

Property Relations During and After Marriage:
A qualitative study of property relations of amaHlubi customary
marriages
in Maluti region (Eastern Cape).

by

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Declaration

I Winifred Bulelwa Magudu, declare that this dissertation, unless stated otherwise in the text, is my own original work.

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ABSTRACT

The property relations of the amaHlubi customary marriages were studied among the women in the Maluti villages around Matatiele. These villages are situated along the border between KwaZulu-Natal and the Eastern Cape of South Africa. These relations were investigated through the use of in-depth interviews with 39 women and six government officials. Of the 39, 26 were individually interviewed and 13 women were in three focus group discussions. The respondents were asked about their experiences and perceptions regarding the current practices in the division of property between the husband and wife. An analysis of these experiences, was carried out and were translated and transcribed into English.

It was evident that during marriage there is an assumption among the women that property is equally owned between husband and wife during marriage. Secondly, on the death of the man, the women are allowed to inherit property from their husbands even in the absence of marriage certificates as long as there is enough evidence that the woman is the rightful heir. In addition, it was revealed that a significant proportion of marriages are dissolved informally, without using the traditional and legal structures of dissolution. As a result of this, women do not inherit property from their dissolved marriages. This study reveals infrastructure problems that woman in the area encounter when they need to visit the Home Affairs offices since the Maluti and Matatiele offices are not able to assist them with registration of customary marriages, Resulting in significant number of customary marriages not being registered.

The evidence from the study supports the argument that women had equal access to property and its use in the traditional customary marriage. Currently, women's conditions have worsened due to the weakening of traditional structures. Results indicate that positive developments in law have not yet benefited women since property relations in rural areas are mediated by traditional tenure systems and customs. The lack of monitoring the proper implementation of the laws poses another challenge. That has resulted in little being achieved in terms of the provisions of the Customary Marriages Act due to implementation problems.

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CHAPTER ONE: THE HISTORY OF CUSTOMARY MARRIAGES

Investigation to discover some facts about gender equality in terms of cultural and traditional values has been, and still is, a controversial and much debated issue in many countries around the world. Marital status and culture are among the justifications of gender inequality in the allocation of resources and opportunities (Quraishy, 2001). In addition to this, South Africa had another factor that contributed to gender inequality; that is, the type of marriage. Of the three marriage types that exist, the civil, Christian and customary marriages, customary marriages and Indian marriages have been lowest in the hierarchy with regard to legal status and have been without recognition. Due to national and international developments to redress all discriminatory practices, the South African laws have gradually progressed to do away with gender inequalities of any nature. This research investigated the practical effects of these developments aimed at getting rid of inequalities and implementing ways and means to empower women. It looked at the impact of these developments with regards to equality of property ownership between spouses in customary marriages.

The purpose of the study is to investigate property relations in customary marriages among the amaHlubi ethnic group with specific reference to access, control and use of property. To place this in context, an overview of the historical accounts of the customary marriages of the amaHlubi is discussed as well as the developments in the legal arena and the effect of these developments in the practices of the amaHlubi marriages.

Before colonial administration, the Nguni women had important rights in the property of the house established by her marriage (Krige, 1981). Before the arrival of colonial administration, customary law governed black people's marriages. According to this practice women married according to customary marriage were recognised. Later in the history of South the colonial administration introduced changes to these practices. The changes favoured Christian and civil marriages. Customary marriages did not have the same legal status as civil and customary marriages. For example, the status of women in customary marriages was the same as that of children. Women in customary

marriages could not represent themselves in court; a male guardian would have to act for her. Women could not negotiate their marriage, terminate it or claim custody of her children. It was for these reasons that customary law has been viewed as having negative implications on women (Bennet, 1999).

Prior to the South African colonial administration, the Nguni people understood the household to be a unit consisting of a man, a wife or wives and children. Wives would have different huts. The man was considered to be the head of the household. Marriage was based on *lobolo* that was in the form of cattle, which were given to the father of the woman to be married and the exchange of gifts between the families and the birth of children. The absence of children constituted a good cause for the termination of marriage (Obbo, 1980). In the absence of children in a marriage, a man could marry another wife without neglecting the first one. Other women ridiculed the women without children in the community. In practice there was no formal divorce in customary marriage as it is in court, for example, if the woman was found to be at fault (such as committing adultery), the man would remarry another wife but continue to provide shelter, food and all other requirements for the woman and her children. In cases where the man deserts the wife and children, the wife could continue to leave and use the property accumulated by her marriage, unless if she decides to leave. Then she could not take any movable and immovable property (Beall, 1982:78).

The colonial administration introduced the customary law that governed Black people's marriages. According to this law marriages were to be dissolved in court. If the customary marriage was dissolved in court and the woman who was at fault, she was sent back home and the cattle were returned back to the ex-husband with deductions (*lobolo* was not returned in full). The woman would go back home with only her belongings, not even with the children (Beall, 1982). The children belonged to the father. The dissolution of marriage in court was a new development in law. Those in customary marriages did not meet the requirements of the law. This development was inconsistent with the practice of the people.

According to Krige (1981) the property in the marriages of the Nguni meant the cattle, other livestock and arable land. This property was equally owned between the husband and wife because no one could make major decisions regarding its use or devolution

without consultation. When the husband dies the property was handed over to the eldest son. The eldest son would then assume responsibility of his father in relation to his siblings. But his mother retains significant rights in the house throughout her life.

Since in the stock book, the livestock is registered in the husband's name, it has been argued that in customary marriages women do not have ownership of property while instead the husband owned all property (Bennett, 1999). It is this lack of access to property use, and the control thereof that was viewed as problematic because it suggested that women in these marriages were legally treated as children. Those married in this manner had been viewed as having lower status compared to those married in civil and Christian marriages (Walker, 1990).

The Black Succession Act 18 of 1864 governed property related matters during this period. The Black Succession Act preceded the Black Administration Act 38 of 1927 (Bekker, 1989). Several amendments were made to the Black Administration Act, for example in 1945; the Act gave women the capacity to negotiate common-law contracts. In 1985, the Act was further amended to provide contractual capacity. However, the Act made no significant changes regarding the status of women and the ownership of property by women. It was only after 1994 that major changes to the Constitution took effect. Among these were respect for all cultures, and equality based on race, culture, gender, and ethnicity.

Legal developments have been put in place to redress the discriminatory practices against women. For example in 1993, South Africa signed the international Convention on Elimination of all forms of Discrimination Against Women (CEDAW). In addition, the 1994 elections were marked with speedy transformation as the new government committed itself to gender equality and empowerment of women. In this context, the Recognition of Customary Marriages Act 120 of 1998 was enacted. Through this Act it was anticipated that many problems within the customary law would be resolved. Because it was enacted in order to redress the past injustices.

In addition, the Equality clause is contained within the Constitution of South Africa, section 28 (1) and in chapter 2 of the Bill of Rights. It states that,

The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, culture, language and birth.

