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The study of customary law benefits from a focus on both the formal rules and mechanisms as well as the informal aspect. The complexity of 'living law' is best captured by attention to process and context. The working of the three-leveled formal traditional courts of the Nkuna Tribal Authority near Tzaneen in the Limpopo Province is complemented by informal mechanisms and processes for adjudication and intervention in conflicts. The civic association, relatives, the police and other organized groups or networks play a significant role inside and outside the formal traditional courts. Case material shows the strategic use of these various mechanisms by the poor rural population, depending on their social and economic position.

"To study rule-orders in action, it is necessary to deal simultaneously with the explicit rules, the occasions on which they are communicated and involved, and with actual behaviour addressed by the rules, the contexts in which it takes place, and the ideas and assumptions that accompany it" (Moore 1978:3).

1. Introduction

In the study of customary law in southern Africa, the focus is mostly on the formal rules that are assumed to be applied in arenas for dispute resolution. The informal aspect of dispute resolution is often overlooked. However, to understand the persistence of the formal customary court system and its use by especially rural populations, it is necessary to situate the disputes that are brought to these fora in a broader context. In this article, I argue that there is a need to have a better understanding of what happens in and around, before, during and after a customary court case and that the anthropological method as part of an interdisciplinary approach is well-suited for achieving this aim. The formal and the informal are intertwined and need to be understood as complementary parts of the same social reality.

Fieldwork for a research project on customary law in the Limpopo Province was undertaken in the first half of 2004 as part of a larger project supported by the National Research Foundation of South Africa.¹ Most of the research was focused on

¹ Four research assistants from the local communities helped to record cases of dispute resolution and did focus group interviews. During visits to the area of research, I and the co-researchers of the broader research team conducted interviews and attended some court cases. Access to the kind of information reported here can be perceived as difficult to get, since it is often sensitive and private. We were fortunate, however, in that earlier research contacts made it possible to build on relations of

the area of the Nkuna tribal authority, near Tzaneen, where earlier research in one of the rural settlements was directed at understanding social relationships and the dynamics of development interventions. People in the area are mainly Tsonga-speaking, although historically there are a number of Sotho-speaking families in the area, despite attempts at segregating the population under apartheid into two 'homelands': Lebowa and Gazankulu.

For the purpose of this article 'formal' will be used to refer to dispute resolution that is done in formal courts recognised by the government administration, of which a current characteristic is the summary recording of cases in record books, while 'informal' is the resolution of disputes outside such public fora.

The aim of the article is to focus on the use of the customary court system by different users in order to find out what the role of these courts is in the life of the poor rural communities. Specifically, the question is put whether the customary courts are used in order to maintain tradition or whether they are rather convenient mechanisms for poor rural populations to find pragmatic solutions to their problems on the one hand and instruments of power in the political settings of pre- and post-apartheid South Africa on the other (Chanock 1985; Suttner 1984).

2. The study of customary law: recording of systematic rules versus process in context

In the study of customary law, there are basically two positions: one emphasizing the aspect of rules as substantively intrinsic to the field, and the other arguing for a more open, fluid and differentiated view, inclusive of social process. Both of these views are forms of legal pluralism, in opposition to a view that denies customary law its existence as a form of adjudication (Wilson 2000:86). The state has, over time, taken the position that customary law has to be acknowledged, but that it is inferior to common law, a position that was originally derived from a racist dualism in which the law of the conqueror ruled supreme (legal dualism). The limits put on the jurisdiction of customary courts and the formulation of the repugnancy clause are typical of the ethnocentric and hierarchical relations that were inherent in the meeting, and by implication the study, of the 'Western' and the 'African' law 'systems'.

Legal pluralism also means that not only the official rules (laws) made by the state are counted in, but all law-like behaviour is taken into account. This means that all kinds of organizations that have rules are potentially considered as part of the legal field. To differentiate between a more widely and a more narrowly conceived field, the notion of 'reglementation' is used, of which law is but one manifestation (Moore 1978:18). This broad definition of the legal phenomenon helps us to look at legal issues as embedded in a broader field. It is especially the fluidity of the conceptual boundaries of and the movement between these demarcated fields that concern us in this article.

friendship and trust and to get the help of very able and well-connected research assistants. Two of the research assistants, Dick Mashaba and Nicholas Mushwana from the Mulati and Berlyn settlements respectively, are personal friends and had been involved in research in the past. Moreover, one of the research assistants, dr. S. M. Shiluvane, is a respected senior 'ndhuna' (headman) at Shiluvane and has a doctorate in education, adding to his high status in the tribal hierarchy. The fourth research assistant, Portia Mavhungu, had an excellent social network among women in the urban and peri-urban area of Nkowankowa. The scope of the material that was gathered was therefore quite extensive.

Despite the high position accorded to the legal and cultural ‘system’ of the colonial masters, the recording of customary law started early in the British colonial administration in southern Africa as part of a policy of political domination, Indirect Rule. The view taken early on was one of stasis and in time it gave room to several anthropological researchers to pursue their research in this field, while meeting the needs of administrators at the same time (Wilson 2000:86). This encoded official customary law was important for the effects it had in higher common law court cases in which customary law was involved, as well as for its influence on laws that reformed the justice system (see Ramsay 1946 for a version of ‘Tsonga law’). “... [T]he written texts imposed systems onto what had previously been a flexible repertoire of rules” (Bennett 2004:6). This approach basically rests on an ethnocentric, static and generalised notion of customary law being a set of formal rules, to be applied deductively in dispute resolution.

