiently as possible, dispose of huge numbers of petty private quarrels that are without relevance to the important events of the day or to the development of the law. And some times small claims courts have been seen as the vanguard of procedural reform and even as the crucible in which reform experiments will be tested and refined for later use in all courts, while at other times they have been largely ignored or viewed as judicial backwaters characterized by stultifying routines of little consequence.

Not only have small claims courts been created in countries like the United States of America, but alternative dispute resolution procedures have been heralded as some of the most important procedural reforms. The loose collection of deformedalized, decentralized procedures, including negotiation, mediation, arbitration, neighbourhood justice centres, and consumer

complaint panels has been applauded as offering speedy, non-intimidating, flexible justice for the common person of limited means.⁷ Resort to these methods has largely been promoted by the belief that some disputes are handled more effectively outside the courts, without "the delay and expense and psychological strain, the hostility or lack of empathy engendered by differences of class or race, or verbal style" that accompany formal adjudication.⁸

In South Africa particularly in certain urban Black townships the need for an informal forum to facilitate access to justice on the part of the ordinary person has been evidenced by the so-called "makgotla"⁹ on the model of traditional courts, and more recently by the establishment of "people's courts".¹⁰ The establishment of "people's courts" is, however, motivated by political considerations. It is an attempt to reject the "white man's justice" in favour of the "people's justice". Small claims courts, and people's courts are confined to certain areas. In rural areas therefore, the chiefs' courts still continue to play a meaningful role in the administration of justice and are still largely accepted by the majority of the people. It will be instructive to evaluate the amount of work done by these courts.

7.3 THE WORK DONE BY CHIEFS' COURTS

In order to determine the amount of work done by chiefs' courts in

KwaZulu, the Department of Justice was requested to supply statistics for the period between 1981 and 1984. Although these statistics do not reveal the complete picture of the work done by the chiefs' courts in KwaZulu, in that some chiefs do not submit their judgements for registration, and other areas of KwaZulu are not included, they serve as an indication that these courts still have a contribution to make towards the settlement of disputes and the maintenance of peace and stability in these areas .

The following table illustrates the number of cases submitted for registration by the chiefs to the various magistrates' courts in various districts in KwaZulu for the period between 1981 and 1984.

DISTRICT

	1981		1982		1983		1984	
	R	A	R	A	R	A	R	A
Ingwavuma	235	14	58	14	103	18	69	8
KwaNgwanase								
Sub-office	-	-	-	-	186	3	82	3
Ubombo	417	14	405	29	343	21	457	20
Nongoma	100	17	75	20	101	21	33	9
Hlabisa	308	27	280	52	277	6	342	26
Mahlabathini	459	32	904	39	764	30	705	24
Enseleni	200	30	200	30	162	17	173	17
Madadeni	115	6	82	5	98	2	112	4
Nqutu	234	32	309	38	304	15	1774	23
Nkandla	102	16	217	17	145	10	106	13
Msinga	31	3	44	Nil	14	Nil	25	Nil
Emnambithi	77	1	87	5	98	4	143	4
Okhahlamba	48	2	51	6	85	2	80	5
Mapumulo	159	9	162	6	199	15	115	7
Ndwedwe	244	11	368	14	590	12	441	3
Mpumalanga	245	15	210	7	148	8	191	4
Umbumbulu	71	10	135	6	77	4	127	5
Vulindlela	Nil	Nil	72	Nil	99	7	90	1
Hlanganani	190	16	259	22	272	23	42	7
Impendle								
Sub-Office	Nil	Nil	74	10	Nil	Nil	53	7
Vulamehlo	196	8	213	8	189	17	194	20
Emzumbe	318	31	326	23	201	25	222	24

The symbols R and A represent cases registered and appeals respectively.

The KwaNgwanase sub-office began operating in 1983 and previously the cases were registered at the main office at Ingwavuma. During 1981, chiefs' cases heard at Vulindlela were registered at the office of the commissioner in Pietermaritzburg. The figures for 1981 and 1983 in respect of Impendle sub-office were incorporated into those of the main office at Hlanganani.

As already pointed out, some areas do not appear from the statistics. Chiefs' cases heard at the districts of Ezingolweni, Simdlangentsha, Ongoye and Inkanyezi were submitted for registration to the following magistrates' courts which fall outside KwaZulu, namely Port Shepstone and Harding, Piet Retief, Mtunzini and Eshowe respectively. Three chiefs in the Enseleni district submit their cases for registration at the magistrate's office in Melmoth.

A survey of the chiefs' records from a few selected areas revealed interesting information. The records disclose the variety of cases which the chiefs usually hear. These areas include, Lower Umfolozi, Hlabisa, Mahlabathini and Mtunzini. Before an analysis of these is made, it is important to note that the statistics supplied by the KwaZulu Department of Justice disclose that the number of cases decided by chiefs varies from place to place. Various considerations may account for this. One of these is the size of the area of a particular chief. The

other is the extent to which people of that area are prepared to take their cases to the chief's court. It must also be pointed out that some disputes are settled administratively.

The following is an exposition of the types of cases heard and the fine imposed as well as damages awarded in these cases by chiefs in the districts of Mtunzini for the period between 1973 and 1983 and Kwamsane, Hlabisa for the period between 1980 and 1983.

7.3.1 Mtunzini magisterial district

7.3.1.1 Chief Mathaba

In this chief's area a number of criminal cases were decided during this period. These include assault, defamation, abduction, kidnapping, theft and rape.

From the records it appeared that cases of assault were quite common. The average fine imposed in less serious cases was R14,55. This was always accompanied by an additional average amount R11,55 payable as costs.

Certain cases of assault with intent to do grievous bodily harm were recorded. A beast payable to the complainant and another payable to the court was usually imposed as a fine. In one case of assault with intent to murder, a nominal fine of R20,00 was

exacted. In terms of the Black Administration Act, chiefs are not competent to hear such cases. In instances where the assault led to hospitalization and medical expenses, the accused was also ordered to pay hospital expenses.

A number of cases of defamation were recorded. The most common form of this involved imputations of witchcraft. The average amount imposed as a fine was R10,00 and an additional amount of R7,55 on the average was payable as costs.

A few cases of abduction were recorded. In one case the daughter was abducted from the family home of his father without his consent for eighteen days. A fine of R20,00 was imposed on the accused. In another case the girl left her father's family home to stay with the accused. A fine of two head of cattle was imposed. In addition one beast was payable as costs.

In another case of abduction the daughter of the complainant was removed from him and hidden. A fine of two head of cattle was payable together with one beast as costs. It must be pointed out once again that chiefs are incompetent to hear cases of
13
abduction.

Two cases of theft were recorded. No punishment was imposed, but an order was issued that the stolen goods be restored to their

lawful owners. One case of attempted rape was reported. The accused was sentenced to a fine of R20,00 plus another R20,00 as costs.

Although the issuing of a trek pass or banishment order is an administrative and not a judicial function,¹⁴ a few cases of this nature were recorded. From the records it appeared that fewer civil cases than criminal cases were decided. A number of these involved ilobolo claims. Paternity was often not disputed and the defendant admitted his liability.

In cases of seduction followed by pregnancy an average of three head of cattle was awarded as damages to the plaintiff. In 30% of these cases an average of R20,00 had to be paid as costs. In 25% of them one beast had to be paid to the chief.

Applications for divorce were referred to the ordinary courts of the law. Five cases were recorded where the defendant omitted to appear in court. In these cases judgment by default was granted. The average costs were R20,00. Damages were assessed according to the damage suffered. These often involved the destruction of sugarcane plantations. In two cases judgment was entered for the defendant. In 31,1% of the cases the defendant or accused was ordered to pay by means of cattle, or cattle were payable as the alternative if he did not have the financial means to pay.

7.3.1.2 Chief Mzimela

Although the Black administration Act ¹⁵ expressly prohibits the hearing by a chief of cases involving faction fighting, fourteen of these were heard and recorded. The accused in these cases were sentenced to R30,00 or one beast.

Few cases of assault were decided in this area. The average fine imposed on the accused was generally high, namely R43,80. The average amount paid as costs was R6,65. In one case of assault with intent to do grievous bodily harm the accused was fined R120,00.

Five cases of defamation were decided. In a case of contempt of court, it was alleged that the wrongdoer assaulted people during a trial. He was fined R120,00 or four head of cattle. In another case the accused impugned the chief's powers. He was found guilty of contempt of court and a fine of two head of cattle, plus R22,75 as costs, was imposed.

Only one case of abduction was reported. The court dismissed it.

From a few reported decisions, it appeared that arson is regarded as a serious offence. In one case the accused was fined R340-00 or six head of cattle, and in another one corporal punishment of

six strokes with a cane, besides the fine, was imposed. Three cases of carrying dangerous weapons such as spears and shields were recorded. The fine was R2,00.

A number of claims involving ilobolo were recorded. The payment of ilobolo took place according to customary law. In other cases concerning contractual claims, the defendant was ordered to perform as per agreement. In one case where the plaintiff had undertaken to build a house for the defendant, and the defendant had omitted to pay he was ordered to pay the amount owing. In one case where the plaintiff claimed damages for adultery, the defendant was ordered to pay only R20,00 plus R4,75 costs.

Damages were assessed according to the damage suffered. Where for instance animals damaged the mealie fields of the plaintiff, the defendant had to pay R20,00 or ten bags of mealies. In general the extent of damage was determined in monetary terms. Payment in kind was ordered in fewer cases.

In 55,2% of the cases payment through the medium of cattle or as an alternative method was ordered. In only 3,6% of the cases (three out of 82 cases) was judgement entered for the defendant.

7.3.1.3 Chief Mkhwanazi

In a number of cases of assault huge amounts of say R160,00 were

paid. It was not specifically mentioned whether the assault took place with the intention to do grievous bodily harm. From the nature of the amounts, however, it appeared that the injuries were serious. In one case hospital expenses were included in the amount awarded.

Where a charge of assault was coupled with contempt of court a fine of R100,00 was imposed. In some other cases of assault a fine of R50,00 was imposed and in another one beast was exacted.