According to Mamashela and Xaba (2003) the Customary Marriages Act 120 of 1998 marked a major development for customary marriages in particular, the recognition of customary marriages. The Act states that customary marriages should be registered (sec4 (1)) so that they can be recognised like all other marriages. The Act specifies the requirements for a valid customary marriage; for example, it states that all marriages in order to be valid must have been celebrated customarily, meaning that customs and traditions that are applicable to the indigenous people of South Africa must have been observed. It further states that all such marriages entered into before and after the enforcement of the Act are valid customary marriages. Section 7 (2) deals with the regulation of property, for instance it specifies that customary marriage is in community of property and of profit and loss between the spouses, except in cases where a special arrangement is made such as when an ante nuptial contract is entered into. Section 8 of the Act deals with issues related to divorce. This is intended to protect the wives and children, especially when it comes to ensuring equitable division of marital estates, post-divorce maintenance, custody and guardianship. Family courts were established for this purpose.

OBJECTIVES OF THE STUDY

Major objectives are:

- To describe the customary marriages of the amaHlubi in the Maluti region.
- To investigate division of property between the husband and wife during marriage, on the dissolution of marriage, and on the death of a spouse.
- To establish how property is divided among the wives in circumstances where one wife is registered, and the other is unregistered on the death of the husband.

- To establish practical evidence as to whether the Recognition of Customary Marriages Act 120 of 1998 has improved the day-to-day conditions of the amaHlubi women in customary marriages.

RESEARCH QUESTIONS

The research was guided by the following questions:

- How are assets distributed between spouses during marriage, during marriage dissolution and, at death of husband?
- What are the current challenges experienced by women married under customary marriage?
- What do amaHlubi women in customary marriages view as possible solutions to their problems?

HYPOTHESIS

Despite positive developments in law aimed at empowering the economic, legal and social status of women in customary marriages, their conditions remain unchanged.

DEFINITION OF TERMS

The following terms are being defined; equality, domestic violence, property relations and empowerment.

EQUALITY

According to Pietilla and Vickers (Ngatia 2002:8) equality is defined as:

The state of being on the same level for example racially, socially, and economically. It can also be defined as both a goal and a means whereby individuals are accorded equal treatment under the law and equal opportunities to enjoy their rights and to develop the potential talents and skills.

The limitations brought on by Black Administration Act, 38, 1927 law resulted in discrimination between women and men regarding ownership of property and regulation of family matters. The concept equality in this study refers to the ownership of property between the husband and wife while still married and equal division of property between them in case of dissolution of marriage. This was the case before the introduction of the above laws.

DOMESTIC VIOLENCE

Domestic violence is defined as

Any act or omission committed within the framework of the family by one of its members that undermines the life, the bodily or psychological integrity or liberty of another member of the same family or that seriously harms the same family or that seriously harms the development of his or her personality (Shafer, 2004:13).

In the study domestic violence is used to understand what men do to seriously harm the development of women, or what it is that they are supposed to do and they do not do. Domestic violence is difficult to observe unless the person who experiences it informs you.

Richardson and Robinson (1993:113) understands domestic violence

as the reflection of unequal power relationships in society and serves to maintain those unequal power relationships. It reflects and maintains the power that men have in society generally and also, therefore, within their personal relationships.

Some scholars are of the view that domestic violence is embedded within the cultures and is widely accepted because cultural justifications that are passed down as common knowledge make violence seem reasonable (Richardson and Robinson, 1993) In contrast to this, there is no literature on culture among the Nguni people that accepts or promotes violence of any form against women. An example of this is that when a woman has been treated in a way that she feels unjust, she has a right to go back home. Then

the in-laws send one of the negotiators to establish the reason for the woman to leave. Both families meet to discuss the matter and to decide on a reasonable fine from the man who committed the act of violence. The maximum fine is a cow. Therefore, the culture justification for violence is not accurate.

In the study women have reported that they are being beaten and sometimes the husbands do not provide them with money to maintain their children. These are examples of the existence of domestic violence in marriages thus resulting in marriage dissolutions. This implies that women are not in a position to enjoy all fundamental freedoms in the society if they still live in fear and are not being provided with the basic needs by their partners.

PROPERTY RELATIONS

According to Hann (1998:4)

Property relations refer to a network of social relations that governs the conduct of people with respect to the usage and disposition of things.

In this study property relations refer to the rights that men and women have with respect to access to use, ownership and disposition of property. There are different kinds of property, which is material property things and intellectual property. Here the focus is on how material property is distributed between men and women. Examples of property are land empowerment, livestock, movable and immovable objects.

Ownership of a homestead is a right, a basic human right and a precondition for full citizenship (Hann, 1998: 14). Access to property determines the level of power that women have. In this study property rights imply women's access to home, livestock and cattle. In particular, access and use is emphasised on dissolution of marriages and on death of the husband. Not having access to these property places women in a dependent and marginalized position. In this manner, it is the access to homes through which relations of power and powerless operate.

According to Mbilinyi (Imam & Mama, 1997: 231)

Access issues lead to those of empowerment, as people face and overcome constraints, which are grounded in power relations, and differential ownership and control of basic resources/in the household, community, nation and world.

“Access to homesteads and farming land for productive use in rural areas is crucial to a household’s economic security and subsistence” (May, 1987: 95). The impact of landlessness is limiting the subsistence needs that a household can produce. Consequently, the women and children from dissolved marriages are exposed to diseases resulting from inadequate nutrition. Being without home as an adult with children also results in loss of human dignity and limited security.

EMPOWERMENT

According to Kornegay (2000:xvii)

Empowerment is the process of “conscientisation” which builds on critical analysis of the skills for an individual to gain self-confidence in order to take control of his or her life. Empowerment of women is regarded as an essential process in the transformation of gender relations because it addresses the structural and underlying causes of subordination and discrimination.

Empowerment in this study is used to understand whether women are on the same level with men with regards to rights to property. It is also used to assess whether there has been a positive change in the conditions of women in customary marriages. Access to property rights and knowledge about these rights is considered to be a form of empowerment.

SIGNIFICANCE OF THE STUDY

The study presents an account of the customary marriages of the amaHlubi, as well as the cause and effects of the changes in the manner in which these marriages are practised. This will serve as a contribution to knowledge and as a reference point for comparison with other ethnic groups. It will confirm or disprove what other studies have presented about the effectiveness of the Customary Marriages Act 120 of 1998, in changing what has been considered as the inferior position of women married in customary marriages. It will further provide an analytical framework for the relevance of present day *lobolo* when unemployment levels are extremely high, specifically in the area under investigation.

Some scholars are of the view that studies relating to culture have not been extensively ,resourced or supported when compared to other disciplines although it plays a major role in development studies (Beneria and Bisnath, 2001; Mama & Imam, 1997:76). This study is intended to contribute towards the apparent research gap in property relations from a development perspective. Control of property is the key to social empowerment and had married women been given clear rights and powers over property, their overall social and economic position would have been improved.