The ‘Pretoria jural school’ was instrumental in the last three decades of separate development in the recording of customary law in South Africa along these lines. This project, involving many ‘volkekundiges’, was a positivist and ideological attempt to document the legal rules of ‘tribes’ in the ‘homelands’ for the benefit of the traditional authorities, the existence and position of which was a strong support for the political system of the time.² This approach was an example of ‘legal centralism’ e.g. in the way in which Western legal categories were assumed as universally applicable (Bennett 2004:26). Context and process were not central issues in this research project, if even taken into account. Theory was not made explicit, but was based on the ideas of ‘volkekunde’. Recent writings by Coertze and his students indicate that this approach has survived to today (Coertze 2003). Critique against this approach is specifically aimed at the idea of a bounded homogeneous society with its culture as equally bounded, homogeneous and static. A core epistemological issue in the study of customary law is the question whether the rules that are formulated emically by (usually) elderly spokespersons, or etically by researchers, based on court decisions, are binding rules to be applied in the same way as laws of a state. They could be ‘rules’ that are of a different nature, like ad hoc rules in a game that is made up situationally between children on a playground, rather than the more fixed rules of a game played on a school sports field during competitions.

In opposition to the static view of ‘official law’, what Wilson calls ‘a processual approach’ gave prominence to the ‘living law’ (Wilson 2000:86; Bennett 2004:27-30). “Scholars, most courts and even law-makers would now be ready to concede that the only true authentic version of customary law is the ‘living law’, the law actually observed by its subjects” (Bennett 2004:7). The emphasis is on court cases as well as out of court settlements. Anthropologists who emphasized the processual and transactional nature of human life, in opposition to an organic and static one, saw no fixed boundary between politics and law. Studies by Gluckman, Bohannan, Roberts and Comaroff were influenced by American Realism (Bennett 2004:162; Moore 1969). They indicated that people make use of a variety of options when in need of adjudication or mediation. In this broader conceptualisation of law, different ways of

² ‘Volkekundiges’ are/were anthropologists, situated at Afrikaans medium universities who supported the policy of separate development. A study from this quarter done on the Tsonga-speaking people of the former Gazankulu without sufficiently considering the changing context of the lives of the migrancy-dependent population is Hartman (1991). See also Gordon (1989)

dealing with grievances and conflict exist: from private to public (Bennett 2004:27). When these institutions and their mechanisms are weak, they can do no more than to arbitrate, mediate or persuade. Where the body that is used is strong, it can adjudicate and enforce its decisions (Bennett 2004:163). In this approach, all kinds of relations are of interest, including pre-trial relations, when the dynamics of a court hearing are studied. Therefore, the need to study actual behaviour.

A critical legal pluralism (or centralism) emerged as a later approach in the study of customary law, integrating Marxist understandings of the relation between the state and society (Wilson 2000:86). In southern Africa this implied that the recognition by the state of traditional leaders and their courts was seen, in political economic terms, as functional to the suppression of rural workers and their exploitation by capitalism. In many ways this interpretation is still valid as a contextual explanation, though the approach is also reductionist and functionalist.

What Wilson calls a 'revised legal pluralism' is an approach that answers the need to study the complex relations between adjudicative institutions (Wilson 2000:86). This approach is probably the most suited to the need to study a complex and fluid reality in the field of customary law and the variety of dispute resolution mechanisms that concerns us here.

In South Africa, the new constitution of 1996 implicitly recognizes and protects customary law via the right to culture (Bennett 2004:91,141). Recent legislation provides for the institutions dealing with customary law (Republic of South Africa 2003). The constitution, through its Bill of Rights, also implies transformative action with regard to customary law (Pieterse 2001). The identification of institutions supported by customary law that discriminate on the basis of age and gender has led the government to intervene in this field via the South African Law Commission (Bennett 2004:91,96). Customary marital unions, for instance, have been legally recognised, but at the same time the legal and equal rights of women have been safeguarded to some extent, at least on paper. While it now seems to be the ideal to move towards one legal and court system, this may imply that customary courts might become less adjudicatory and more advisory in the future. Meanwhile, the existence of concurrent jurisdiction of different court systems gives people the scope to 'shop around' for the most suitable mechanism for their specific purposes. All of these ongoing interventions and changes need to be studied in terms of the discourses and actions implied in the field of customary and common law as well as other forms of regulation. The changes in the economic, social and political dimensions of society need to be taken into account as the relevant context for these changes.

3. Formal mechanisms for dispute resolution in the rural areas of the Limpopo Province

While access to magistrates' courts is available at the administrative centres in the rural areas, of much more importance for dispute resolution in terms of number of cases heard and conflicts resolved are the courts of traditional leaders in the rural areas of South Africa. The current number of traditional authorities in the Limpopo Province of South Africa are officially put at a figure of 225. In these there are 188 paid chiefs and 931 headmen of whom only some are paid. The salaries for chiefs in the province runs into R50 million per year, indicating the importance attached by previous and present administrations to the law and order role of the institution of

traditional leadership. Politically, the traditional leaders are represented by the 36 members of the provincial house of traditional leaders which has an advisory function in the political system. In the process of 'retraditionalisation' and Africanisation there is an increasing recognition of the importance of traditional leadership and associated cultural traditions.

Whereas the ANC-led liberation movement came into power in 1994 with a critical stance regarding traditional leadership, especially amongst the civic organizations and the 'comrade' youth, the realities of entrenched traditional leadership and the dynamics of the political situation in KwaZulu-Natal forced the ANC to take a much more accommodating position (Oomen 2000). This move is exemplified in recent legislation which accommodates traditional leaders as partners in local government and land management as well as stipulating their powers with regard to their adjudicative and other functions (Hendricks and Ntsebeza 1999). Traditional leaders perceive the powers allocated to them during the transformation of political institutions in the country as being too limited, but at the same time they realise that the institution needs to be brought into synchronization with the new political system. For instance, according to new legislation, traditional councils will in future have to be elected and need to be more representative of the gender composition of the population. Symbolizing this renewed focus on the (less political) role of traditional leaders, are the new tribal offices and court buildings one can find at the centres of tribal authorities, now called 'traditional communities'. At these offices one can also find decentralized service points of government departments, e.g. of social development for the payment of welfare grants and pensions.

The customary court system is seen by most people in the rural areas as a useful form of adjudication and alternative to the less accessible common law courts of magistrates. Benefits that are mentioned include that the customary courts are more open ("like democracy") because all adults can participate, they are public and they keep traditions alive. A lawyer is not needed as the system is not expert-driven and the fines are not that high. The emphasis is on social outcomes rather than on individualizing outcomes. As problematic aspects of these courts it is mentioned that record-keeping is not of a high standard and that the voices of women and the youth are not yet taken seriously.