One case of kidnapping was recorded. The accused had taken the complainant's ^{na} daughter-in-law and three children from his family home. A beast of R40,00 plus R3,00 costs, was imposed. In a case of abduction the daughter of the complainant was taken away without his consent. The court only ordered that she must return to her father's family home.

Three cases of theft were reported. One such case was decided in favour of the accused because his ownership was proved. The other two were theft of a record player and theft of R140,00. In both cases the court ordered that either the record player be returned or R50,00 and that in the case of theft of R140,00 the said amount be returned to its owner.

Six cases of defamation were heard. Three of these were

dismissed, and one was decided in favour of the accused. In most of these cases imputations of witchcraft were involved.

The position relating to ilobolo claims was largely the same as in the other chiefs already mentioned. It was generally ordered that the cattle owing be paid in cases of seduction. In the case of the death of the girl the return of the already paid ilobolo was ordered. In only few cases was money offered in the place of cattle.

In a few contracts of sale and service contracts, the judgment was usually for specific performance, namely that the defendant should perform what he had agreed to perform. Ten percent of the cases dealt with disputes as to the ownership of land. The cases were generally considered and decided either in favour of or against the defendant dependent on the evidence.

Nine cases out of a total of 111 were decided in favour of the defendant (that is 8,1%). Damages for damage to fields and sugarcane plantations were realistically assessed in the light of the damage suffered. In 32,43% of the reported cases, cattle were ordered as the medium of payment. In only one case was a goat ordered to be paid.

7.3.1.4 Chief Zulu

In the area of Chief Zulu few cases were recorded, a total of only twenty cases. Only one case of assault was recorded. A beast worth R80,00 was imposed as a fine and R18,00 as costs.

In one case of contempt of court R20 was ordered to be paid. In another case the chief brought an action against the defendant after defendant had accused him of taking cattle illegally. He presided over the case. This does not appear to be a clear case of contempt of court, and his presiding over the case seems to have violated the rule that the presiding officer should not have an interest in the matter he is hearing. The fine was R100,00 plus one beast.

A few recorded civil cases involved ilobolo claims, claims for seduction and pregnancy, damages for destruction of crops, and damages for defamation. In one case where the defendant defamed the plaintiff in the chief's court the plaintiff claimed R1500,00 and the court awarded the amount. In 50% of the cases cattle were payable as damages or in the alternative.

7.3.1.5 Chief Nzuza

Altogether twenty-six cases were recorded in this area. Of these

seven involved assault. The average amount awarded for less serious cases of assault was R33,65. In one case of serious assault a claim for R240,00 plus R60,00 costs, was brought and granted. It would appear that this was a case of assault with intent to do grievous bodily harm.

Nine cases that were recorded concerned claims for seduction and pregnancy. In each case three head of cattle were claimed. A few other cases involved ilobolo claims. In most of these cases liability was admitted. A few cases dealt with contractual claims.

In 46% of the cases cattle were used as a medium of payment or in the alternative. Judgment was given for the defendant in only 7,1% of the cases. It was in only one case that judgment by default was granted.

7.3.1.6 Chief Dube

A total of thirty cases was recorded for the area of Chief Dube. Only cases of common assault were recorded. Where the plaintiff was bitten by the defendant, it was regarded as assault.

Only three cases of defamation were recorded. Nominal amounts were awarded as damages. There was also one case which involved

theft and housebreaking. For theft a fine of R60,00 was imposed, and for housebreaking R69,00. In one case of attempted rape the accused was fined R20,00.

A number of other cases involved ilobolo claims, claims for seduction and pregnancy and claims based on contract. No case was decided in favour of the defendant.

7.3.2 KwaMsane magisterial district

The records of the chiefs' courts that were examined in Hlabisa came from four chiefs, namely M. Hlabisa, Mdletshe, Mkhwanazi, and D.J. Hlabisa.

7.3.2.1 Chief M. Hlabisa

A total of thirty cases were decided in this area. Unlike in other areas, only two cases of assault were recorded. According to the record the defendant in one case wanted "bloodshed". The plaintiff claimed R180,00 as damages. It is not clear from the record whether the assault took place with intent to do grievous bodily harm. This may perhaps be inferred from the amount claimed. The court awarded R60,00 plus R36,00 costs.

Eight cases were recorded where the accused omitted to pay the tribal levy. The accused were consequently found guilty and

ordered to pay the sum of R26,50. In each of these cases the tribe instituted the action. It is, however, not clear whether the chief or the tribe brought the action.

Two cases of crimen injuria were uncovered. In the one case a claim for damages amounting to R300,00 was brought. The court, however, dismissed the action. In the other case the complainant was insulted before the magistrate's court and a claim for R40,00 was granted.

A number of what can properly be termed civil claims related to ilobolo and claims for seduction and pregnancy. Where a claim for the return of cattle was brought, it was usually granted. It would appear as if there were no problems relating to the type of claim in question. In cases of seduction followed by pregnancy liability was usually established. Only in one case was paternity disputed.

Damages were assessed according to the loss or injury suffered. Where fields were destroyed by animals, payment in kind was often ordered. In only one case was judgment by default granted.

In 10,5 of the cases cattle were used as a medium of payment or were ordered in the alternative. The total number of cattle was sixteen.

From the records it appears that any offence relating to an official is regarded as a serious violation. Where, for instance, the tribal police were obstructed in the performance of their duties a fine of R40,00 was imposed. Even in a case where an induna was not visited as agreed upon a fine of R10,00 was imposed.

7.3.2.2 Chief Mdletshe

Altogether twenty-six cases were decided in this area. Fifteen percent of the cases dealt with assault. No distinction was drawn between common assault and assault with intent to do grievous bodily harm. In one case a claim for R400,00 or nine cattle was brought. This arose from the loss of the use of his hand by the claimant after being stabbed. The court awarded R400,00. From the nature of this assault it appears that it was with intent to do grievous bodily harm. The rest of the cases of assault were cases of common assault.

Nineteen percent of the cases surveyed concerned claims for outstanding tribal levy. The average amount awarded in each case was R10,00 and the average amount awarded as costs was R7,50.

Only one case of defamation was recorded. The defendant had accused the plaintiff of theft. The plaintiff instituted a claim

for R500,00 or five head of cattle. The court awarded the claim plus R25,00 costs.

About 26,5% of the recorded cases dealt with claims for ilobolo, and claims for damages for seduction and pregnancy and extramarital cohabitation. The average amount awarded for extramarital cohabitation was R60,00. In the event of pregnancy, the claimant claimed damages and generally three head of cattle were awarded in accordance with custom.

The majority of cases arose from the destruction of crops by animals. The amount of damages was assessed according to the loss suffered. In 11,5% of the cases judgment was entered for the defendant. In 30,8% of the cases cattle were paid as a fine or as an alternative medium. It was in only one case that goats were ordered as payment.

7.3.2.3 Chief Mkhwanazi

In the area of Chief Mkhwanazi 46 cases were decided. Forty-six percent of the cases investigated were assault cases.

A distinction was made between common assault and assault with intent to do grievous bodily harm although it was not clear whether these were accompanied by serious injuries. There was

one case where a claim for R960 or four head of cattle was brought. One recorded case involved the carrying of a dangerous weapon. The accused was fined R30,00.

A number of civil claims related to ilobolo and seduction coupled with pregnancy. Damages in the form of three head of cattle or the alternative amount, R960 on the average, were claimed and awarded. Contractual claims also featured prominently. Damages were also claimed for damage caused by animals to fields. One case concerned failure to build a toilet, and a fine of R15,00 was imposed plus R10,00 costs.

Payment through the medium of cattle was ordered in only four instances. In one case the chief himself instituted the action over which he presided. This was a case where he had been assaulted, and a fine of R30,00 was imposed. There was no judgment by default or judgment in favour of the defendant.

7.3.2.4 Chief D.J. Hlabisa

Altogether seven cases were decided in this area. One case was that of assault. An amount of R200,00 was claimed for injuries suffered, and R30,00 for medical expenses. The court awarded only R180,00.

Two cases were recorded where health regulations were contravened and a fine of R15,00 plus R10,00 costs was imposed. In ilobolo claims the customary procedure was followed. A claim for damage to a house was instituted and R800,00 or three cattle claimed. The court granted the claim. Judgment by default was granted in two cases. In 71,2% cattle were ordered payable or in the alternative.

It will be illuminating to observe the amount of work done in the other two districts. The following tables will in broad outline indicate the amount of work done in the Lower Umfolozi district for the period between 1978 to 1981 and Mahlabathini district for the period between 1982 and 1983.

7.3.3 Lower Umfolozi magisterial district

CHIEF	TYPE OF CASE	NUMBER OF CASES	TOTAL
Mthethwa	Theft	11	
	Malicious injury to property	65	
	Assault	76	
	Defamation	17	

CHIEF	TYPE OF CASE	NUMBER OF CASES	TOTAL
	Rape	2	
	Maintenance/ <u>Isondlo</u>	2	
	<u>Lobolo</u>	21	
	Seduction and pregnancy	56	
	Lease agreement	5	
	Breach of contract	2	
	Adultery	5	
	Miscellaneous	34	
			298
Zungu	Theft	4	
	Assault	19	
	Defamation	13	
	Malicious injury to property	27	
	<u>Lobolo</u>	1	
	Seduction and pregnancy	10	
	Arson	1	
	Contract of sale	2	
	Adultery	1	
	Inheritance	1	
	Abduction	1	
	Miscellaneous	7	
			87

CHIEF	TYPE OF CASE	NUMBER OF CASES	TOTAL
Khoza	Theft	7	
	Assault	17	
	Malicious injury to property	9	
	Defamation	6	
	Maintenance/ <u>Isondlo</u>	2	
	<u>Lobolo</u>	3	
	Lease agreement	1	
	Rape	1	
	Seduction and pregnancy	4	
	Abduction	1	
	Miscellaneous	9	
			60
Mbuyazi	Theft	3	
	Assault	18	
	Abduction & cohabitation	3	
	Defamation	2	
	Malicious injury to property	3	
	Seduction and pregnancy	8	
	Sisa contract	2	
	Lease agreement	1	
	Miscellaneous	11	
			51