The study reveals that there are some logistical problems regarding the implementation of the new Act. In addition, other problems such as poor infrastructure in the area have proven to be major obstacles in terms of seeing the goal of empowering women being successful.

ASSUMPTIONS AND LIMITATIONS

This study is based on the assumption that customary marriages of the amaHlubi are similar and are practiced by a significant number of the amaHlubi population in the Maluti area. This implies that, at best, the findings will be appropriate for the amaHlubi in Maluti.

The study looks at a sensitive issue on gender but confines it to the amaHlubi women, which may or may not be the same for other women. It assumes that experiences reported are the same for all women married in customary marriages. One of the research limitations is that, in reporting, some respondents may have exaggerated order to get sympathy or because they were looking for immediate solutions from the researcher.

Although customary marriages are between men and women, the study was based on the interviews of women only. This is because the purpose of the study is to investigate the legal status of women married according to customary marriages. In addition, the amendment of the laws leading to Recognition of Customary Marriages Act was made in order to improve the conditions of women in customary marriages.

OUTLINE OF CHAPTERS

Having introduced the research questions and the introductory chapter, chapter two provides a detailed description of the process involved in the marriage of amaHlubi tribe. This is discussed highlighting the changes that have occurred over time, from the time of colonialization to the present. The legal implications of these marriages are discussed with specific emphasis on their impact on women in relation to property ownership.

Chapter three deals with the research methods adopted for this study. The section provides a detailed description of the method used to collect data and its analysis. Included in this chapter is the discussion of the process of data analysis. Chapter four is a discussion of the research findings. Chapter five is conclusion of the study.

CHAPTER TWO: HISTORICAL BACKGROUND OF THE AMAHLUBI

2.0 INTRODUCTION

The study provides a historical account of the culture of amaHlubi customary marriages, the causes and effects of the changes that have occurred in time and the context in which the research takes place. In addition, a brief synopsis of the evolution of laws regulating the customary marriages is provided. The major question underpinning this research is whether the Customary Marriages Act 120 of 1998 provides a solution in terms of gender equality and women empowerment in the amaHlubi customary marriages.

The purpose of this chapter is to provide a broader picture of the area under investigation in terms of the physical location of amaHlubi, and the economic and social circumstances surrounding the area. The first section describes the physical location followed by the social conditions. The last part deals with the culture of customary marriages of the amaHlubi in the area with specific reference to the stages that distinguish it, and what benefits each stage brings to the social status of women.

2.1 CONTEXT

This study was conducted in the Eastern Cape Province, which is commonly considered as the poorest province in South Africa. The Eastern Cape is located on the southern seaboard of South Africa. It is the second largest province in the country. Maluti forms part of the former 'independent' homeland of the Transkei and falls under the Wild Coast District Council in the Eastern Cape. People within the Maluti administrative area do their shopping and other activities in Matatiele, which is located in KwaZulu-Natal province. All the rural areas feeding Matatiele are within the Maluti jurisdiction, which is in the Eastern Cape (Budlender, 1999) where government offices, like home affairs, are situated. *Refer to the map provided in appendix.*

This section explores the amaHlubi tribe in the Maluti district in the Eastern Cape. It specifically presents their origin, marriage and cultural practices. By so doing it seeks to critically explore issues and interests pertaining specifically to the distribution of productive assets between husband and wife during customary marriage. Wright and Manson (1983:2) point out that the history of the amaHlubi has not been documented by the amaHlubi, instead the amaHlubi rely on oral forms of communication (Ownby, 1985:2), the most useful of these being praises (*izibongo*). Praises are communicated from generation to generation through praise singing. Customarily, they are normally performed during ritual ceremonies, naming of children and when the mother stops the child from crying (Hadebe, 1992: 8). Wright and Manson, 1983 states that:

It is also noted that *izibongo* reflect the background not only of social life but also of the country itself. Therefore frequent references to mountains, ridges, rivers, and forests.

There is no consensus as to why they became known as the amaHlubi (Wright and Manson, 1983). The missionary researchers, who have also confirmed the absence of documentation, wrote the existing historical documentation (Wright and Manson, 1983; Mama, 1997). Wright and Manson (1983) assert that the amaHlubi society evolved in southern-eastern Africa sometime before the 18th century. It is believed that during this period the amaHlubi occupied the land in the vicinity of the Lebombo near Swaziland. This is why they are closely related to the amaSwazi. This is evident in the similarities between the languages of the amaHlubi and the amaSwazi. It is noted that the amaHlubi are distinguished from other people by their language and by their customs. Furthermore, it is said that the amaHlubi did not follow the practices that were common among the Nguni people in Natal. Tibbatts (1987:7) points out that the "amaHlubi were placed near the Drakensburg in Estcourt by Natal authorities for a specific purpose". The authorities required these amaHlubi to act as buffers between the Bushmen and White farmers as the white farmers had been consistently experiencing stock theft.

As the chiefdoms of the amaHlubi began to increase, power relations between them became increasingly tense. Fights are believed to have been common among the amaHlubi chiefs and, as a result, the chiefdoms are now scattered in different parts of the country. Both rivalry and drought destroyed the nation and consequently, this period

of destruction of the nation is known as *izwekufa* (the death of the nation) (Wright and Manson, 1983).

Some of the fights between the amaZulu and Langalibalele, one of the chiefs of the amaHlubi, started over cattle theft. The amaHlubi were accused of stealing cattle from the amaZulu (Herd, 1976:3). Langalibalele was summoned to the kraal by chief Dingane to discuss the matter. He disobeyed the order, alleging that some years previously his brother, Dhlomo, had been murdered when summoned to appear before Dingane. Langalibalele was known for his reputation as a troublemaker; he was regarded as a rain-maker, a man of supernatural and temporal power with a non-compliant attitude. It was this attitude that irritated Shepstone who ordered the removal of his tribe, (Tibbatts, A 1987). Shepstone was the Commission member who was appointed to administer the tribes in Natal.

Conflict sparked in about 1817. After this conflict some defeated leaders left the area and only the powerful ones were left behind. Estcourt is currently regarded as the royal house of the amaHlubi. The amaHlubi in different parts of the country occasionally gather in Estcourt and celebrate together. Through the destruction of the nation, some groups fled to the Ladysmith-Bergville area, while some came to rest in the upper Thukela area. Others fled south across to the Mzimkhulu, into East Griqualand and beyond (Wright and Manson, 1983). From there, many moved to find food and protection in the geographical area occupied by the Gcaleka (Xhosa ethnic group) in the country (Webb and Write, 1979). Among these amaHlubi were three of the Mthimkhulu sons namely, Mhlambiso, Magadla and Ludidi. It is these three chiefs who are found in the Maluti region.

Tibbatts (1987:2) points out that:

The amaHlubi were a tribe weakened by internal dissension and jealousies, retaining some semblance of tribal unity but possessing no real cohesion and, as a result, they were the first natal tribe to be displaced and scattered by the southward-moving waves of war and rapine brought about by the depredations of Tshaka to the north.