Headman's court

In the Nkuna tribal area near Tzaneen, there are 34 'tindhuna' (headmen) of which one acts as 'ndhunankulu' (head ndhuna) and headman of the royal village. The number of headmen has grown from 30 in 1987 to their present number, due to a substantial increase in the population (Boonzaaier 1987:60). This was caused by the ongoing trend to move from deep rural areas to sites nearer to work and to transport routes, as well as the shedding of permanent and on-farm labour in the agricultural sector. Since 2003 an innovation was introduced to reduce the pressure on the chief's court in the 'headkraal' to adjudicate the many cases on appeal that reached it. Ten cluster courts, combining the areas of jurisdiction of several headmen, were therefore instituted with senior headmen as presiding judges. Cases from the lower headmen's courts could go on appeal to the cluster or be referred to it if the matter could not be solved at the village level. From the cluster court a matter could be taken to the chief's court and from there to the magistrate. Alternatively, a matter could be taken directly to the magistrate's court. The jurisdiction of the customary courts was

circumscribed and limited to specific matters. Serious cases, such as assault, rape and murder or theft of expensive items had to be taken to the police and the magistrate. The customary courts were required to keep records of their cases, which was done in the vernacular (Tsonga), while until recently a short resume used to be sent to the magistrate as well.

In some areas more cases were brought to a headman than in other areas. For example, in the Berlyn settlement there were cases every month, while in the adjoining settlement Mulati there were months without cases being heard. The reason given for this difference was that Berlyn's new stands had attracted more troublemakers, coming from the farms 'where they lived a less respectful life'. This may be true, but the fact that the headman of Mulati did not live in the settlement and that there were quite a number of Sotho-speakers in Mulati may also have influenced the matter. It was not expensive to litigate: R10 had to be paid to register a case, which was paid to the messenger who took a notice to the defendant to sign. The person who lost the case had to pay R30 to 'close the court'. This money and the fines that were paid were often pocketed by the headmen as part of their benefits. Headmen in the Nkuna area were instructed by the chief to impose fines at a maximum of R30, but often the fines were much higher in certain instances. Nevertheless, the headman's court, as well as the higher courts can be seen as courts for poor people, where justice can be had at a reasonable monetary cost.

Neither the ndhunas nor the chiefs got any training for their role as judges. This was not experienced as a serious issue, since they were anyway assisted by their councillors or headmen who prepared and summed up the matters before judgment was given. In Berlyn, the Village Committee was the body assisting the headman, consisting of men and women who were prominent members of the settlement. They decided on a date when a case would be heard and assisted the headman during the court case. The messenger announced the court date and time while walking in the settlement, blowing a horn and calling out the particulars of the meeting. The meetings were always on a Sunday morning in Berlyn. On these court days, the court ('huvo') started early to give people a chance to attend church services later in the day, thereby integrating the court into the local daily routines. The court was also physically close to inhabitants of the settlement and therefore easily accessible. When men and women had gathered outside the headman's house, seated in separate groups under and near a tree, the headman and his committee would enter while everybody got up. A prayer was said at the beginning and close of the meeting. The court cases usually followed after announcements and settlement administration business had been chaired by the headman.

The social use of space as expressed in seating arrangements symbolized the status differences in the local social hierarchy. The young new headman of Berlyn was seated behind a table, facing the assembled men and women. (When his late father was a headman, he used to sit on a chair next to a prominent tree, without a table during court meetings.) The committee members also sat on chairs behind the table to the left of the headman. Women sat on the ground, in front of and to the left of the headman, while men sat to the right in a half-circle on stones, poles and low chairs. Out of respect for the court and the headman, men often wore jackets and women put on a coloured cloth to symbolize formality. People involved in a court case were called to sit in front of the headman. The complainant talked first, then the defendant,

then the witnesses that were brought and then the members of the community. Men got up when they spoke in court, and tended to argue their points with much enthusiasm. When the matter drew to a close, someone summed up the matter and the headman would then give his decision.

Examples of typical cases that were heard in a headman's court were the following: a dispute about a ploughing field that was claimed by two women, a loan that had not been repaid, a husband who had left his wife to stay with another woman, a boyfriend who visited a girl without her father's permission, a husband who had an affair with a married woman, verbal abuse, neglect and accusations of witchcraft. All cases of witchcraft accusations had to be referred to the higher courts.

| Complainant and Defendant | Matter | Decision |
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| BR F(emale) wife JR M(ale) husband | Opposed husband marrying 2 nd wife, as the woman was known as being promiscuous. Women chanted slogans supporting the rights of women to refuse that their husbands sleep with 'prostitutes', who were possibly carriers of AIDS. Ndhuna appealed to remain calm | The man may marry a second wife according to Tsonga custom, but he should consult his wife, although he could go ahead anyway. The husband commented that women had too much say in a court. Women activists said that the rights of women were still ignored and that men ignored HIV/AIDS. |
| GM F neighbour, 75 SN F neighbour | The woman was accused of bewitching the son of the plaintiff. He was said to hear a voice saying that he should not be in the company of boys. His school attendance was also poor. The defendant claimed that the boy smoked dagga. Youths accused her of witchcraft. A teacher was asked to search the boy and dagga was found on him. | Defendant found not guilty, but fearing her security, the police were called. They arrested the plaintiff for pointing someone out as a witch. The son was arrested for having dagga on him. Some people still believed that the defendant was a witch. |
| RM M older brother NM M younger brother | Claims the stand occupied by younger brother, after their father's death. Claims that culturally he is entitled to the stand as the older brother and that their father gave it to him. Defendant is seen as a troublemaker by community members. Another community member supports the defendant: the youngest son should inherit the stand. | The stand should be occupied by the older brother, but the defendant indicates that he will appeal to the chief. A comment was made by a member of the public after the court that the matter should have been settled in a family meeting. |
| JK M father, disabled LK M son 15 | The son had assaulted his father. The father wanted to report the son to the police, but his wife convinced him to report to ndhuna. The boy explained that the father was too strict and quarrelsome. The father explained that his son was disrespectful. The mother of the son blamed witches for the behaviour of her son. The civic member youths were critical of both the father and his son. | The son should get corporal punishment. Civic members carried him away, as they were against corporal punishment in the new South Africa. After the case the civic was criticized for taking over the functions of the ndhuna's court. |
| LR M husband | A man complained that his wife refused to breastfeed her child and demanded that he should use a condom during sex. The woman explained that she was ill and had | The court asked the couple to have a family meeting to sort out the matter. The husband should visit the hospital to find out about the wife's illness. |