CHIEF	TYPE OF CASE	NUMBER OF CASES	TOTAL
Mthembu	Theft	4	
	Assault	9	
	Defamation	3	
	Malicious injury to property	7	
	Abduction & cohabitation	2	
	Seduction and pregnancy	4	
	Lobolo	1	
	Adultery	1	
	Contract of sale	1	
Miscellaneous	9		
			33
Cebekhulu	Theft	3	
	Malicious injury to property	5	
	Arson	1	
	Rape	1	
	Miscellaneous	1	
			11
Mthiyane	Assault	1	
	Defamation	1	
	Miscellaneous	1	
			3
			<u>543</u>

7.3.4 Mahlabathini magisterial district

CHIEF	TYPE OF CASE	NUMBER OF CASES	TOTAL
Buthelezi	Contempt of court	27	
	Carrying dangerous weapon	12	
	Failure to pay tribal levy	11	
	Assault	13	
	Failure to build toilets	4	
	Failure to pay dog tax	5	
	Damage to crops	9	
	Defamation	8	
	<u>Lobolo</u>	5	
	Seduction and pregnancy	6	
Miscellaneous	73		
			173
Ndebele	Assault	1	
	<u>Lobolo</u>	3	
	Damage to crops	2	
	Defamation	2	
	Miscellaneous	3	
			11
Zungu	Damage to crops	3	
	Keeping plaintiff's wife	1	
	Miscellaneous	5	
			9

CHIEF	TYPE OF CASE	NUMBER OF CASES	TOTAL
Mbatha	Miscellaneous	6	6
Mpungose	Seduction and pregnancy	2	
	Miscellaneous	4	6
Mlaba	Strayed stock	1	1
			206

7.4 CONCLUSION

From the foregoing exposition, it is clear that chiefs' courts still have a meaningful role to play in the administration of justice in KwaZulu. Although some are in favour of their abolition, those in favour of their retention are undoubtedly in the majority. There are convincing reasons why these courts should be retained, namely simplicity, informality and flexibility of procedure and the speedy and simple justice dispensed. This implies that chiefs' courts still enjoy a large measure of legitimacy in the areas where they operate.

The records investigated, revealed that the amount of work done by chiefs' courts varies from place to place. It is clear,

however, that many of them still deal with a number of cases. Although the records studied covered a few years ago, no noticeable change may have taken place in the meantime.

A striking feature of the decided cases is that no clear distinction is made between civil and criminal cases. Both claims are summarily dealt with in the same action. Punishment and compensation are simply finalised at the same time. Cases where jurisdiction was exceeded were plenty. There is no doubt, however, that the parties involved often have no objection to this. It was also noticed that in a number of instances the fines imposed and damages awarded were never paid. This poses problems for the party entitled thereto.

Although the number of cases was largely not overwhelming, the impression must not be created that these courts are idle. In the majority of cases disputes are settled informally and administratively. But the value of these courts lies not only in the recorded cases they decide, but also in those which never come before them. The very existence of these courts and the possibility of the claim being taken to them is sufficient to deter many people who otherwise would have acted wrongfully to contain their differences. The existence of this judicial machinery facilitates order and stability even without disputes being taken to court. Moreover, it enables even individuals with small claims to have their day in court.

FOOTNOTES

- 1 Hund & Kotu-Rammopo 197.
- 2 Van Nelsen 146.
3. Republic of Bophuthatswana Report of the Commission of Inquiry into (a) The Functioning, the Effectiveness Efficiency and Continued Retention of Traditional Courts Established in terms of the Bophuthatswana Traditional Courts Act, 1979 (Act 29 of 1979) and (b) The Efficaciousness of the System Applied for the Maintenance of Law and Order Within Tribal and Community Authority Areas (1985/1986) Vol. 2 & 3 (hereinafter referred to as the Bophuthatswana Commission).
4. On the reasons for the establishment of small claims courts in South Africa see Hoexter Report 12 et seq; see also Du Plessis "Hof vir Klein Sakies" 1975 De Rebus 68 et seq; Noeth "Die Agtergrond en Ontwikkeling van Wetgewing met Betrekking tot die Klein-Eise Hof" Paper read at UNISA's Conference on Small Claims Courts. (1984) 1 et seq; Milne "Delays and High Legal Costs Cause of Great Concern" 1985 The Natal Mercury 14 November.
5. For a discussion of this see Steek "The Historical Context of Small Claims Courts". 1981 American Bar Foundation Research Journal. Vol. 2, 269 et seq; Domanskis "Small Claims Courts: An Overview and Recommendation" 1976 University of Michigan Journal of Law Reform, 590 et seq; Sikes "Small Claims Arbitration: The Need for Appeal" 1981 Columbia Journal of Law and Social Problems 399 et seq; Thomas "Small Claims - The New Arrangements" 1981 New Law Journal 429 et seq; King "Small Claims Practice in the United States" 1977 St John's Law Re-view 42 et seq; Frame "Small Claims Tribunals" 1982 New Zealand Law Journal 251 et seq; Pye "Speedy Trial" 1986 Duke Law Magazine 9-10; Gottwald "Simplified Civil Procedure in West Germany" 1983 American Journal of Comparative Law 687 et seq; Turner "Small Claims and the Country Court in England - A contrast to the Australian Approach" 1986 Anglo-American Law Review 150 et seq.
- 6 Steele 296.
7. Delgado, Dunn, Brown, Lee and Hubbert "Fairness and Formality: Minimising the Risk of Prejudice in Alternative Dispute Resolution" 1985 Wisconsin Law Review 1359-60.

- 8 Cahn & Cahn "Power to the People or Profession? - The Public Interest in Public Interest Law" 1970 Yale Law Journal 1017; Green "A Comprehensive Approach to the Theory and Practice of Dispute Resolution" 1984 Journal of Legal Education 246; Felstiner "Influences of Social Organization on Dispute Processing" 1974 Law and Society Review 1362.
- 9 Ndaki 176 et seq.
- 10 See Majola "Symposium on the People's Courts in the Republic of South Africa" 1986 Unpublished. On the position in Tanzania, India and Burma see Tiruchelvam "The Ideology of Popular Justice" in Reasons & Rich (eds) The Sociology of Law: A Conflict Perspective (1978) 263 et seq.
- 11 For a discussion of the work of chiefs in other areas see Schapera "The Work of Tribal Courts in the Bechuanaland Protectorate" 1943 African Studies 27 et seq; Schapera "The Source of Law in Tswana Tribal Courts: Legislation and Precedent" 1957 Journal of African Law 150 et seq; Schapera "Tswana Chiefs as Innovators" 1966 Kroniek van Afrika 157 et seq; Schapera "Tswana Legal Maxims" 1966 Africa 121 et seq; Kuper "The Work of Customary Courts; Some Facts and Speculations" 1969 African Studies 37 et seq.
- 12 Schedule III of Act 38 of 1927
- 13 Schedule III of Act 38 of 1927
- 14 For a discussion of this see Buchner "Die Trekpas Gebruik van Inheemse Gewoontereg" 1983 De Rebus 383 et seq.
- 15 Schedule III of Act 38 of 1927.

CHAPTER VIII

LAY JUSTICE IN AFRICA: A COMPARATIVE PERSPECTIVE

8.1 INTRODUCTION

In most African countries where customary law was recognized as a separate but subsidiary legal system, subject to the repugnancy clause, this led to the creation or formal recognition of special courts or traditional courts respectively to deal with questions of customary law between Blacks. Almost all of these countries have on independence to a greater or lesser extent phased out the dual court structure while retaining the application of customary law. Most of them have retained the traditional courts, whereas a few have modified them. A few countries in Southern Africa will be discussed although occasional reference will be made to other parts of Africa or even other countries. The pattern in Africa has largely been similar.

Comparative law, it has been said, "procures the gradual approximation of viewpoints, the abandonment of deadly complacency and the relaxation of fixed dogma. It affords us a glimpse into the form and formation of legal institutions which develop in parallel, possibly in accordance with laws yet to be determined, and permits us to catch sight, through the differences in detail, of the grand similarities and so deepen our belief in the existence of a unitary sense of justice".¹

8.2 BOPHUTHATSWANA

Before independence² the tribal judicial system in³ Bophuthatswana was regulated by the Black Administration Act⁴ and the regulations published thereunder. In terms of this legislation jurisdiction was granted to chiefs and certain headmen⁵ to hear and determine cases.

On attaining independence, provision was made, in the Bophuthatswana constitution for the recognition and application⁶ of customary law. Legislation was then passed to regulate the traditional judiciary machinery.⁷ This legislation conferred jurisdiction on the tribal and subordinate courts instead of on the chiefs personally. It also eliminated the disparity that existed before independence between chiefs in the defunct British Bechuanaland Protectorate and those Tswana chiefs who found themselves outside that area or the extent of their jurisdiction.

In terms of s2 of the Act a tribal court is established for each⁸ tribal authority. A tribal authority must function in⁹ accordance with the laws and customs of the tribe concerned. Courts subordinate to the tribal courts are also recognized and are supposed to administer justice in terms of tribal law and¹⁰ customs. Although these bodies may differ from tribe to tribe, they are normally the courts of the different dikgotla, and merake.

A tribal court consists of the chief and those members of the tribe who, in accordance with the law and customs applicable in the said tribe, are recognized to be members of the court.¹²

The chief is the chairman of the tribal court.¹³ In some tribes it is customary that the chief does not preside in person over cases, but appoints a person to act as chairman.¹⁴ The court must also consist of those persons who are members of the court by virtue of their position in terms of the laws applicable in the tribe. The membership of the tribal court as prescribed by law and custom, may differ from tribe to tribe, but normally will consist of some of the paternal uncles of the chief (borrangwane); all the heads of dikgotla within the tribal capital; the heads of the outlying villages (dikgosana of the different meraka); and other men who, because of their knowledge of customary law or conspicuous ability and shrewdness in dealing with cases, gradually work themselves into prominence.¹⁵

The tribal court is an open court and every adult male in the tribe has the right to be present at any trial and participate in the proceedings. Although they may not strictly speaking be members of the court,¹⁶ they may influence the decision. The chief or the appointed chairman, must always be present when a case is tried. If a case is tried in the absence of the chairman, the judgment or sentence will be null and void. Moreover, at least one third of the members of the tribal court should be present when a case is tried and determined. If not,

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the trial and verdict will be null and void. Provision is made for members of the court to be compelled to attend the sessions of the court regularly. If a member is absent without any sound reason, he may be fined.