2.1.2 BOUNDARIES OF THE AMAHLUBI IN MALUTI

These three chiefs are now found in the Matatiele/Maluti district. This study takes place in this area as the amaHlubi are located within the following villages: Hlomendlini, Dengwane, Lunda, Sijoka, Magonqoloweni, Caba, Mdeni, and Nzondweni. All of these villages fall under the jurisdiction of chief Magadla. Other villages occupied by the amaHlubi are: Sigoga (Mt Hargreaves), Lixeni, Nkalweni, Mgubho and Mbizeni, and Lugada. These villages fall under the jurisdiction of chief Luphalule. Villages under the rule of chief Lumphindo are, Mafa, Tshisa, and Bethesda. In addition to these are Bhubesi, Rholweni, Ludidi and Mandileni along the mountains towards Mt Frere. The well-known rivers that are important to the amaHlubi are the Ncome, Kinira and Umzimvubu. These are the villages in which the study is conducted. *Refer to a map provided.*

2.1.3 THE PASSAGE TO MARRIAGE

There are major ceremonial events in which a person is welcomed to the next stage in their life. These are known as *umhlonyane* (ritual marking the first menstruation) for women and *ukweluka* (circumcision) for men.

Umhlonyane for girls is a passage to marriage. This is a big ceremonial event that is celebrated by the community instead of the 21st birthday as celebrated by other Western cultures (Blose, 1998:19). This is done for one girl or more in the same family, the maximum is normally three or four girls in order to minimise costs (Magwaza, 1993). Gifts such as money, blankets, dishes and clothes are presented. In this event, counselling is given to girls regarding how they should behave since they are no longer considered to be teenagers. This can be done later in life if it has not been done at the same time when the girl enters into womanhood, as long as it is done before marriage (Hammond-Tooke, 1926:23).

The passage to marriage for boys is the initiation process in which circumcision takes place. Initiation takes place in an individual home where there is a boy. The maximum

number of boys is approximately one hundred. Celebration of circumcision is necessary for men before marriage (Wilson, 1981).

When those who have been involved graduate from these events, they no longer mix with the younger ones who have not been part of this process. Boys no longer wear the same clothes as they wore when they were boys because they are now called *amadoda* (*men*). It is a very strict rule that one cannot marry without having gone through this process. Without having gone through this, the man is considered to be an *inkwenkwe* (*boy*). The *inkwenkwe* does not attend the same events attended by older men, such as that of *imbizo* (*community meetings*). He cannot be engaged where major decisions in the family or in the community are made because he is considered to be a child. At the end of this process counselling is provided to make sure that they behave appropriately as adult men. Failure to comply with the rules of manhood is heavily punished by other men in the amaHlubi tribe.

The passage to marriage for both men and women signifies the uniqueness of the amaHlubi marriages in relation to other Nguni tribes in South Africa. No man can marry without having undergone an initiation ceremony. There is no shortcut to marriage, since passages are celebrated communally, as is the marriage.

2.2 AMAHLUBI CUSTOMARY MARRIAGE

A major literature search shows that there are few ethnographic studies that have focused on the amaHlubi customary marriages; instead, research has grouped and discussed them under Nguni tribes. Nguni is the umbrella term for five major ethnic groups, namely: Bhaca, Xhosa, Zulu, Mpondo, amaBomvana (Hellmann, 1931). This categorisation leaves out some of the major distinctive features of amaHlubi marriages. One of the distinctive features of the amaHlubi is their customary marriage; it differs in respect of name-calling, dress code and the absence of a ring. There are three forms in which marriage takes place in this custom, these are *ukucelwa*, *ukugcagca*, and through pregnancy.

2.2.1 FORMS OF THE AMAHLUBI CUSTOMARY MARRIAGE

2.2.1.1 Ukucelwa Kwentombi ¹

In this instance, a young man falls in love with a woman, they decide to get married and the man informs his parents of his decision to marry. His parents (the lineage) then ask him if he has identified the woman of his choice. Sometimes, the man's parents will suggest a woman because of qualities that she has. If the man has identified the woman, his family (lineage) sends *oonse/wane* (two male negotiators) to the woman's parents to negotiate *ilobolo*. They are given money to pay for things such as *imvulamlo* (the beginning of a negotiation process) and a number of cows that are available for payment. Then the negotiators bring the report back to the man's father (lineage) as to how negotiations went. *Ilobolo* usually takes the form of livestock; but money may be given in the absence of cows, goats and sheep. There is no standardised money price; this is something that each family decides depending on what is available (Khumalo, 1997). These are accompanied by the exchange of gifts (known as *ukwembesa*) between the in-laws for both families. It is argued that gift exchanges are done in order to strengthen the relationship between the bride and groom's family (Obbo, 1980). There is no time frame in which this should be completed, it sometimes takes months, or years for the two families to agree that the couple can marry and only then does the marriage take place. This was the tradition in which marriages took place, but recently there is a lower incidence of this type of marriage.

2.2.1.2 UKUGCAGCA/ UKUTHWALA KWENTOMBI (ABDUCTION)

The second form of marriage takes place when the couple in love decides to marry without the consent of the parents. This is commonly known as *ukuthwala* (abduction) or *ukugcagca* (synonym for *ukuthwala*). In this case, the couple that is to be married arranges for the woman to sleep over at the man's place and the following morning the man informs his parents that he brought the woman in. The negotiators are then sent to the woman's family to inform them about what happened. If the woman's family approves, the *lobolo* process may commence (Bekker, 1989). When negotiators go back

¹ (A formal request to marry a woman)

home and announce the approval, then the man's parents start to sew the *amajeremani* for the daughter-in-law. Wearing of *amajeremani* (German print) by newly weds are considered to be traditional. This normally takes three to seven days. On the last day, the married women will be given new clothes in the afternoon and taken to the kitchen to be introduced to the family members. The newly wed bride is then given a cup of tea and they announce the new name that they are giving her. The mother-in-law gives her tea and announces the name; the mother-in-law or the father-in-law gives her this new name. If she likes the name she will drink the tea. A goat is slaughtered, and this occasion is considered to be an introduction to both the living family members and the ancestors. They are always informed of the new members joining the family. The *lobolo* continues to be paid while the woman stays in the man's home. This kind of marriage is considered to be less expensive than the one previously described. In this case, the final marriage rituals are celebrated when the woman's children have reached maturity, and sometimes only when the children themselves are married (Wilson, 1981). This type of marriage began to be the common norm around the 1960s and 1970s. This shift in the manner in which the process occurs compared to the formal marriage is regarded as a consequence of costs involved in the former.