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| RR F Wife | been told by nurses not to breastfeed. The husband did not want to listen to nurses. | Comment by a woman after the court: the wife surely had AIDS and was afraid to tell her husband. |
| PS M traditional healer JM M Pastor | Pastor refused his daughter to marry a healer because of religious differences. There had been three attempts to negotiate about the matter. The couple had a 3 year old child. The healer said that he believed in ancestors as well as God who is the "father of the ancestors". | The healer and the daughter were adults, they should go ahead with their plan to get married. They were advised to see the magistrate if problems should arise. |
| PH F Nurse Relatives of husband | A woman was accused of witchcraft, after her husband had died. A family meeting had ordered the wife to marry her husband's brother. She had, however, refused as husband might have had AIDS and also because the practice was outdated. | The family could not force her to marry her brother-in-law. She might rather consider going back to her parents. Comment after the court: people were not yet aware how HIV was spread. |
| LM M leader of the civic HM M pensioner, 83 | An old man was accused of witchcraft, after having been pointed out by a diviner. A man had been killed by lightning. A community meeting, mainly attended by youth, was held in the name of ndhuna and was led by a civic leader. The ndhuna was forced to participate and to adjudicate as if it were his usual court.. | The crowd shouted at the ndhuna to give judgment. The accused said that 'muti' (medicine) was given to him by the grandfathers of the leaders of the civic. The ndhuna then gave his judgement: other people were also involved and were equally guilty. The police were called who then arrested the civic members. Comment made afterwards: the youth had taken the powers of ndhuna and this could have led to the killing of the accused. |
| JM M husband PM F wife | A woman was accused of attempting to poison her husband with love muti which was intended to prevent him having contact with other women. An envelope with muti and a letter was found in her purse. The matter had been discussed with relatives, but this had not satisfied the husband. The wife explained that the man had many extra-marital relations, but she was also accused of such. | Both should stop their extra-marital relations. The wife should first discuss with her husband before getting help from a healer. The couple should get help from pastor or social worker. Comment by a woman after the case: the court saw the wife as a minor. |

In the court cases used as illustrations in the above table, it is clear that the fault lines in society become visible as the conflicts bring matters into the open space of public discussion and disputation. In some cases the consensus of court members was that the matter should not have been brought into the public arena at all but that the family meeting would have been the proper place to deal with the matter. The main lines of conflict were drawn between the generations and between men and women. Activist behaviour was sometimes seen in a court when a group of women, for instance, used a specific case to focus on a core social issue: the lack of women's rights in a context of patriarchy. This relates to AIDS as a contested issue and example of how men claim the exclusive right to have extra-marital relations. Generational inequality and unjust treatment are issues that are taken up by the civic association that is seen as representing the rights of the youth, inter alia. In the case where civic members opposed physical punishment by carrying away the accused, they were seen as

undermining the authority of the headman. This also emerged in a witchcraft accusation where the headman was forced to participate by civic members.

The cases also illustrate how changes in a 'rule' are made. Although the right of a man is maintained to have a second wife, it is conceded by the court that a man has to consult his wife about such a matter. In another case, the court found that a widow could not be forced to marry her brother-in-law, thereby harmonizing the right of women with the claim that a traditional rule had to be applied. When witchcraft accusations led to a dangerous situation for the accused, the police were called in. In the case of a couple who were refused permission to marry by the woman's father, the court decided against the customary expectation that a daughter had to obey her father – they were advised to see the magistrate if the woman's father, a church pastor, were to create further difficulties.

The cluster court

As mentioned, the cluster court system is a local innovation in the Nkuna court system and it is not clear whether this innovation has been followed elsewhere or whether it was adopted from another area. The cluster court at Ntsako, where the senior headman of the cluster lived to whom cases from the Berlyn settlement were sent on appeal, convened on a weekday morning once a month. It brought together seven headmen of which four had to be present to form a quorum. As indicated, the function of the cluster was to reduce the number of cases that were sent on appeal to the 'headkraal'. Again, as in the headman's court, it cost R10 to register a case and R50 had to be paid by a person who lost a case to 'close the court'. Fines at this level were higher than at the court of the ndhuna, therefore there was a higher monetary risk in taking a matter to the cluster court or to the chief.

At the Ntsako ward show ground, the cluster court cases were held in a building or under a big fig tree, depending on the weather. The arrangements were much the same as at the headman's court. More people might attend a case, depending on the interest they had in it. The plaintiff and defendant had to do an oath like in a magistrate's court before they related their side of the case. One of the headmen present kept notes in the record book and another led the evidence. These courts had therefore more formal elements than in the case of a headman's court, drawing from the codes of behaviour in a magistrate's court as a cultural model to some extent. If the case could be solved there, the matter was finalized or if it was outside the jurisdiction of the court, it was sent up to the chief with a letter. As in the headman's court, cases at the cluster level involved debt, insults, theft, etc. In the case of witchcraft accusations, statements were taken and people were advised to sort out the matter themselves or the matter was sent to the chief.