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The president is empowered to confer civil jurisdiction on the tribal authority court. No tribal court will have this authority unless it is conferred by the president. Any member of the tribal court as well as the chief, is liable to prosecution if he participates in trials or allows trials to take place without first obtaining authorisation. The court is empowered to decide all cases involving customary law in accordance with the tribal law applicable to such customs except if the law has been repealed or modified or is contrary to public policy or the principles of natural justice.

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A tribal court has original and exclusive jurisdiction to hear and determine all civil cases and matters arising between members of the tribe concerned; where the defendant or respondent resides or has his home within the tribal authority area or if he carries on business or is employed within the said tribal authority area; where any partnership which has business premises situated within the tribal authority area or any member thereof resides within such area; in the case of any person irrespective of whether or not he resides, carries on business or is employed within the tribal authority area, if the cause of action arose wholly within

that area; where a defendant or respondent appears and does not object to the jurisdiction of the court; and where a person owns immovable property within the tribal authority area and has an action in respect of that property.²²

A tribal court has no jurisdiction to try civil actions which do not arise from tribal law. Consequently it has no jurisdiction in matters involving the validity or interpretation of wills or other testamentary documents; the status of persons in respect of mental capacity; a decree of perpetual silence; a decree of nullity, divorce or separation in respect of a marriage; and where the tribal authority or the chief or headman is a party.²³

The president is empowered to confer limited criminal jurisdiction on any tribal authority. This jurisdiction is limited to offences under customary or common or statutory law except offences mentioned in the first schedule to the act.²⁴

The jurisdiction is limited to a fine not exceeding two hundred rand or two head of large stock or ten head of small stock. Corporal punishment may be imposed with a cane only and on unmarried males below the apparent age of thirty years and the number of strokes is limited to seven. The sentence may also impose compulsory labour to be performed periodically or continuously for a period of not more than 180 hours at a designated place.²⁵ The court is precluded from imposing a sentence involving death, mutilation, grievous bodily harm or

26 imprisonment. The tribal courts are permitted to conduct a civil and criminal trial simultaneously if the said trials arise from the same facts and between the same parties. 27 Appeals from tribal courts lie to the magistrates' courts having jurisdiction over the area, and these are competent to try the case afresh as courts of first instance. 28

The provisions of the Bophuthatswana Traditional Courts Act, are in some respects a re-enactment of certain provisions of the Black Administration Act relating to chiefs, and in others are an innovation on this act. Some of the problems which arise from the interpretation of the provisions of the Black Administration Act have been eliminated. Others still remain.

8.3 BOTSWANA

Customary courts in Botswana were recognized for the first time by proclamation 1 of 1919 which provided for appeals against chiefs' judgments 29 and this was later formalized and superseded by proclamation 75 of 1934. In January 1944 the Native Courts Proclamation of 1943 took effect. This provided, inter alia, for the recognition and constitution of the Botswana customary courts. The Native Courts Proclamation of 1943 was replaced by the African Courts Proclamation of 1961 which was later amended in 1968 by the African Courts Acts of 1968.

In terms of section 8 of the African Courts (Amendment & Supplementary Provisions) Act ³⁰ customary courts have civil jurisdiction where all parties are tribesmen or the defendant submits to the jurisdiction of the court. Furthermore, a customary court may exercise criminal jurisdiction where the accused is a tribesman or consents in writing to the jurisdiction ³¹ of the court. This means that the courts have since 1968 ³² acquired multi-racial jurisdiction. In addition, a customary court of appeal may be established by the president consisting of a chief or a body of chiefs or any other tribesmen or a combination of such chief and other tribesmen or men sitting with or without assessors. A right to appeal exists against a decision or order of a lower customary court to a higher customary court and from there to a customary court of appeal, or a subordinate court of first class of competent jurisdiction. In a case where there is no higher customary court, an appeal lies with the subordinate court of the first class of competent jurisdiction.

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The Customary Courts Act provides for the appointment of a customary courts commissioner whose powers and functions encompass, inter alia, the guidance, supervision and organisation of the customary courts in the whole of Botswana. The customary courts commissioner may also discharge any function vested in a subordinate court by the Customary Courts Act. The customary

courts commissioner may also, in certain circumstances, transfer a case for hearing and determination by some other customary court or subordinate court of appropriate jurisdiction.³⁴ He may in certain circumstances revise and correct any proceedings of a customary court.

8.4 CISKEI

Before independence, the tribal court system in Ciskei, like all the other independent countries that formely formed part of the Republic of South Africa, was governed by the provisions of the Black Administration Act and the rules promulgated thereunder.³⁵

On the attainment of independence,³⁶ Ciskei provided in her constitution for the recognition of customary law and the operation of chiefs' and headmen's courts.³⁷

Prior to independence certain provisions of the Black Administration Act were amended by the Ciskei legislative assembly.³⁸ Section 63 amended certain portions of s 12 of the Black Administration Act by providing that any chief or headman recognized or appointed in terms of s 43(3) of the Act of 1978 is authorized to hear and determine claims arising from the law and custom of blacks brought before him by black against black within his area of jurisdiction or the area of jurisdiction of the community authority of which he is chairman. This creates the

impression that civil jurisdiction is not conferred on all chiefs and headmen but only on those who are chairmen of tribal or community authorities.³⁹

Section 64 of the Ciskei Act increases the criminal jurisdiction of chiefs by amending the provisions of s 20 of the Black Administration Act. The amount of R40,00 is increased to R100,00. Failure to attend court proceedings or place in response to an instruction given by the paramount chief, chief or headman⁴⁰ of the area is an offence. A court may convict a person for the contravention of a provision of this act, and if there is no specific penalty provided, it may impose upon him a fine not exceeding R200,00 or imprisonment for a period not exceeding⁴¹ twelve months.

In the independence constitution it is provided that all duties and functions lawfully exercised by chiefs and headmen immediately prior to the commencement of the constitution should continue in force until varied or withdrawn by a competent authority.⁴² The appointment or recognition of chiefs and headmen vests in the president in council.⁴³ The president has the discretion to create a new chieftainship but it cannot be confirmed except after consideration of the recommendation by the executive council.⁴⁴ The existing chiefs and headmen are deemed⁴⁵ to have been appointed by the president. All powers,

authorities and functions lawfully exercised by tribal and regional authorities in Ciskei immediately before the commencement of the constitution remain in force until amended or withdrawn by a competent authority.

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Commissioners' courts were abolished in Ciskei. Provision was therefore made for appeals from chiefs' courts to be to the magistrates' courts. When the Ciskeian Administrative Authorities Act, was passed, the provisions of the repealed Ciskeian Authorities, Chiefs, Headmen Act were largely retained. The new Act refers to "tribal courts" rather than "chiefs' courts". The civil and criminal jurisdiction of the tribal courts remains unaltered. Schedule III of the Act deals with rules for chiefs' civil courts.

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8.5 LESOTHO

In Lesotho customary courts were established by the Native Courts Proclamation 62 of 1938. The scope of the courts' jurisdiction was set out in the respective warrants issued by the resident commissioner. The Native Courts Proclamation was amended on several occasions from 1938. Although it is now the Central and Local Courts Proclamation, it remains substantially the same. The function of these courts is to apply Lesotho customary law. These courts may apply customary law to Africans as well as non-

Africans provided it is not repugnant to justice or morality nor inconsistent with the provisions of any law in force in Lesotho.

8.6 SWAZILAND

The Swazi customary courts were established by the Swazi Courts Act.⁵¹ These courts exercise civil and criminal jurisdiction over members of the Swazi nation. The limits of their jurisdiction are defined by a warrant under the hand of the King. An aggrieved party may appeal from the Swazi Court to the Swazi Court of Appeal and from there to the Higher Court of Appeal.⁵²

8.7 ZIMBABWE

The customary law courts in Zimbabwe were established by the Native Law and Courts Act 33 of 1937. This was repealed and substituted by the African Law and Tribal Courts Act.⁵³ These courts had both civil and criminal jurisdiction. They were empowered to try civil cases between "African" and also between an "African" and a person who is not an "African" in matters in which customary law was applicable provided the non-African consented to the jurisdiction of such tribal court. The consent had to be in writing. The court could exercise criminal jurisdiction in cases where the accused was an African and where the complainant was an African or a person who consented to the

jurisdiction of the court or where the government was the
complainant. ⁵⁴ Criminal jurisdiction could be exercised only
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with the approval of the minister of justice.

A party dissatisfied with a judgment or order of a chief's court
could appeal to a tribal appeal court. The decision of a tribal
appeal court in any matter other than a removal order, was final
and not subject to further appeal. ⁵⁶ The tribal appeal court was
composed of three chiefs who were presidents of local chiefs'
courts. Although a chief exercised all powers of the court
personally, he was obliged to sit with two assessors chosen by
⁵⁷
customary procedures.

For civil matters, tribal courts had to apply customary law only.
A chief's court had power to order the removal of "undesirable"
Africans from its area, subject to an appeal to the district
commissioner, and from him to the provincial commissioner.

Tribal courts had to submit court returns to the district
commissioner in person and to provide him with reasonable access
for court inspection. The district commissioner had to review
the records. In the exercise of this function he had wide powers
of annul, quash, refer to another court, with or without
instructions, or to notify the police to take over criminal
⁵⁸
matters.

The tribal courts operated only in rural areas where chiefs lived. After the tribal courts were introduced in 1969, the caseloads in rural district commissioners' courts declined considerably. In urban areas only district commissioners' courts handled disputes. "The triadic structure thus reinforced the rural/urban divisions, apart from denying urban Blacks their own forums".⁵⁹

During the war years the civil administration in most rural Zimbabwe was severely disrupted. "The whole environment for the formation and recognition of ordinary private disputes was upturned in violence and revolution". This often led to the establishment of party political "Kangaroo courts".⁶⁰

In February 1981, the Customary Law and Primary Courts Act⁶¹ was passed by the parliament of Zimbabwe. This was aimed, inter alia, at the termination of the "kangaroo courts" that had mushroomed during the war years. "The simplest reason was that these courts 'were necessary in war, but not in peace'". The establishment of primary courts was therefore intended to displace party political justice.⁶²

The Customary Law and Primary Courts Act has revolutionalized the tribal court structure in Zimbabwe. It has transferred authority in judicial matters from traditional to elected and nominated leadership. Community court presiding officers are civil

servants and village court presiding officers are appointed by
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 the minister of justice.