2.2.1.3 UKUQHUTSHWA KWESISU

In contemporary times, societies no longer practise some of the cultural practices that used to have important relevance to marriage, for example, the cultural practice of virginity testing. It is suggested that a consequence of this is the current high levels of teenage pregnancy. This has resulted in a shift in the form of marriage to accommodate this pandemic. This takes place when the young man and woman have been in love and the woman becomes pregnant. When the woman's family discovers the pregnancy, she is accompanied by a group of three to four married women to the man's home to establish the truth as to whether the man she mentioned is the one who did the 'damage' and also what his intentions are. If the man agrees in front of his parents that he made the woman pregnant, then he is asked whether he wants to pay for the *idemeshe* (damages) or whether he will marry the woman. If he agrees to marry her, those women who have been accompanying her will leave the woman to so that they can report the information back at their home. In homes where there are cows, the women will leave with one cow called the *umqhobo* (the ngqutu beast). The *lobolo* negotiations follow

while the woman continues to stay in the man's home. If he is only prepared to pay for the damages, then the pregnant woman goes back home. Pregnancy and birth signify critical events in the lifecycle of a woman. Pregnancy of the bride brings joy to the families of both the man and the woman (Ayisi, 1988). Those women who did not get married as a result of pregnancy, have to announce the news to the mother-in-law when they start displaying visible signs of their pregnancy.

Unlike amaZulu, the amaHlubi also consider the above situation to be a marriage, whereas the Zulus do not. Among the amaZulu any payment resulting from pregnancy is considered as the payment for the damages. Should the men wish to proceed with the marriage after this, they still have to do it the normal way, such as formal request to marry.

This shift in arrangements regarding marriage has implications regarding women's access to property, division of property on the dissolution of marriage and on polygamous relationships. Property relations traditionally depended highly on indigenous systems of marriage. This refers to the knowledge that was shared by members of the community that involves customs, traditions and beliefs of that community. Indigenous systems are no longer popular; marriages share both traditional and modern characteristics. All members of the society do not share modern systems of dissolution of marriage and the division of property. This is true for those in rural areas, people with lower levels of literacy, and those who do not have access to information on recent developments are uncertain and this results in confusion, leading to practises that discriminate women.

2.3 THE PROCESS AND RITUALS IN CUSTOMARY MARRIAGES OF THE AMAHLUBI

2.3.1. INTRODUCTION OF THE BRIDE

When a woman is married, irrespective of which form the marriage took, a goat is slaughtered during the first day when she is introduced to the family members. She is given a name such as *Novusumzi*, *Nosakhele* or *Novumasande*. This name giving is accompanied by a cup of tea, if the bride does not like the name she does not drink the

tea. The mother-in-law or father-in-law gives this name to her daughter-in law. When the first child is born, if it is a boy, he is given the name of his mother, for example, 'Vusumzi', or 'Sakhele'.

Alternatively, if the mother is not called by the name that was given to her on the introduction day, she is called by her *isibongo* (*clan's name*). An example would be MaBhungane taken from Bhungane; Makhesa taken from Kheswa. The distinguishing feature of the married woman's name is that they begin with 'No' or 'Ma'. In addition, the married woman is expected to respect her husband by not calling him by his name in front of the in-laws. The same also applies to men; they do not call their wives by their first names in the presence of their parents. Should anyone break this rule he/she becomes subject to a fine that ranges from a goat to a cow for disrespect. If the lawbreaker is a woman, she is sent home to collect the animal and then it is slaughtered in order to clean what has taken place (*ukuhlamba inyala*). When a man makes the same mistake, he pays the cow to the woman's parents. The name-calling is one of the distinguishing features between the amaHlubi marriages and other Nguni tribes.

Furthermore, the daughter-in-law is not supposed to use the names of fathers-in-law in that family. If the father-in-law's name is *Manzini* (*water*), she is given an alternative name to use whenever she refers to water. This practice is also common to other African countries (Ayisi, 1979). This ceremony is regarded as the first introduction to both the living people and the ancestors.

Name-calling is done in the spirit of showing respect, irrespective of whether the person is still alive or dead long before the woman is married to the family. In the context of the amaHlubi, it is believed that the woman is married to the family of the husband, not just to the husband alone. This is evident in their language, for example when the amaHlubi want to know the whereabouts of your marriage they say; *wendele emanini* (which clan are you married to)? They do not say 'whom are you married to?' The answer would be *ndendele kwa-Hadebe*, meaning 'the clan of Hadebe' instead of saying 'I am married to Siphohadebe'.

In addition, one is able to distinguish between a married and unmarried person, and whether one has recently married, through the way in which they dress. Married women

cover their heads with a scarf; a newly wed wears a black velvet scalf, a long dress called *ijeremani* (German print), known as *isishweshwe* in isiZulu and a rag covering the shoulders. All of these are given to her on the first day of introduction. After a period of three months, a towel around the shoulders replaces the cloth and after a year the towel is placed around the waist. The towel or scarf is something that women will wear until their death. They are exempted from wearing this only when they go to church, town, or to work. In addition, married women are not supposed to wear a short-sleeved top, this is to respect the father-in-laws, and to whom they cannot show their bodies.

The woman becomes formally under the supervision of her mother-in law until the birth of the first child. This period is known as *ukukotiza*. Throughout her marriage life, she is expected to *ukuhlonipha*, that is to obey the principles of the husband and his family (Beall, 1982). Another aspect of *ukuhlonipha* (respect) involves not eating *maas* (sour milk) and eggs, or not eating at all in the presence of the father-in-law until such time as the bride is officially introduced to them (Khumalo, 1997).

The bride in the amaHlubi context then becomes part of the family until such time as the chief allocates her a piece of residential and farming land. If the husband is a first born (*indlalifa*), or when he is the only male child, she is not supposed to leave the in-laws home as she is expected to take care of the elderly members of the family and when they die, she and her husband automatically inherit what belonged to the parents. This is not the same for all the Nguni people in South Africa, but a significant proportion of the population still practise this. The implication of this is that a married woman in this arrangement does not own the homestead together with her husband. Whatever they accumulate belongs to the whole family, including the husband's parents.

2.3.2 UKUPHINDA UMKHONDO²

In common with other Nguni tribes, after four to six months, the young wife goes home to pay a ceremonial visit to her parents (Khumalo, 1997). This is called *ukuphinda umkhondo* and is marked by the exchange of gifts between the two families. When the newly wed is sent back home, a young girl who is expected to return within two to three

² (The first formal visit of the bride after marriage to her natal home)

days accompanies her. After one or two months a letter is sent to the '*makoti's*' in-laws informing them of the date of her arrival. This is done so that they can make the necessary arrangements. The bride returns back, accompanied by a group of approximately twelve to fifteen people. They carry new dishes such as plates, cups, buckets, brooms etc, together with *umqombothi* (African Beer); *amahewu*; sugar; home baked bread and many other things. On their arrival a goat is slaughtered so that these people can eat before they go back home. This exchange of gifts between the families continues even in the case of a death in one family, or in the case of a happy event such as ritual ceremonies known as *isipheko*. A similar practice exists among the Bhaca society in Mt Frere (Hammond-Tooke, 1926).