| Complainant and Defendant | Matter | Decision |
|---|---|--|
| SM F Mother DM F Daughter | Daughter was accused of leading an irresponsible life, she was said not to respect her mother, had lefts her children unattended and owed R1 025 to her mother. | The daughter was ordered to refund the money borrowed in 3 months. She was also admonished to respect her mother. |
| PR M AM M | An amount of R105 had not been paid back after having been ordered in the cluster court to pay back. The defendant mentioned family commitments as the reason, but a court member indicated he spent a lot of money on alcohol. | The defendant was ordered to pay back the money owed. Afterwards, the matter was referred to the chief after the defendant did not pay back the money. |
| NS F NM F | Abusive language was used in a quarrel near a school next to a taxi rank. A teacher stopped the quarrel. The two women had accused each other of starting the quarrel. Both had used abusive language. | Both women were found guilty and each was fined R200. The one who did not start the quarrel should not have retaliated with abusive language. The women were ordered to apologize at the school for their bad behaviour that was modeled in front of the children. |
| NM M Ndhuna ST F Teacher and councilor | A municipal councilor was accused of interfering with the duties of ndhunas by allocating house sites and calling meetings without the knowledge of the ndhunas of her ward. | The councilor was threatened to be reported to both the chief and the mayor, after which she apologized. The apology was accepted. She was told that she should direct her requests to the ndhunas. One ndhuna recommended that a report should be sent to the chief anyway. |
| MB M Teacher NM M Ndhuna | A site that had been allocated for a driving school was also allocated by the ndhuna to another businessman. The owner of the driving school, a teacher, had all the documents needed as well as the approval of the municipality. The other person had paid the ndhuna R500 and got a receipt. | The finding of the court was that the ndhuna was corrupt as only the chief could allocate sites. The R500 had to be paid to the chief. The other businessman had bribed the ndhuna. The teacher was declared the rightful owner of the site. The matter was referred to the chief to fine both the ndhuna and the businessman. |

Many of the cases adjudicated in the cluster courts were similar to the ones in the headman's courts, but could not be settled at the lower level. Good examples of such cases were those where relatively large amounts of money were involved. Despite the extra court fees, sometimes individuals risked a possible negative outcome for themselves, often in order to gain more time in the hope that a conflict would not lead to further legal action.

The cluster court was also the site where issues concerning the status of adjudicating officers of the lowest courts were brought forward. Collectively, a group of headmen litigated against a ward councilor who had overstepped her rights. A corrupt headman was furthermore brought to book in the cluster court.

The chief's court

The chief's court was the highest court of the customary courts in the tribal areas, but people could have their cases reviewed on appeal in the magistrate's court. Formerly,

forms with a resume of each case had to be sent to the magistrate, but this practice seemed to have been discontinued in the Nkuna area after the end of Bantustans during the democratic transformation of 1994. However, the old Gazankulu homeland forms were still used at Mhinga in early 2004.

At the court of the Nkuna chief, the chief himself was the judge, whereas in other places he might be represented by an appointed deputy (e.g. at Mhinga). Cases were brought to the Nkuna tribal office on Mondays when the chief and his advisors ('vatsunduxi') listened to the complaints and tried to solve them where possible. It seemed that about half of the complaints were solved during these sessions whereas the rest were scheduled to become court cases for a Wednesday, the court day (also indicated by Nkuna 2002:37). Some cases were referred to the magistrate with a letter from the tribal office. The cluster headman, the people involved and their supporters attended the hearing. A typical week would involve about 7 cases, but sometimes there would be no cases, as the cluster system seemed to have taken care of the overload that was experienced in the past in an effective way.

The type of cases adjudicated in the tribal court were the more serious disputes about the same issues as in the lower level courts. In addition, the dissolving of customary marriages was still done at the chief's court (despite the prohibition by the Recognition of Customary Marriages Act, 1998), issues around nature conservation and land were sorted out and witchcraft cases were often referred to the chief's court. It was unusual for the court to impose a fine, as the main emphasis was on the resolution of a dispute (Bennett 2004).

Witchcraft accusations were rife in the area. It was assumed, as elsewhere, that women transmitted witchcraft to their children. In the local understanding, jealousy was associated with witchcraft which was believed to be used by business people and others to ensure success against their competitors. It was believed that people making use of a 'tikoloshe' or zombies ('xidudwana') later on had to feed them with blood, especially of a relative. Therefore, unnatural deaths were often ascribed to witchcraft.

| Complainant and Defendant | Matter | Decision |
|--|---|--|
| MM M Husband JN (and parents), F wife | 'Ndzhovolo' (marriage goods) had not been paid for a wife, but R700 that had been paid by the husband was disputed. He claimed that the marriage was by 'ku pfhukisa' (convince girl to leave parents), and that he had sent messengers to negotiate about the 'ndzhovolo' and paid R700. The wife had left after 5 years as he did not pay the rest. He was willing to pay more, but his in-laws did not inform him about the amount they wanted. They informed the court that R8000 was wanted before the wife would return. According to them the R700 was only for 'lavelani halenu' (search here) and not part of the 'ndzhovolo'. The wife said that she still loved the husband, but | The husband has to pay 'ndzhovolo', but the families need to negotiate about the return of the wife. The husband was fined R200 for ignoring his responsibility to pay 'ndzhovolo', the fine was to be paid to the tribal fund. Different opinions were held by people in the court about the way things were done by the husband and the in-laws. |