The act defines "primary courts" as only village and community
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 courts. In the act the minister is empowered to constitute
 village courts by warrant published in the gazette. These courts
 are known by their relevant African names. The court must be
 presided over by an officer appointed by the minister, and
 removable by him after consultation with the senior inspector.
 The presiding officer is also known by a particular indigenous
 title. He has to choose assessors from a list of persons
 prepared by the minister after consultation with the
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 inspectorate. They act only as advisers to the court.

The presiding officer and assessors are paid an allowance from
 money allocated by the legislature. Village courts are civil
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 courts of first instance. They may only apply customary law
 and their jurisdiction is limited to claims up to ZD 500. They
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 may not dissolve a marriage.

Community courts are also constituted by warrant. They are
 courts of first instance, and courts of appeal for review from
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 decisions of village courts. The office of presiding officer
 of community courts is part of the public service. Presiding
 officers have a discretion to consult any assessors. Both the
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 court and the presiding officer are given traditional titles.

Community courts may only hear matters in which customary law is applicable, but there is no financial limit to their jurisdiction. They are given special jurisdiction to hear maintenance claims,⁷⁰ but they may not dissolve civil marriages.⁷¹ The act provides for these courts to exercise⁷² fairly extensive criminal jurisdiction.

A magistrate's court may be declared by the minister by notice in the gazette to be a district court for an area of jurisdiction. The court, but not the presiding magistrate, is given a traditional name. The district court has appellate and review powers only.⁷³ It may also use assessors.

The inspectorate consists of a senior inspector and such other inspectors as may be determined by the minister. The inspectorate has wide powers and duties in advising the minister. It supervises the primary courts and trains the staff of the courts. The inspector has a discretion to initiate review proceedings in a district court if it appears that a primary court has exceeded its jurisdiction.⁷⁴

The primary courts have jurisdiction to hear, try and determine any civil case in which customary law is applicable, where the defendant is normally resident within the jurisdiction of the court; or the cause of action or any element thereof arose within such area; or the defendant consents to the jurisdiction

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of the court. Primary courts, like the tribal courts, may
award damages as well as compensation. 76 They may also give such
orders as are necessary "to enforce any right to use or occupy
immovable property held in accordance with customary law". 77

Although, as stated above, an inspector may refer civil or
criminal matters to the district court for review where a primary
court has given a judgment or order it was not competent to
give, 78 a district court may not review a civil matter without
the inspector's referring the case. This implies that the
litigants have to obtain the inspector's approval before the
matter is taken on review. But this review procedure is only
available to examine excess of jurisdiction. In other matters,
only the high court has review jurisdiction. 79

In criminal matters there is automatic review by district courts
of judgments by community courts where a fine exceeding 50
dollars is imposed. 80 Even if a fine is below 50 dollars, an
unrepresented convicted person may request a review within three
days. 81

The primary courts are supposed to follow a free and informal
procedure which is in accordance with the customary practices, and
which is aimed only at doing substantial justice. 82 Legal
representation is not allowed in village courts, but is permitted
in community and district courts. 83

8.8 TRANSKEI

Before independence the Black Administration Act applied in Transkei. On Transkei's attaining of independence in 1976 this act continued to apply although commissioners' courts were abolished and their functions were subsumed by the magistrates' courts. Appeals from chiefs' courts would lie to the magistrates' courts and from there to the supreme court.

It has been said that the levels of appeal in customary law are fewer than those of the courts applying the law of the land. In cases involving the law of the land appeals lie from the magistrates' courts to the supreme court, which includes the provincial division and ultimately the appellate division, whereas in customary-law cases chiefs' courts not being courts of record, appeals used to lie from the commissioner's court to the appeal court for commissioner's courts. It would only be in exceptional circumstances that there would be an appeal to the appellate division.

Transkei tried to solve this problem by providing for a new court known as the regional authority court which is presided over by the head of the regional authority, that is a chief or in his absence a duly appointed deputy. This court can only try cases where the accused in a criminal case or the parties in a civil case are Transkeian citizens. It is entitled to exercise

jurisdiction concurrently with magistrates' courts within its regional authority area and enjoys in all respects the same powers, authorities and functions as those of a magistrate's court.⁸⁸ The court is empowered to hear appeals from chiefs' courts.

The establishment of this type of court is nothing new. As early as 1968 the Coertze and Mostert Commission recommended the creation of a similar court in the whole of South Africa.⁸⁹ This recommendation was, however, never implemented. Transkei has taken the lead in doing this.

The creation of this court has both been severely criticized⁹⁰ and vigorously defended.⁹¹ The main criticism is that by virtue of its position and modus operandi, this court will not necessarily promote the interests of justice.⁹² As Beck puts it:

Having pointed out the differences between the new system and the old, and between the regional authority courts and the magistrates' courts, it is submitted that the innovation is of no particular value. It does seem, however, that it has serious disadvantages. In particular, it is

submitted that every state should strive towards a unitary system of justice and its administration. Transkei has had the opportunity to do this, but it seems that this new Act is a step in the other direction.

A rejoinder to this criticism is that it is expressed by persons with a foreign outlook schooled in the western tradition with its particular emphasis on the due process of law which often does not lead to justice being done but on the contrary to a travesty of justice, which outrages the community. Transkei has apparently followed the Malawian example where traditional regional authority courts and national courts were created and the chiefs were given the power to try even serious criminal offences including murder and to impose sentences including the death sentence.

All that can be said is that both contentions have merits and demerits. Extreme technicality often leads to injustice, but traditional courts were created in a specific milieu and can only operate effectively in that milieu. Giving them extensive judicial powers may not conduce justice as they are often ill-equipped for the due exercise of those powers.

In 1983 Transkei passed a new act on chiefs' courts. This act is a substantial re-enactment of the provisions of the Black Administration Act with minor alterations. It is unnecessary

to recount these here. Only those provisions which amend the provisions of the Black Administration Act will be dealt with.

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In the exercise of the criminal jurisdiction conferred on him, a chief may not impose punishment which involves death, mutilation, grievous bodily harm or imprisonment or a fine which exceeds four head of large stock at one hundred rand per head; or twenty small stock at twenty rand per head; or four hundred
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rand. This means that the maximum fine has been increased from forty rand to four hundred rand.

To insult a chief or other member of his court during a sitting of the court or to interrupt the proceedings of the court wilfully or to misbehave in the place where the court is held is an offence. A person who commits any of these acts may be removed from the place where the court is being held and, if necessary, detained in custody until the rising of the court. Failure to attend a sitting of the chief's court wilfully and without good cause after being warned to attend is also an offence punishable by a fine not exceeding one hundred rand or imprisonment for a period not exceeding three months or to such imprisonment without the option of the fine. The obstruction of a messenger of a chief in the execution of his duty also constitutes an offence. It is also an offence for a judgment debtor to make or allow a disposition of his property with the

intention of avoiding execution in satisfaction of the judgment debt. The punishment for this is a fine not exceeding two hundred rand or imprisonment for a period not exceeding six months or imprisonment without the option of a fine.

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CONCLUSION

Because chiefs are not formally trained as judicial officers, they may be regarded as laymen dispensing justice. This system of lay justice has been retained in many parts of Africa.

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In Malawi traditional courts have been retained and given increased jurisdiction. The regional traditional courts and the national traditional appeal courts were established in 1969 with power to try most important criminal offences, including murder, and to pass any sentence, including the death penalty. Whether the granting of this extensive jurisdiction on these traditional courts was warranted is debatable. The main justification was that certain cases required the knowledge and expertise of customary law which expatriate judges often lacked. The political leaders were also disillusioned with the technical nature of British justice and opted in favour of African justice.

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Appeals in such cases would be heard by the national traditional appeal court established in 1970. It hears civil and criminal appeals from the urban, grade AI traditional courts, the traditional appeal courts, and the three regional traditional courts with purely criminal and first-instance jurisdiction. From this court no appeals lie to any other court. These courts have been regarded as an assertion of Malawi's own traditional concept of justice which is respected. This had far-reaching implications, which involved the amendment of other aspects of the law especially criminal procedure and evidence. The president was even empowered to amend any statutory law. This precipitated the mass resignation of the judges of the high court.

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In certain parts of Nigeria customary courts were abolished in 1966 and this was implemented in 1971. The underlying reason was the attempt to create unity of laws by terminating the duality of laws and court structure. In the white paper of 1971 on "Integrating the Administration of General Law", it was inter alia contended that it was necessary to have a system of administration of justice which takes into account the dynamic and changing society and the cosmopolitan and heterogenous nature of the urban population. It was further contended that modern conditions necessitated the introduction of more up-to-date methods of determining the truth than the simple methods adopted

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by the customary courts. Other lofty reasons were suggested, but none of them is above criticism. The attempt to abolish customary courts, however, did not succeed which indicates that they have not outlived their usefulness. Although the customary courts were abolished in Anambra, Imo, Rivers and Cross Rivers States in 1966 and Bendel states in 1973, Cross River reinstated them in 1969 but the remaining states did not. The Area Courts Reform Committee and the Customary Courts Reform Committee appointed in 1976, after an extensive and comparative investigation, found overwhelming support for the retention and re-instatement of customary courts even in the states of Anambra, Imo, Bendel and Rivers. The recommendations of these committees were implemented in 1978.

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The abolition of customary courts in Zimbabwe was facilitated by the war years and not necessarily by legislation, which makes a big difference. This has also been the case in Mozambique.

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It is envisaged that in an independent Namibia it would be unrealistic and retrogressive to rehabilitate the traditional courts largely because they have been tainted by the policy of apartheid, and because they might be perceived as entrenching tribalism and racism which the progressive forces seek to

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eliminate. Whether this will be so one has to wait and see.