In some cases a marriage certificate sometimes does not exist because the man has not yet finished paying *lobolo*. Evidence seems to suggest that insistence on payment before marriage causes a lengthy postponement and possibly followed by the break-up of the relationship, leaving the unmarried mother with the children (Hellmann, 1931).

According to Msimang (Khumalo, 1997), the second major home visit is when the married woman falls pregnant. Later in her pregnancy she is sent back home again. This is done so that her mother can teach her how to care for the baby. At all times during her official visit back home she is accompanied a teenage. When the baby is born, the in-laws of the woman are informed. A date is set to go and visit the child so that they can bring some baby napkins. The mother-in-law, accompanied by other old women, pay a visit to the child where they carry food and clothes for the new-born, as well as all the necessary requirements for the mother and the baby. This is commonly known as *ukuhambiswa kwama-napkin* (delivering of the baby napkins). As usual, they are welcomed by the slaughtering of an animal. They return the same day if it is not far, but if it is far they come back the following day. This ritual is also true for amaHlubi in the area under investigation. According to the culture, it is compulsory for the married woman to have the firstborn child at her home.

This visit is finished when the married woman goes back to her husband's family. The husband's family is notified that she will be returning. She is accompanied by people with food, children's clothes, home-made bread, African beer, a goat, and new clothes (*ijeremani elisha*); *amagcantsi* (home-made mats), a teapot and *emere* (water bucket).

This is commonly known as *ukugoduswa komntwana*. This is only done for the first baby (Hammond-Tooke, 1926). One goat arrives with the *umakoti* from home, one is given as a symbol to say the bride can now eat everything (*ukudliswa komakoti*), the last one is given to the bride's mother. This is also to tell her that she can eat everything, it is known as *ukudliswa kwabakhozi*'. All three goats are slaughtered on the same day. According to Westermarck (Khumalo, 1997:583), this event marks the confirmation of marriage rites and it is of great formal importance.

After this ceremony the woman can now be allocated residential and farming land provided that she is not married to a first-born son. If the husband is a first-born, she remains with the in-laws. During the time prior to her receiving land, she and her husband do not own anything, and they cannot make any major decisions without the approval of the mother-in law and father in-law, to such an extent that the in-laws should approve even the name given to the child. The allocation of land is also determined by the relationship between the in-laws and the bride, if it is a good relationship this can be delayed until the birth of the second child. When the relationship is good the mother in-law does not want the young couple to leave the homestead, however, in the case that the bride and in-laws have differences, they arrange the land allocation sooner.

2.3.3 INTRODUCTION OF A CHILD

According to Khumalo, (1997) this is an event that signals the celebration of the new – born child. A goat or sheep is slaughtered. This event marks the beginning of major changes in the life of a married woman. In this *imbeleko* she is introduced to cooking along with other married women during the ceremonial rituals such as funerals. The introduction to cooking is known as *ukungeniswa ezimbizeni*. After this introduction the *makoti* is expected to cook for all the families of her clan and relatives. *Imbeleko* is common in almost all the Nguni tribes, however it is done for different reasons.

Imbeleko is also known as the thanksgiving ceremony and the official introduction of the child. For the Nguni people the family performs the thanks giving ceremony as a culture in which they officially introduce the child to both the living members and the ancestors. This is a public celebration and one of the acts of expressing thanks and grateful acknowledgement of benefits or favours from the ancestors (Ngcongco, 1996:18).

The Nguni people believe that everything that takes place in the world of the living should be reported to the ancestors because all good things come from them, hence the need to thank and inform them every time good fortune comes (Ngcongco, 1996; Khumalo, 1997).

2.3.4. EXCHANGE OF GIFTS

This is a ritual that starts when the husband's family brings two or three cows for the *ilobolo*, accompanied with pinafores (*ifaskoti*) for the family-in-laws. After some time, a similar ritual takes place when the married woman brings back the pinafores to her in-laws. The pinafores are normally accompanied by firewood, African beer, home made bread etc. The women who accompanied the newly wed are honoured with a goat. On their way back home a goat is slaughtered on their arrival. This whole process is called.

2.3.5. UKUHLATSHISWA KWABAKHWENYANA

The final ritual in the process of payment of *lobolo* is '*ukuhlatshiswa kwabakhwenyana*'. As soon as the husband finishes paying the agreed *lobolo*, a major event known as *umlobolo* is celebrated. This is equivalent to a formal Christian marriage, except that no wearing of a white dress takes place. This is celebrated in both families. It starts by negotiations of *lobolo* for the last time and is concluded by the slaughtering of a cow that is given to the *umkhwenyana* (son in law). These are usually all-night celebrations. The following day, the *abakhwenyana* (husband and accompanying men) are given a cow to take home with them, on their arrival this cow is slaughtered in celebration of the completion of *lobolo*. Marriage brings with it an important change of status since only a married woman is considered a full member of the family, irrespective of whether she entered through *ukugcagca* or pregnancy or the formal wedding. This process is believed to cement the relationship between the two families. Marriage is not permitted with any member of the clan of either parent, or of the grandparents.

2.3.6 UKWEMBESWA KWABAKHOZI (Prize giving ceremony for the in-laws)

In all three forms of marriage the process called *ukwembeswa Kwabakhozi* concludes the final stage. This is a big event that takes place on the groom's side and is accompanied by the slaughtering of the cow. In some instances, it takes place on the day following the celebration of marriage, but in others it follows later. At this stage the bride brings along furniture, kitchen utensils, brooms and presents for the husband, family in-laws and the members of the extended family. The furniture may consist of a bedroom suit and a lounge suit, but this is not compulsory. The presents include *amagcantsi* (home-made mats), pinafores, scarves, blankets, plates and cups. Each member of the family receives each of these gifts, from the grand parents to parents, brothers and sisters, irrespective of whether they are still alive or not. If a person who is supposed to receive the present is already dead then the present is given to another member of the family. Another significant feature of this occasion is the process called *ukuyala umakoti*, this is when the bride and groom's parents provide counselling. This event is common to all the Nguni tribes; the only difference is the timing. In some tribes it precedes the marriage, while in others it forms part of the final stage.

The family, that is the mother-in-law, father-in-law, brother-in-law and all the extended family members, take care of the new family. They are responsible for peace and welfare of the new family. If anything goes wrong it also becomes their business. Domestic violence is a punishable offence; when it occurs the woman needs to inform the in-laws first. There is a saying that *induku ayinamzi*, meaning that you cannot build your house by beating a woman. If there is a dispute that the couple fails to resolve, they then forward the matter to the adults, if unresolved even after the intervention of the adults, the woman goes back home and reports the problem. The two families meet in order to solve the problem. This is also punishable, just like name-calling. Adult parents from both families normally resolve conflict between the married couple; they try using all means to ensure that the conflict does not result in the dissolution of the marriage. In cases that are beyond their control, they try to take care of the children. This is reported to be experienced in other African countries (Obbo, 1980). The role of the negotiators does not end with the marriage ceremony. They continue to be responsible for advising, ensuring the good welfare of the new family and counselling (Khumalo, 1997).