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| | had to support her parents. | |
| PM M IS F | A cow was lost, but was then discovered among the six cattle of the defendant. Parties agreed the cow should stay there. The cow was gone after two months. The defendant had sold it without permission for R1700 to a local butcher and the plaintiff was informed by the herder. The matter was reported to the police who advised to find a solution through discussions. The matter was then tried by the ndhuna and the cluster court. The woman claimed that the evidence of the herder was untrue because he was half mad and had been fired. | The defendant should replace the cow as soon as possible and has to notify tribal office when done. Different opinions were held about the outcome: some said she should have been handed to the magistrate, others: that the case was handled correctly, etc. |
| DM M Pensioner, 68 Maluvana Burial Society, represented by chairperson | Society did not pay out after the death of a couple: the parents of plaintiff's nephew who was a member of the burial society. The society chairperson stated that the nephew should be the plaintiff. The plaintiff did not know the details of the constitution of the society. The rules did not cover the parents. | The court found that there were no grounds for the matter - the parents were not covered. The plaintiff was fined R200 for interfering with the administration of the society - this money was to be paid to the tribal fund. |
| MP F AM M | The defendant had threatened the plaintiff at a shebeen to kill her and her family by witchcraft. Thereafter her father-in-law died which led to great fear. Witnesses were not available since the threat was made at a shebeen amongst drinking and dancing people. The defendant said he only told the woman to go home, since it was too late for a woman to be at the shebeen. | The court found that both people were drunk and that the chief's court was not the place to deal with drunkards. The woman was reprimanded for being at a shebeen at late hours, especially since she was a married woman. The parties were advised to solve their problems by using family discussions. One opinion that was heard after the case: the case should have been handled at the ndhuna level. |
| RM M GM F | Witchcraft accusation of a relative: the plaintiff alleged that the defendant had caused the death of two of his sons and made them zombies (swidudwana), she had also caused the miscarriage by the plaintiff's wife. He had consulted a sangoma and this was revealed by his ancestors in a dream. The defendant had allegedly admitted to the plaintiff's wife that she was responsible for the bad things that had happened. The defendant said that none of this was true, she had only given advice to the couple when their sons became ill, after they had taken them to a healer. They passed away due to malaria. According to the defendant the miscarriage was caused by alcohol | The defendant was giving good advice as a relative. The family believes too much in witchcraft. They have to ask relatives for help. |

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| | abuse. | |
| BS F HM M Ndhuna | It was alleged that the ndhuna had told people not to donate money after the death of a relative of the plaintiff. He also had discouraged people to attend the funeral. Only a few young men had turned up to dig the grave. | The ndhuna was found not guilty. Members of the community did not help because the deceased had stayed in Cape Town and was not known in the community. One opinion that was given after the court: the matter could have been solved at the community level. |

The cases brought to the chief for adjudicating had been brought before the lower courts as well. They were not satisfactorily resolved, going forward to the highest level in the court system. Again, as in the case of the cluster court, it concerned cases involving relatively high amounts of money, amongst others. As a rule, cases involving witchcraft accusations had to be sent on for retrial to the chief's court. Cases involving a headman also had to be dealt with finally by the chief himself.

4. Informal mechanisms for dispute resolution

While the attention in studies of customary law is usually on the formal mechanisms, there are a number of informal dispute resolution mechanisms that have to be taken into account if one wants to have a fuller picture of a complex and fluid reality. Mention has already been made of the discussions that a chief and his advisors had with people bringing a case to the tribal office. In many cases the complaint could be solved without a court case. The same applied to the court levels of the cluster and the headman.

But even before a case was brought to the formal dispute resolution mechanisms, there were a variety of ways in which a dispute could be settled without recourse to a formal route. Most important here was the discussion in a family with prominent family members, known as 'vatswari' (parents), if the matter was internal to the family. If the matter concerned in-laws or another family, the discussion on the family level could involve the two families. Where necessary, a mediator was sent to the people with whom there was a problematic relationship. Such a mediator usually was an older person or he or she could even be the headman or a member of the civic.

In urban areas the existence of 'makgotla' courts and 'people's courts' is a well-known, though controversial phenomenon since the late 1980s. These fora had taken judiciary powers upon themselves during the liberation struggle and in as far as their actions had been illegal and contrary to official adjudication, they were called 'bundu courts' or 'kangaroo courts'. In the rural areas, the local branches of the South African National Civic Organization (SANCO) had since the early 1990s at times also taken judiciary functions on them in opposition to the traditional leadership. This had especially been the case until 2000 when the polarization between the civics and traditional leaders had come to an end. In some places the civics still seemed to involve themselves with dispute resolution after 2000, to the chagrin of the relevant tribal authority.

In the Mulati and Berlyn settlements, for instance, a civic structure was created in 1993 for the two settlements in combination, an act which was seen as undermining the authority of the two headmen. A number of cases were adjudicated by the civic, in opposition to the headman's jurisdiction. Civic members also disrupted court cases

at the ndhuna's court by intervening in an aggressive way. In Mulati the fact that the headman was living in another settlement and the members of the civic executive were well-known local people, made the civic a more attractive dispute resolution instrument to some people in the settlement. In addition, the tribal structure was seen as biased against Sotho-speakers, while the civic was perceived as more accessible and democratic, especially by the younger generation, the 'comrades'. Also attractive was the fact that no fee was involved. Recently, the civic in Mulati and Berlyn was no longer in open opposition to the headmen and would not adjudicate cases. The civic executive was moreover not regarded as legitimate by some, since SANCO had not required that new executives be elected each year. Members of the civic executive nevertheless claimed that the reduced number of court cases in Mulati had been caused by the complementary adjudicating role parallel to that of the headman. The civic members held workshops on human rights sometimes and informed the public about grants and other information that could prevent disputes and problems. Still, the civic was sometimes used in dispute resolution, in the role of a mediator/arbitrator. A recent case in Mulati was where a woman brought a complaint against another about a debt that was not paid. The civic wrote a letter to invite the woman who owed the money to a civic meeting. At the meeting the matter was sorted out and the owing woman promised to pay her debt. The civic members of Mulati said that they would no longer adjudicate, but that they would continue to be mediators and that they would refer matters to either the headman or the police.

Similarly, the municipal councilor recalled that the local authority until at least 2000 had an adversary relationship with the traditional leadership. Comparable to the situation around the civic, the conflict between democratically elected local government leaders and traditional leaders was characterized by the polarization of democratic authority versus authority by descent. Although after about the year 2000 there was a relationship of more respect and some co-operation, the municipal councilors in rural areas would also from time to time play a role as mediators in dispute resolution. Again, the reason why some people went to these leaders was because of the perception that they were closer to the people, that they represented the younger generation and that they were to be trusted more. The local municipal councilor at Ntsako indicated, for instance, that people would bring a complaint about witchcraft to him which he would then refer to the ndhuna, or assault which he would refer to the police. In another case, in March 2004, two brothers who had a conflict about sharing their donkeys, brought their case to him to be solved. It was also alleged that AZAPO and the UDM, as political parties, had involved themselves with family disputes in order to get a positive community-oriented profile for the recent national elections in April 2004.