The idea of lay justice may appear anachronistic in an era where emphasis is on specialization and the professionalization of the

administration of justice. Yet this phenomenon is not peculiar to Africa. In England many of the magistrates are not legally qualified. The magistrates in England may be either lay justices of the peace or professional stipendiary magistrates. Most of the criminal cases are finally heard and determined by lay unpaid justices. However, on points of law and procedure they are advised by the clerk to the justices who is normally a legally qualified person. They also have to undergo basic training to prepare them for their duties.

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The English system of using lay magistrates assisted by legally qualified secretaries is attractive because it is less revolutionary than complete abolition. But the financial aspect thereof should be properly considered. The abolition of chiefs is not recommended at the moment because experience elsewhere in Africa has taught that such a step could be premature and therefore dysfunctional. Where abolition was resorted to as a modernizing process, it led to many problems which culminated in the re-establishment of the customary courts. Saddling chiefs' courts with increased jurisdiction as is the case in Malawi is also not recommended because they may not be sufficiently equipped to shoulder that responsibility. The overemphasis of "African" as opposed to western justice may prove to be too emotional a concept to rely upon especially in a rapidly changing society.

FOOTNOTES

- 1 Zweigert & Kötz An Introduction to Comparative Law Vol
1 (1973) 3, 12.
- 2 On 6 December 1977.
- 3 Act 38 of 1927.
- 4 Government Notices R45 of 1961 and R2082 of 1967.
- 5 ss 12 and 20 of Act 38 of 1927.
- 6 s 67 of the Bophuthatswana Constitution Act 18 of 1977.
- 7 The Traditional Courts Act 29 of 1979 and the regulations
prescribing the rules relating to procedures, proceedings,
judgements and the execution of judgments of and appeals
from tribal courts and other bodies (Government Notice No
8 of 1982).
- 8 On tribal authority see Bophuthatswana Traditional
Authorities Act 23 of 1978.
- 9 S 3(1) (a) & (b) of Act 29 of 1979.
- 10 S 1, 3(b) and 6(b) of Act 29 of 1979.
- 11 Cronje 92 et seq; Coertze 137 et seq.
- 12 S 2 of Act 29 of 1979.
- 13 Rule 2(1) of Government Notice 8 of 1982.
- 14 Rule 2(3) of Government Notice 8 of 1982.
- 15 Schapera (1955) 292 et seq; Coertze 153 et seq; Cronje
110- 111.
- 16 Coertze 153.
- 17 Rule 3 of Government Notice 8 of 1982.
- 18 Rule 12(3) of Governmentt Notice 8 of 1982.
- 19 S 3 of Act 29 of 1979.
- 20 S 12 of Act 29 of 1979.
- 21 S 4 of Act 29 of 1979.
- 22 S 5(1) of Act 29 of 1979.

- 23 S 5(2) of Act 29 of 1979.
- 24 S 6(9) of Act 29 of 1979.
- 25 S 7(1) of Act 29 of 1979.
- 26 S 7(2) of Act 29 of 1979.
- 27 S 11 of Act 29 of 1979.
- 28 S 9 of Act 29 of 1979.
- 29 Khumalo Practice and Procedure of Customary Courts in the
Republic of Botswana (1977) 1.
- 30 Act 57 of 1968.
- 31 S II of Act 57 of 1968.
- 32 Bekker "The Future of Indigenous Courts in Southern Africa" 187
- 33 S 4
- 34 S 10 of the Customary Courts Act of 1961.
- 35 Act 38 of 1927 and Government Notice R2082 of 1967. For a
discussion of this from 1927 to 1981 see Mqeke (1985) 52
et seq.
- 36 On 4 December 1981.
- 37 Ss 69, 70(1) and 71(1) of the Republic of Ciskei
Constitution Act 20 of 1981.
- 38 The Ciskeian Authorities, Chiefs and Headmen Act 4 of
1978.
- 39 Mqeke (1985) 67.
- 40 S 56(e) of Act 4 of 1978.
- 41 S 58 of Act 4 of 1978.
- 42 S 69 of Act 20 of 1981.
- 43 S 70(1) of Act 20 of 1981.
- 44 S 70(2) of Act 20 of 1981.
- 45 S 71(1) of Act 20 of 1981.
- 46 S 71(2) of Act 20 of 1981.
- 47 S 76(2) of Act 20 of 1981.

- 48 S 76(2) of Act 20 of 1981.
- 49 Act 37 of 1984.
- 50 It is interesting that here the old nomenclature is used again instead of "tribal courts".
- 51 S 3 of Act 80 of 1950.
- 52 S 13 of the Swazi Courts Act 50 of 1950.
- 53 Act 24 of 1969.
- 54 Ss 9(1)(a) and (b), 9(2), 12(1) and (2). See also Bekker (1981) 187; Goldin & Gelfand African law and Custom in Rhodesia (1975) 83 et seq.
- 55 S 7(1) of Act 24 of 1969.
- 56 S 21(7) of Act 24 of 1969.
- 57 S 7(6) of Act 24 of 1969.
- 58 S 20 of Act 24 of 1969.
- 59 Ladley "Changing the Courts in Zimbabwe: The Customary Law and Primary Courts Act" 1982 Journal of African Law 99.
- 60 Ladley 101.
- 61 The Customary Law and Primary Courts Act 6 of 1981 as amended by Customary Law and Primary Courts Amendment Act 21 of 1982.
- 62 Ladley 101.
- 63 Ladley *ibid.*
- 64 S 2 of 1981 Act.
- 65 S 8 of Act 6 of 1981.
- 66 S10 of Act 6 of 1981.
- 67 S 11 of Act 6 of 1981.
- 68 S 19 of Act 6 of 1981.
- 69 S 8, 10 and 19 of Act 6 of 1981.
- 70 S 12 (3) of Act 6 of 1981.
- 71 S 11(2) of Act 6, of 1981.

- 72 S 14 of Act 6 of 1981.
- 73 S 4(a) of Act 6 of 1981.
- 74 Ss 21 and 22 of the 1981 Act.
- 75 S 10 of Act 6 of 1981.
- 76 S 12(1)(a) of Act 6 of 1981.
- 77 S 12(1)(c) of Act 6 of 1981.
- 78 S 22 of Act 6 of 1981.
- 79 Ladley 104.
- 80 S 14 E(1) of Act 6 of 1981
- 81 S 14 E(2) of Act 6 of 1981.
- 82 S 17(1) of Act 6 of 1981.
- 83 Ladley 108.
- 84 S 54 of the Transkei Constitution Act of 1976.
- 85 S 54 (2)
- 86 Bekker (1981) 192.
- 87 S 1(2) of the Transkei Regional Authority Courts Act 13 of 1982
- 88 S 3
- 89 164 et seq.
- 90 Beck "Regional Authority Courts in Transkei" 1983 De Rebus 396-397.
- 91 Koyana The Judicial Process in the Customary Courts (1983) 41 et seq.
- 92 398
- 93 Koyana 41 et seq.
- 94 Chimango "Tradition and Traditional Courts in Malawi" 1977 CILSA 40.
- 95 Act 6 of 1983.
- 96 Act 38 of 1927.
- 97 S 2(1) of Act 6 of 1983.

- 98 S3 (3) of Act 6 of 1983
- 99 S 11 of Act 6 of 1983.
- 100 Buthelezi "Faction Fighting Halts Development" 1987
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and Vocational Training Bulletin. Vol 11 No 19
- 101 Chimango 54-55
- 102 Chimango 55-56.
- 103 Chimango 56.
- 104 Nwogugu "Abolition of Customary Courts - The Nigerian
Experiment". 1976 JAL 2.
- 105 Nwogugu 6 et seq.
- 106 Tobi "Recent Reforms in Area and Customary Courts in
Nigeria" 1978 JAL 133 et seq; Local Courts Interim
Judicial Service Bodies (Establishment) Decree No 3 of
1978; Collett "Recent Legislation and Reform Prospects
for Customary and Area Courts in Nigeria" 1978 JAL 161 et
seq.
- 107 De Sousa Santos "From Customary to Popular Justice" 1983
JAL 94; Sachs "Changing the Terms of the Debate: A Visit
to a Popular Tribunal in Mozambique" 1983 JAL 99 et seq.
- 108 Sichilongo Towards a New Legal System for Independent Na-
mibia unpublished 35.
- 109 De Smith Constitutional and Administrative Law 3 ed
(1977) 345-6; Davies Appointment as a Magistrate (1976)
12; Yonge (ed) Halsbury's Statutes of England 3ed Vol2,
(1970) 1 et seq.

CHAPTER 9

CONCLUSION AND RECOMMENDATIONS

9.1 FINDINGS

Justice, like beauty, is easy to see but difficult to define. Attempts by western thinkers have not been entirely successful. Yet the difficulty in defining justice, like that of defining beauty, does not make it any less a reality. Every society has a certain conception of justice. One's conception of it is, often unconsciously, influenced by one's values, prejudices and predilections. Values are fashioned by society's social and moral outlook. Values, however, are not static, but do change.

Perfect justice is an ideal rather than a practical proposition. Yet it is possible to formulate certain procedural constraints to ensure the minimum of justice. That perfect justice may be unattainable makes justice no less a desirable goal. Nor does one have to have an idea of perfect justice before insisting upon the doing of minimum justice between man and man.

Various societies in the world have ^d developed certain procedural guarantees and principles to facilitate the doing of minimum justice by judicial tribunals. These vary from society to society

and are often a product of sociological and political developments of each particular society.

Although a certain concept of justice did exist in traditional black society, it differed to some extent from the western one. It emphasized more the peace-keeping function of law. The chiefs' courts today in KwaZulu, and even in other parts of the country, represent the traditional judicial machinery. They have no doubt been influenced by western ideas, but their mode of operation remains largely unaltered. The fundamental principles and guarantees which evolved in the modern world do not find complete application in these courts. The doctrine of separation of powers, which is conducive to the maintenance of judicial independence, is entirely lacking. Many of the other attributes which ensure such independence, are not fully developed. This is largely to be attributed to the face-to-face society from which these courts have developed.