Recently, polygamy is not a common practice among the amaHlubi, but it is reported that before colonial administration and exposure to Christianity, polygamy was common among the amaHlubi and other Nguni tribes. This practice was severely discouraged by the Christian missionaries. They argued that polygamy and *lobolo* are instances of woman selling, and strongly suggested that members of the church should not be allowed to practice polygamy or pay *lobolo*. According to Meintjes (Walker, 1990:141) when the missionaries came to the African continent, they did not understand these cultural practices. It is this failure to understand the significance of *lobolo* and its role that led the missionaries to believe that it was for the appropriation and exploitation of women. Furthermore, this failure to understand led the missionaries to conclude that *lobolo* was the selling of a woman into female slavery (Guy in Walker, 1990). At the present time people still continue to pay *lobolo* even if they are marrying according to Christian or civil marriages, despite the fact that *lobolo* is not a requirement of these types of marriages.

The significance of *lobolo* is evident in the study; it was revealed that although unmarried women preferred not to be married according to customary marriage, however, they want *lobolo* to be paid for them. It has also been evident that payment of *lobolo* contributed to the indissolubility of marriages.

2.4 CHRISTIAN MARRIAGES

The arrival of missionaries marked significant changes in the cultural practises of the Nguni people. The idea that women were sold became widespread; therefore Christians were discouraged from many traditional practises by referring to them as sins or barbaric (Walker, 1990). In addition, Christianity discouraged the extended family and their role in the marriage by requiring the newly married couple to build and occupy their home and stay away from their parents (Bennett and Pearl, 1991).

Many traditions, such as the rule that the new bride starts married life by living under the watchful eye of the mother-in-law and that the wife must return to her natal family to bear her first born, are slowly fading away. The bridegroom's mother, traditionally a partner in the marriage of her son with rights of control over the bride, has no place in

Christian marriages. In this instance the husband simply takes control over property (Bennett and Pearl, 1991).

As a result of these ideologies, people associated everything that has to do with culture as immoral and degrading. Consequently, modern marriages are marked by the abandonment of old rituals and the preference for civil and Christian marriages. Currently, marriages are characterised by the neglect of formal divorce proceedings and desertion. The mediating influence of the extended family has been ruined since parents have little say in their children's marriages. Due to this, there has always been inconsistency between the legal theory and social reality (Bennett and Pearl, 1991).

Recently, the amaHlubi marriages are marked by a dual system of marriage in which people practise the customary marriages, but combine them with civil or Christian marriages. In times of crisis the confusion begins because the married couple find themselves unsure whether to apply traditional systems of resolution or to use the modern ones. In addition, they are not well informed on how the modern legal system works. That is why there are many desertion cases.

This inconsistency between the legal theory and the practical reality took place during the colonial system of government. In fact, it is one of the reasons that chief Langalibalele became disfavoured and it was the source of conflict between him and the colonial administration. The marriage regulations of 1869 regulated marriages through tax that was payable by the man per wife that he had. Chief Langalibalele did not comply with this rule; instead he had many wives without paying tax for them. Because of his failure to pay tax for all his wives Langalibalele was severely punished. In addition, he refused to declare the firearms that were believed to be in the possession of the people he ruled. These incidences led to a war that became known as the Langalibalele rebellion (Herd, 1969).

According to Chiwame (Sono, 1994: 60) Christian influence was disadvantageous in the sense that parents lost control of children. In customary marriages each side of the family that were related by marriage or blood had obligations to honour. Spouses became less knowledgeable of what is expected of them. Virginity and other values that controlled African social life stopped to be celebrated communally; instead they became

the property of the women alone. She is accountable to herself. Monogamy is a significant feature of Christian marriages and is synonymous with private property ownership. Christian marriages do not provide any supportive social institutions to marriage other than a marriage certificate. The elders stopped socialising the young about marriage values, and stabilising the family through *ukuyala*. Hoping that missionary education was going to take over this responsibility. In fact it didn't, instead it created a gap between Christian faith and traditionalists.

Despite the fact that missionaries were opposed to customary marriages, these marriages survived and they continue to exist. The stages in the marriage process are significant in that each stage brings certain powers and privileges to women. Marriage among the Nguni is a process rather than an event. In spite of the dual system of marriage, the practice of these stages is still dominant and they determine the social status, powers, and privileges of a woman (Sono, 1994).

This section provided a detailed description of the customary marriages of the amaHlubi by tracing them from pre-colonial period to modern times. The most crucial aspect of this is the changes identified in the process in which marriages occurs, resulting in different effects on the social status of women, in relation to access, control, ownership and use of property. Rural African people rely on the common shared traditions; values and beliefs in their survival in contrast to the written law prescribing how things should be done. According to them both men and women equally share the property since decisions regarding property are held jointly between the husband and wife. For them, the absence of a written document stating who owns what is not a problem for them. Even if in writing such as the stock book the only name that appears is that of a man, this has got no significance to them, it does not bother them. They believe in equal ownership. Only the outsiders think that this is a problem.

2.5 PROPERTY RELATIONS IN CUSTOMARY MARRIAGES

2.5.1 DURING MARRIAGE

Traditionally, it was commonly accepted that during marriage the husband and wife equally own all productive assets, even though no formal contract documented this. The

homestead and livestock were registered in the name of the men, however, each one in the family was equally entitled to access and use of the property, and no one had individual property rights. The men administered property on behalf of the family (Mamashela and Xaba, 2003). The men in the Nguni culture could not sell property for their own benefit; they ensured that all that what they did would benefit the whole family. For example, they could not even slaughter an animal without consultation with the members of the extended family. This practice is inconsistent with the claims that all property in marriage belonged to men and that women in customary marriages did not have ownership of productive assets and property.

2.5.2 ON DISSOLUTION OF MARRIAGE

There are two major incidences that normally lead to the dissolution of customary marriages; these are the desertion of the wife and domestic violence. The desertion of a wife by a husband is sufficient cause dissolution of marriage. The women are expected to inform the adult members of the family of their situation so that they can provide advice. For example, they can allow the woman to sell livestock for the benefit of her and the children. The in-laws together with the local chief normally allow the women to retain the homestead and all what has been accumulated in the marriage. However, if she chooses to leave, she can only take her belongings with her, she cannot take any movable or immovable property. The children may choose to stay with the grandparents if she leaves in order to look for employment in urban areas. If she goes back to the natal home, the children may follow her but she will not have custody of the children (Bennet, 1999).

Secondly, domestic violence accompanied by unemployment of the man has the potential to dissolve the marriage. When a married woman experiences unacceptable treatment from her husband, the first step for her is to inform the in-laws. Where reports have been made, both the woman and man's family discuss the matter in an effort to try and resolve the issue. These involvements of family members in resolving disputes among the married couple have been reported from other parts of Africa as well (Obbo, 1980). In the case of the woman deciding that the relationship is irrecoverable, she will decide to leave with the children. When the marriage terminates in this manner, the woman leaves with only her own belongings, she is not entitled to take any assets with

her. This implies that women partly benefited from the system provided they were prepared to remain despite desertion. The only time where they were disadvantaged is when they prefer to go back home, then they were not allowed to any property with them. This is based on the belief that the property belongs to the extended family, and it is not acceptable to move property from one clan (man') to another (wife).