Other examples of informal dispute resolution involved the police. A recent dramatic case in which the police took on the role of the chief's court in 2004 was reported in the local paper. A police officer had brought four girls who were accused of witchcraft to the local police station for their own safety and for questioning, knowing the violent public potential of such accusations. A few days later, the policeman took the girls to the Nkuna chief's place where he conducted an interrogation of the girls and other people involved in the case in the courtroom of the chief's place. The local headman and the parents were also present. The policeman took a videotape of the proceedings from which it was clear that confessions were made willingly about the alleged witchcraft activities and nightly air flights in a spoon to Mankopane in the

company of an older witch. After the confessions and amidst great public interest, a local church pastor spoke to the girls about the wickedness of witchcraft and the Christian beliefs that they should follow instead. The girls then asked for forgiveness, accepting that Jesus was of a higher authority than the witches. The community was asked to forgive the girls and a successful reconciliation ensued. In other cases, police referred matters that were brought to them to the families concerned for internal solution.

The recently established Nkuna Traditional Doctors Association with its head office next to the royal place, had its own disciplinary committee where members were disciplined and disputes among members were sorted out. If members were accused of witchcraft by members of the public, they tried to get the person involved to apologize at the Association's office in a meeting. Soccer clubs also had their own disciplinary committees. Matters that were brought to these committees were absence from meetings, abusive behaviour, etc. Members could be expelled or fined a small amount, e.g. R5 or alternatively to clean a part of the soccer field. A matter could be taken 'on appeal' to the headman, the police or the civic. Similarly, other organizations in the communities had their own procedures for handling disputes and for disciplining their members. Churches, savings groups, etc. in this way played a role in the settlement of disputes in their own midst and sometimes also with regard to people that were in a dispute with one of their members. The following example indicates that the police and the headman are regarded as authorities that can be drawn into conflicts in an informal manner:

A woman died, but 'ndzhovolo' had not been paid for her, yet the kin of her husband arranged her funeral. Her agnatic relatives from Venda demanded R20 000 for 'ndzhovolo', and refused to let the funeral take place. The families were quarreling openly and eventually the police was called in to intervene in the chaos. The police advised the man to promise to pay and allow the funeral to proceed. He then promised to pay next year, and indeed paid an initial amount of R1000. The headman was also involved, he had advised the husband's kin to let the relatives of the woman know in advance, but his advice had not been heeded.

5. Strategic use of dispute resolution: who used which mechanism?

With the availability of a number of formal and informal mechanisms being widely known, it is tempting to ask how the available mechanisms were used by people from different social categories. This question is especially relevant in the light of the strong patriarchal tradition in customary law and its emphasis on traditionalism, in a context that was increasingly recognizing the rights of women and the need to adapt to modern conditions. In order to arrive at substantiated inferences, it is necessary to have a fuller analysis of the case material that is available at this point. For now, while further work has to be done on the material, it is only possible to give some first impressions.

People who have become 'modernized' through their education, income and employment tended not to use the traditional courts, as it was perceived to be below their dignity (Bennett 2004:167). These people, the 'vadyondzile' (educated) would rather use the magistrate's court or the help of a social worker. This is not to say that they would never use a traditional court, as instances can be referred to where teachers brought cases to a headman's court. Also, the informal mechanisms that have been mentioned were used by all categories and classes of the population.

People who were interviewed during focus groups and after a court case about their opinions, often expressed the view that a case should not have been brought to the traditional court, but rather to the magistrate or that the case could have been solved in a family meeting. In other words, people were quite aware of the possibilities of 'shopping around' for the most favourable adjudication mechanism (Bennett 2004:149). One woman indicated that she used the traditional court because she did not want her opponent "to rot in jail" and that the magistrate's court did not deal with tribal land matters. Other general arguments in favour of the traditional law were that it promoted unity in the community and that it underscored respect and good morals.

After losing his case, JK, a male pensioner, expressed his skepticism with the functioning of the tribal court, but he was in praise of traditional law. He said that youths had to be controlled and order was needed, but it seemed that courts nowadays were listening to women. According to him, there were issues women could not do, like being the head of the family. Men were created to feed the families, a woman should therefore respect her husband, realizing that she was a helper, she could not be the boss, but she could cook, wash, look after children and nurse, he said.

In an interview, SM, a young woman with Grade 12, expressed her ideas about customary law. She was a shop assistant whose parents had advised her to report her abusive husband to the headman's court. The headman had referred the matter to the family. She saw traditional law as something for the older generation that could be manipulated to suit the men. Traditional law, according to her, propagated the abuse of women, e.g. only men were allowed to have more than one partner and men could force themselves sexually on a woman. Physical abuse by men was allowed according to traditional law, she complained, adding that the traditional law system did not support education. Women were not favored in the courts that were run by men, she said.

In a focus group interview, boys who were soccer players, were ambivalent about customary law. They said that young people could be excluded from traditional court discussions, but that traditional law, on the other hand, was important for respect, morals and unity.

Girls, who were church members, said in a focus group that women were seen as property, that they were abused and that traditional law did not encourage the education of girls. It did, however, further respect and morals.

Women members of a poultry farming project (aged 33-38) said in a focus group that women were seen as second class citizens and that their education was not promoted. They were not free to choose a partner, traditional law was not good for women, as men decided their fate. They were slaves, who had to work in the fields, cook, care for children and were just to be seen and not heard. They were expected to endure when men did wrong, e.g. having an extra-marital relationship. What was positive about traditional law was the respect it promoted and its support for institutions such as 'ndzhovolo'.