Chiefs generally do not act as individuals. They act with the assistance of their councillors. The chief is not simply a dictator. He depends on the wisdom and opinion of these councillors. They have the liberty not only to cross-examine the parties but also to ensure that they are treated fairly. The chief will mostly follow the view of the majority of the members of the court. Yet despite these in-built checks and balances,

irregularities do take place. A number of such irregularities were revealed by the researcher. These irregularities include, *inter alia*, the exceeding of jurisdiction, the hearing of cases where the chief has an interest, decisions where the accused or defendant was not allowed to be heard and to give evidence in his defence, nor to cross-examine his opponent's witnesses. These irregularities discredit chiefs' courts in the eyes of many people who have to appear before these courts.

Notwithstanding some of these irregularities, chiefs' courts enable a number of people to obtain access to justice. Access to justice is generally influenced by three determinants, namely knowledge of the law, financial means to bring an action in court, and confidence in the legal system.¹

There is no doubt that customary law is largely well known to the majority of the black people in the rural areas because it derives from the accepted practices of the people. This law is simple and often changes as the acceptable practices of the people alter. It is more popular because people are involved in its making and administration. In many instances it is in line with common sense. Moreover, unlike the South African common law, it is expressed in their own language and is applied by the people they know. Although many may not know the finer details of the law, they do understand the broad principles thereof. The

procedure is simple, informal and flexible and commends itself to the understanding of the ordinary man. No technical rules of evidence apply, and every man is his own lawyer. He has the liberty to say what he wants to say.

The South African common law, on the other hand, is foreign to the majority of the black people. It is expressed in a foreign language they do not understand. It is generally expressed in a technical language and is applied by professionals. Functionaries in court are often white and they have to speak to them through interpreters. The judicial officers themselves often do the same. In the process of interpretation, the meaning of what the black witness says is sometimes lost. Innocent behaviour is frequently interpreted negatively by the judicial officer who knows neither the language nor the customary practices of the black people. The procedure is formal and the system of evidence is strict. Exclusionary rules apply. Hardened language barriers make all these difficult for the ordinary man to understand. There is no doubt that many black people lack confidence in the South African legal system in general. This is often exacerbated by the fact that many crimes are punished lightly and the wheels of justice grind slowly before a matter is heard. Delayed justice ultimately amounts to a denial of justice.

Chiefs' courts on the other hand deal with cases expeditiously. Because these courts form part of the cultural heritage of the people and because of the other attributes mentioned above, many black people in KwaZulu do have confidence in them.

Litigation in the ordinary courts of the land is often expensive so that unless a person has a claim of not less than R750,00 it is not worthwhile to pursue it in court. Many blacks usually have claims far below this amount. A number of cases from the records of chiefs' courts surveyed bears testimony to this. Chiefs' courts therefore provide an inexpensive and expeditious forum for the settlement of disputes and the administration of justice. Although provision of legal aid does enable indigent members of society to bring actions in court, this is not yet functioning efficiently, and many black people are unaware of the existence of legal aid.

Although the procedure in the chiefs' courts is still largely informal and flexible, rules have been introduced which have modified the traditional procedural approach. It is nonetheless provided in those rules that the procedure to be followed is in accordance with the customary law of the tribe. Yet some of these rules deviate from and are contrary to customary law. In a number of instances the courts do not comply with these. This may have serious consequences for the chief in question as he may

be held liable to the litigant if for instance he has failed to have the judgment registered because the judgment then lapses.

Despite the introduction of these rules, emphasis in the approach of the chiefs' courts is still on facilitating reconciliation and arriving at a mutually satisfactory solution. This emphasis on reconciliation and informality has become popular not only in South Africa, but also in other countries like the United States of America. The establishment of small claims courts in the United States of America and in South Africa, which adopt this mode of operation is evidence of this.

Although the chiefs' courts still largely follow the customary procedural approach, there is a noticeable tendency on the part of some of these courts to emulate the formalities observed in say the magistrates' courts. Even the approach to evidence in the magistrates' courts has to some extent influenced the approach of the chiefs' courts. Chiefs' courts now tend to be wary of the admissibility of hearsay evidence albeit not to the same extent as in the magistrates' courts. Notwithstanding this slight shift of emphasis, a dichotomy still exists between the procedural and evidentiary approaches of the chiefs' courts and those of the magistrates' courts. This is particularly evident in the event of an appeal from the chiefs' courts to the magistrates' courts. The fact that the case has to be tried

afresh presents problems. These relate to whether a new cause of action can be formulated, whether there can be change of parties, whether a decision based on hearsay evidence in the chiefs' courts can be reversed on appeal, and whether this is an appeal in the true sense of the word. The courts have come to accept that this is truly an appeal.

All procedures have the same end in view, namely providing an orderly search for the truth. Differences in approach depend on the historical events behind the institutions. There is no doubt that although chiefs' courts have a different procedural approach, this approach does provide an orderly search for the truth. The procedure accords with the sense of justice of the community which the courts serve.

Human institutions tend to move in circles. What is popular today may change tomorrow. Even the procedural approach followed by western courts is not applauded by all and sundry. There is a feeling that there is a need for the relaxation of certain rigid rules which do not serve the interests of justice. In this regard the western courts could learn something from chiefs' courts. This does not mean that these courts are perfect, as has already been indicated. No human institution is perfect. What ultimately counts is simply the element of legitimacy of the institution concerned. The people must feel that the tribunal as well as the approach it espouses serves their best interests.

9.2 CONCLUSION AND RECOMMENDATIONS

The crucial question is whether chiefs' courts in KwaZulu have to be abolished or retained. If abolished what should take their place and if retained what needs to be attended to in their method of operation?

The attitude of blacks to the institution of chieftainship is extremely important because it demonstrates the element of legitimacy of this institution. It also shows whether the institution should be abolished or retained. Some blacks especially the educated ones, who are aware of the history behind chieftainship often perceive chieftainship as part of the apartheid establishment. Although chiefs are not completely a creation of the South African government, and are no longer responsible to the white administration in the homelands, this stigma has not been totally eliminated. Here, one's political views largely play a role. Illiterate and semi-illiterate blacks who are unaware of the historical background to the institution of chieftainship regard it as a purely traditional institution which must be retained and the authority of which they implicitly accept. Other black people, even though aware of the history of chieftainship, do realise the role it plays in the administration of justice today. This perception, however, also depends on where a person comes from. A person who comes from the urban

areas who has had no contact with the chiefs or their courts will have no sympathy for them and his views are largely based on what he has heard from others. Those who come from the rural areas are more familiar with these courts.

It is quite clear that there is no unanimity within the black society on the retention or otherwise of chieftainship. Some favour its abolition as they consider it archaic and unsuited to modern circumstances. Chiefs' courts often compare unfavourably with the ordinary courts of the land. Others allege that chiefs are incompetent, impede progress, take bribes and their administration of justice is often inefficient. There is evidence that some of the chiefs do not do their job of administration of justice properly. Some of their actions are patently a travesty of justice.

Those who advocate the retention of chieftainship do admit that there are valid and legitimate complaints against particular chiefs or chieftainship in general. Yet they do realize the practical utility of this institution especially in the administration of justice. They point out that those chiefs with bad character, who abuse their position of power, are autocratic, are uneducated and lack training, are indolent and often indulge in excessive drinking are in the minority. Others who are no doubt in the majority may be of good character. They may,

however, lack the necessary knowledge and expertise to meet the needs of today. The shortcomings therefore are confined to individuals and are not a general feature of chieftainship. Chiefs themselves are no worse than the people they govern. Obviously their position imposes a lot of conflicts on them and this may account for deviant conduct on the part of some of them.

Chieftainship still enjoys a large measure of legitimacy in the black community in KwaZulu. This is evidenced by the frequent use of this institution by people where these courts are found. If these courts were not used, they would die a natural death, and the question would therefore be asked as to whether the expense incurred in maintaining them was justified. Legitimacy is not something static, but is rather variable and is dependent on the attitudes, values and interests of the community. In the black community, not all persons are in favour of the retention of chieftainship because of changed attitudes due to education and westernization. There is no doubt, however, that in those areas where there are chiefs, the majority of blacks is in favour of the retention of chieftainship. This is because the decisions of chiefs result in fewer costs; the proceedings are expeditious and there are no endless postponements; the procedure is free, flexible and informal and commends itself to the understanding of an ordinary man; more substantial justice is done; compensation is awarded to the complainant in criminal

cases, chiefs' courts are more practical than technical, and chiefs are still seen as a cultural heritage. The doing of justice facilitates social stability. Courts are, in any society, a means of social control aimed at the preservation of peaceful coexistence of the members of a community despite conflicting interests.

Chiefs' courts also relieve the backlog in the magistrates' courts. The establishment of the small claims courts in South Africa is evidence that magistrates' courts are often inundated with a lot of work. Chiefs therefore hear and decide a number of cases which could be heard by the magistrates, and there is no doubt that justice, as perceived by the society concerned, in the majority of those cases is done. If they have to be removed a number of considerations including costs and convenience have to be taken into account. In addition the premature abolition of chiefs or the removal of judicial powers from the hands of chiefs could result in social conflict.

Although chiefs' judicial functions should be retained, it is imperative that chiefs should receive proper training. Their training should not simply be confined to the academic sphere, but should also embrace administrative training as well as training in customary law and procedure. If these courts have to command the respect of the educated blacks they should be manned

by people who are educated and trained in their sphere of activity. The training should not imply that these courts should adopt technical rules of procedure and evidence, but it should enable the chief to comply with the minimum rules for ensuring the doing of justice, and it should be aimed at creating confidence in the functioning of the court and the consequent acceptance by all members of the community of its decisions. In a community with conflicting interests and values, the affirmation of community norms can be done by a specialized body of persons.³ There is no doubt that the black community in KwaZulu is no longer homogenous.

It is obvious that the retention of the judicial - functions of chiefs cannot be done without a deviation from tradition.⁴ This is because chieftainship is mostly based on hereditary succession and not on suitability for such appointment. Emphasis on training and competence is essential because some blacks have felt that the retention of chieftainship has been done to perpetuate tribalism as part of the apartheid structure. This creates the impression that blacks are relegated to an inferior court system. Proof of this is that once a white person is involved the case must be heard by a magistrate. This is obviously not good for the prestige of these courts. Unless the status and proficiency of the chiefs' courts are raised to those of the other courts, they might be rejected by blacks as impairing their basic human dignity.⁵

It is imperative that chiefs' courts should be properly integrated into the judicial system of the country. Although judicial segregation may not necessarily lead to a violation of basic human rights,⁶ the maintenance of a judicial system with differentiated norms creates the suspicion that other sections of the population are given a lower quality of justice. There is no doubt that such an attitude is not conducive to the maintenance of good relations.