A focus group of male pensioners at the local dipping tank came up with several strongly 'sexist' opinions. Traditional law had many advantages, it was part of the tribe, they opined. There were some cases that a magistrate did not need to adjudicate, as the magistrate did not have sufficient knowledge of the traditions, e.g. about witchcraft. Women did not have a say in decisions, as men were the heads of families. They paid 'ndzhovolo' to have women as wives and not as equals. The role of women was to make the surname of the men grow and multiply. Women were expected to listen to and respect their husbands at all times. Women tried to act like men, e.g. by putting on trousers which was not correct. Women could not be members of the headman's council because they were ruled by emotions and were narrow-minded. Women could rather guide their daughters, they said.

Interesting differences of accent appear in the focus group material. Most people were in favour of customary law to some extent, especially in terms of its general function to support relations of respect and order. Women and young people,

however, were critical of the social exclusion and patriarchy which was implied in customary law and its institutions. The expectation about the outcome of a case strongly influenced the decision whether to bring a case to a specific forum for resolution. While women knew that the traditional court was loaded against women's rights, they attempted to use the scope that the courts offered to protect their marital and other rights. It seemed, however, that many more men than women used the traditional courts, while adult women were a much larger de facto population category than adult men in the rural areas, due to migrant labour absence. Nkuna mentions that in his sample 12% of the people in a semi-rural area in the tribal area had reported cases to the traditional authority in a recent year, whereas 16% had taken their cases to a magistrate (2002:59). This may be an indication that with a more urbanized lifestyle the use of the traditional courts was decreasing.

6. The changing social and political context of customary law

Why was customary law at the time of study (2004) still a popular set of discourses and values that were applied in traditional courts? How traditional is customary law anyway? To answer these questions, it is necessary to look at the factors that have given customary law its present strong position in the life of rural people in South Africa. It is undeniable that the history of colonialism, segregation, homelands and underdevelopment are foundational to the continuing existence of the institution of traditional leadership and its associated court system. Without the support of legal mechanisms to secure traditional leadership, the transformation of 1994 could have undermined the institution. As it is, the institution has always been in a process of change.

Changes in the court system are easily indicated. The jurisdiction of the courts were severely curtailed when the courts were made inferior to the common law court system. Recently, a process was started to bring customary law in line with the South African constitution. The position of women in the traditional courts has changed from having virtually no legal standing to being recognized as legal persons. Women were also more involved in court cases as litigants and as participating members of the court than ever before, to the extent that men were complaining that women were no longer respectful to them. Of course, from the point of view of women's rights, much still had to be changed as the basic assumptions and associated structures of patriarchy were still strongly entrenched. There was not yet any reason to speak of gender equality in customary law as was clear from the more limited use of the customary court system as a dispute resolution mechanism for women. With the presence of the AIDS pandemic, the gender imbalances in rural areas, due to patriarchal notions and relationships have become matters of life and death. But not only gender, also generational relationships were involved.

One example of how the rules of customary law had changed with regard to intergenerational relationships was the fact that the inheritance of a homestead had moved from the eldest son to the youngest son, an innovation reflecting the change in settlement pattern since about 1970. Scattered homesteads with the opportunity for sons to build next to their parents made place for lines of stands where space for extension was extremely limited. This change had occurred under the 'betterment' policy that was enforced in the Bantustans, separating grazing from arable and habitation space. Under the influence of rules of equal inheritance in the common

law, furthermore, the inheritance of property as applied in customary law was no longer in favour of the eldest son.

Maybe the argument can be made that customary law and the associated courts are not so much about 'rules and tradition', but that they are first of all about a grassroots-based practical and sustainable form of adjudication. The use of tradition in the case studies often seemed to be more about the relative hierarchical position of men, women and the generations than about the specific content in the cases. Verdicts in court cases mostly did not refer to generalized and abstract customary rules in the first place, but took into account the motivations of people, common sense and fairness, as is indicated by the case material. Customary courts were more directed towards finding solutions than towards enforcing rules (Bennett 2004:3). For this reason contradictions, fluidity and differentiation could be accommodated by customary law and its institutions. The plurality of customary law is not only a matter of different systems, but also a matter of plurality within a 'system'. Customary law is an affordable, socially sensitive adjudication and arbitration system for a poor rural population, packaged in the discourse of tradition and patriarchy. In order to understand it, the rules, actions, process and context have to be taken into account.

7. Conclusion

Formal and informal dispute resolution in one area of the Limpopo Province indicated that a variety of mechanisms were used, depending on the social position of the party seeking a solution to a problem and the context of the case. The mechanisms were not isolated but formed part of a fluid reality where actors made use of a variety of opportunities, depending on how their interests were served by their choices. The existence of the mechanisms for dispute resolution has to be understood contextually in terms of continuing social and economic inequality and exclusion of the poor rural population in South Africa. With a liberal and market-oriented development policy in place, the chances for a radical transformation of underdeveloped rural livelihoods are slim at the moment. Therefore, the continued use of customary courts seems to be a logical option for the poor rural population living in areas under jurisdiction of traditional leaders.

While the recording of customary law may be of use to those who are involved in the facilitation of processes of justice, this 'law' is easily essentialised and solidified as a system, to the detriment of 'living law'. The people in the rural areas of South Africa make use of a variety of mechanisms and are more concerned about pragmatic solutions to their life problems than about the continuation of tradition. In order to study the 'living law' more closely, then, there is a need to record the process of dispute resolution both in its formal and its informal manifestations. The recording of case studies of formal and informal dispute resolution can form the basis for an improved understanding of what goes on at the level of actors and real events. This approach implies that law should not be studied as a system of rules, but as social complexity, interaction and fluidity. The 'revised legal pluralism' approach seems to be well-suited for this research challenge (Wilson 2000:86).

Part of the emphasis on law as process should be the contextualization of dispute resolution in the political economy of South Africa. An interdisciplinary and critical approach is needed for the engagement of research with the process of reformation of

customary law, as initiated by the government. Where the emphasis in the old South Africa was on the codification of customary law, the emphasis in the new South Africa is on the alignment of customary law with the constitution. The contested process of what this entails in concrete micro situations is extremely relevant for the study and practice of customary law and human rights.

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