Not only should chiefs undergo basic training, but also some in-service training must be provided at government expense. The problem which may be encountered here is that some chiefs may be reluctant to do that. In fact magistrates interviewed did intimate that some chiefs are not open to teaching. When their tribal secretaries inform them of some new procedure to be followed, they seem to have a feeling that these secretaries want to usurp their powers as chiefs. This can be removed only by proper education and training, and by showing that this is ultimately to their benefit.

In order to protect the chiefs and to raise the prestige of their courts, in 1968 the Coertze and Mostert Commission recommended that a special judicial officer be appointed to exercise the judicial functions of the chiefs on their behalf. This would be based on the English model where the court is known as the

queen's court, but the queen herself does not exercise the judicial functions. Similarly, although the judicial officer would exercise the judicial functions, the court would still remain known as the chief's court.⁷ This would protect the chief in that when his decisions were reversed on appeal, it would not embarrass him personally and it would raise the prestige of the court in that a person who is suitably qualified for the job would do the work. In Britain, certain magistrates are not legally qualified and are therefore laymen dispensing justice. But legally trained secretaries assist them. To adopt a similar system would obviously entail high costs.

Although this recommendation is quite attractive, it gives rise to certain problems: The problem is whether the chief would be prepared to accept that, and the question of costs. There is no doubt that the chiefs could gradually come to accept this arrangement, more especially because many chiefs are not only having administrative functions, but are also members of the legislative assemblies. They therefore cannot pay undivided attention to the matters of the tribe during the session of the legislative assembly. In many tribes chiefs' deputies hear the cases during the absence of the chief. The appointment of the said judicial officer therefore would not imply that the procedure and composition of the chief's court is to be drastically altered. It would be for purposes of ensuring

proficiency and specialisation. The only remaining problem is the financial implications of such an appointment. A suitably qualified person would have to be paid a salary that is in accord with his training and work.

Another problem of this approach is that it may lead to making chiefs' courts pseudo-magistrates' courts thereby losing their traditional role. This may further result in duplication of "magistrates". The hallmark of chiefs' courts is that they are community courts where a person, like in the jury system, is tried by his peers. It is desirable that these courts should retain this attribute of informality and flexibility.

The introduction of rules and regulations which govern the operation of these courts, however, has introduced an element of technicality, because these rules have at times to be interpreted by the courts and consequently technicality in interpretation is unavoidable. This may further estrange the people from these courts because one of the advantages of using these courts is that their procedure is free and flexible and is comprehensible to the ordinary man. But this is far different from what the position is in magistrates' courts.

Another alternative may be provided, like in the case of the small claims court, that submission of a claim to the chiefs'

courts should depend on the consent of both parties and that there should be no appeal from this court. Anyone who does not want to submit to the jurisdiction of this court should therefore take his case to the magistrate's court. This possibility has its own problems, including the failure of justice in the chief's court when the chief knows that there is no appeal from his decision. This means that before this can be resorted to, the chiefs' courts should be properly structured to avoid a travesty of justice.

In the meantime, it is also recommended that the remuneration of chiefs should be investigated. This is important because one of the ways of ensuring the independence and incorruptibility of the judiciary is by paying them adequate remuneration. Chiefs cannot be expected to be immune from bribery and corruption unless they are paid salaries commensurate with their functions and status.

From the foregoing it is clear therefore that whereas the retention of chiefs' courts may be desirable, reform of these courts is necessary to ensure that justice is done. Reform should, while not destroying the essential character of these courts, aim at securing better justice and at instilling the confidence of the public in the operation of these courts.

Abolition is obviously not recommended. No country in Africa has succeeded in effectively abolishing traditional courts. Where the attempt was made, it was dysfunctional and these courts had to be re-established. It was only where these had died on their own because of prevailing circumstances that they were not resuscitated. But even there, courts based on a similar model were created. This demonstrates the need in all countries for tribunals that will dispense simple expeditious and inexpensive justice.

Experience elsewhere in Africa has taught a lesson that reform of traditional institutions is bound to fail unless it has the support of the majority of the people affected thereby. This is because law as an instrument of reform has its limitations. Unless it is based on certain jural postulates or values, it may not achieve the desired results. Impatience with certain institutions and an attempt to bring about uniformity, noble goals as they undoubtedly are, may be hampered by the legislator's being at odds with the people for whom he legislates. He may underestimate the force of habit. Any effective reform of law must take into account that law is not simply an official norm, but that it also involves a social fact and an ethical value.

The belief that legislation is the solution to every problem is fallacious. Legislation has the chance to succeed if it is not in conflict with the needs and aspirations of the people for whom it is made. The Romans did something we could emulate. The Romans never used legislation to abolish certain institutions which could not serve the interests of a certain section of the population. They created a new one while allowing the older to continue to operate. At times the two institutions operated side by side until the new one superseded the older one. This was the case even in their law of procedure where the formulary procedure was established and operated next to the procedure per legis actiones until the formulary procedure superseded the earlier one. Later the extraordinary procedure was instituted. It operated next to the formulary procedure until it ultimately superseded the formulary procedure. ¹⁰ Obviously this approach can at present only be adopted within certain limits in the light of the financial implications it may entail. Nonetheless it provides a lesson that abolition by legislation is not always the best.

It is sometimes advisable to leave the abolition of certain institutions to other forces than legislation. Legislative abolition may therefore be authoritarian. It is only where the retention of an institution causes positive harm or injustice that resort to legislation may be recommended. If legislation is

used, it must be based on a systematic and sound theoretical basis which is backed by empirical evidence. Recourse should also be had to the experience of other countries. Not only must empirical evidence be obtained, the possible results of this legislative scheme must be taken into account.

In the light of the available evidence and what has been said above, the conclusion can be drawn that the case for the abolition of chiefs' courts can only be regarded as not proven.

11

Finally, the words of Sir John Donaldson MR in British Airways Boars v Laker Airways Ltd, although relating to the differences between the English and American procedures, are particularly appropriate.

Second, let it be said at no less volume and with no less clarity that no submission has been made to this court that the civil procedures of the United States courts and, in particular, the system of pre-trial discovery by the taking of depositions, the administration of interrogatories and the disclosure of documents, the limited circumstances in which a successful defendant would be awarded costs, and the conduct of litigation on the basis of contingency fees are in any way to be criticised. They are different from English civil procedures, but the days are long past when English courts and judges thought that there was only one way of administering justice and that was the English way. Each nation must decide for itself which way is appropriate to

its needs and there is nothing strange in two nations which enjoy a common legal heritage and which could be described as 'cousins-in-law' rightly deciding that different procedures suited them best.

What is more iconoclastic, the western courts may have something to learn from the dispute-settlement procedures of the chiefs' courts. The small claims courts follow this approach.

FOOTNOTES

- 1 Kemp "Access to Justice" 1985 unpublished 9 et seq.
- 2 Van Veslen 146.
- 3 Hund and Kotu-Rammopo 198.
- 4 Wood "Some Reflections on the Bantu Courts; Present and Future" 1966 Speculum Iuris 21.
- 5 Bekker "The Future of Indigenous Courts in Southern Africa" in Sanders (ed) op cit 199.
- 6 Van der Vyver "Human Rights Aspects of the Dual System Applying to Blacks in South Africa" 1982 CILSA 312.
- 7 132 et seq.
- 8 Allott "Reforming the Law in Africa - Aims, Difficulties and Techniques" in Sanders (ed) op cit 230 et seq.
- 9 Sanders "In Search of Disciplined Law reform" in Sanders (ed) op cit 237.
- 10 For a discussion of this see Thomas Textbook of Roman Law (1976) 73 et seq.
- 11 (1983) 3 AII ER 375 (CA) 397.

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APPENDIX "A"

QUESTIONNAIRE TO MAGISTRATES AND COMMISSIONERS ON THE CHIEFS AND
THE ADMINISTRATION OF JUSTICE

1. How many chiefs do you have under your jurisdiction?
2. What are their educational qualifications?
3. What are their ages?
4. How long have they been in office?
5. Has any been charged and convicted for a criminal offence?
6. Is there any acting chief?
7. How many of them are members of the Legislative Assembly?
8. What arrangements are made for the exercise of their judicial functions during their absence?
9. What type of society exists in chief's wards?
10. How many appeals were there to the Commissioners' Court between 1980 and 1982?
11. Do chiefs furnish reasons for judgment appealed against?
12. How many of those appeals were successful?
13. What is the chiefs' attitude towards appeals?
14. Do the records submitted by chiefs serve any useful purpose?
15. Should chiefs' jurisdiction be increased or reduced?
16. How are the fines utilised?
17. Are there any irregularities in connection with the exercise of jurisdiction by chiefs?
18. Who tries cases where a chief is a party?

19. What is the nature of sentences imposed by chiefs?
20. Are there any problems of attachment?
21. Are there any problems with eviction orders?
22. What happens to litigants who use the chief or his councillors?
23. Do chiefs often confuse complaints with cases?
24. Do you think chieftainship should be retained in its present form?
25. What can you say for the retention of chiefs as judicial officers?
26. What recommendations would you make for the reform of the exercise of judicial functions by chiefs?
27. Is there any other relevant information that you can offer in respect of chiefs and the exercise of their judicial functions?

APPENDIX "B"

A SURVEY OF POPULAR OPINION ON CHIEFS AND THE ADMINISTRATION OF
JUSTICE AROUND KWA-DLANGEZWA

1. Have you ever instituted an action before the chiefs' court?
2. If so, why, and were you satisfied with the outcome of the action?
3. Has anybody brought a case against you before the chief's court?
4. Were you satisfied with the outcome?
5. Would you take a case before the chief's court?
6. If so why, and if not why not?
7. Do you think chiefs' courts serve any useful purpose?
8. Should the chiefs' courts be abolished or retained?
9. If they should be retained what improvements would you recommend should be made on the chiefs' courts?
10. If they should be abolished why do you think they should be abolished?