The concept divorce does not seem to have existed among the Nguni people before the colonial administration. Women had the right to retain all the property from her marriage including the livestock and land. If the man insists on remarrying, He was expected to provide for the new marriage without taking anything from the first wife. All property accumulated from the first marriage belonged to the first wife without being subject to division. They were even more advantageous that when the divorce took place in court. In court the property is equally divided between the husband and wife, whereas in traditional system all the property belonged to the first wife. A man would then start afresh for a new house with the second wife.

2.5.4 DEATH OF THE HUSBAND

Historically, spousal death did not imply that the marriage in question no longer existed. The existing spouse would inherit all the property to be used by him/her, together with the children. If the husband marries another woman, a separate house has to be established with separate property. Nothing can be inherited from his deceased wife in order to be used by the newly married woman.

In the case where the deceased spouse is a man, everything that belonged to the married couple during the marriage forms part of the property, together with the children. But she cannot take the property with her to re-marry another man. The death of one spouse does not terminate the marriage. All these values and beliefs are not documented but it is known and accepted by those who practice customary marriages. This shows an equitable distribution of family property between men and women in traditional customary marriages. The major difference with current practise is that when women are deserted they want to re-marry, and those whose husbands have died. It is along this that they cannot inherit the property from the previous marriage. This does not imply that deserted women were not allowed to have emotional relationships with other

man. Instead, it means that as long as their relationships did not mean that they are physically move in with men, women had the right to property. Children born out of this relationship belong to the man where the woman was married to, not the biological father. This applies both in desertion and in the death on the man.

2.6 THE EVOLUTION OF LAWS GOVERNING CUSTOMARY MARRIAGES

This section describes the laws governing the relations between spouses in marriage with specific impact on property relations. The laws regarding customary marriages have evolved from traditional customary law; through the Natal Code of Zulu Law of 1891; the Black Administration Act 38 of 1927; to the Recognition of Customary Marriages Act of 1998. A major significance of these laws is that they have affected the status, roles and functions of men and women in customary marriages. This is important especially with respect to property rights, legal status, and rights regarding children.

2.6.1 TRADITIONAL CUSTOMARY LAW

Customary law refers to marriage regulations as indigenous people practise them not in the same manner as legally proposed by law. This involves a set of beliefs, norms and values in a given community. In customary law, an agreement to marry did not create an enforceable right. There are no damage claims in the case of breach of promise. Engagement was normally terminated by agreement between parties engaged in the negotiation of *lobolo*, death or desertion. After the marriage had been celebrated, it was not easy to dissolve it because even the death of a husband did not result in termination. If the woman terminated the engagement for a valid reason, her guardian or father would retain the cattle. If the woman were found to be at fault, the husband-to-be would terminate the agreement and claim back his cattle. Many scholars have argued that it is this *lobolo* that has legitimised men's control over women's fertility (Beall, 1982:66).

The marriage was then celebrated when the following essential requirements were met:

- The consent of the bride's guardian
- The consent of the bride
- The consent of the bridegroom
- The payment of *lobolo*

➤ The handing over of the bride to the bridegroom

Given that customary marriages did not consist of marriage certificates, in relation to the proof of existence of customary marriage, the ceremony and the slaughter of an animal was strong evidence that a customary marriage had taken place in which payment of *lobolo* demonstrated the validity of the marriage. *Lobolo* still remains the rock on which customary marriage is founded. Traditional customary law gave women minimum recognition in relation to property ownership.

In relation to production within the household, all agricultural work was conducted by females, together with domestic work and child rearing, whilst the men were responsible for all work that had to do with livestock. It was unusual for woman to own cattle. The male role could be seen as that of a director whose responsibilities were to supervise, manage and sometimes become involved in marriage negotiations, jurisdiction and the decision-making process. On the other hand, women had control over food for immediate consumption; all surplus food was in the hands of the husband (Beall, 1982). However, the husband did not own the family property in the Western sense, of being the only one with access to the use and control for his personal use; instead, he administered it on behalf of the family members (*ibid*).

For example, he could not sell the property, i.e., house and stock, in order to use the money for his personal benefit. The other senior family members served as checks and balances in that he had to consult them each time he had to take major decisions, about the property and the family. Further than this, for the ritual ceremonies that required the slaughtering of a cow, the man had to discuss the matter with other family members (Bennet, 1995). Children born within wedlock normally assume the father's surname and belong to the father's lineage. Even the child born by a married woman outside marriage belongs to the marriage since it was believed that the father was the thief, therefore he cannot have ownership of the child. Therefore, the father exercises superior guardianship and custody rights over the children because they belong to his lineage (*ibid*).

Other than a general principle that the husbands own and manage the matrimonial estate, customary law had no clear provisions on the spouses' property relations.

Through two rules, however, wives can find themselves seriously disadvantaged on the dissolution of marriage. First, because a wife is deemed not to have full capacity to own property, anything she acquires becomes her husband's property. Hence, when her marriage ends, the wife is liable to forfeit all acquisitions to her husband or his family. Secondly, because it is assumed that her own family will support a divorcée or widow, husbands have no duty to pay post-divorce maintenance.

Linked to the paucity of rules on property in customary law, is the absence of rules designed to regulate the management of family estates. Heads of households had total control of family and house property, together with the sole authority to represent the family in dealings with third parties. Apart from a general duty to maintain dependants that would, in practice, be enforceable through complaints to family elders, the family head was subject to no limitations in his management of house and family estates. Problems arise in these situations. For example, if a family head were to dissipate assets through negligence or incompetence, family members would have few formal mechanisms to restrain him. His wife's ultimate remedies would be desertion and possibly divorce (Mamashela and Xaba, 2003).

2.6.2 THE DISSOLUTION OF TRADITIONAL CUSTOMARY MARRIAGES

Given that customary marriage is centred on *lobolo*, when a marriage is dissolved, *lobolo* is returned to the husband with deductions if the woman was found to be at fault. If the man is at fault he has to forfeit *lobolo*. The deductions were determined by the court ruling if the matter was resolved in the civil court. In marriage dissolution, a woman is sent back to her matrimonial home with only her belongings (clothes). Alternatively, the husband would dissolve the marriage by deserting a wife or by entering into a civil marriage to another woman. It is in this regard that payment of *lobolo* has been regarded as the sale of women (Beall, 1982:75).

In addition, it could be argued that customary marriage dis-empowers women in the sense that while they are in their marriage, they contribute to the accumulation of assets, however, when the marriage dissolves, they are not entitled to any property as is the case with civil marriage (Bekker, 1989).

2.6.3 THE BLACK ADMINISTRATION ACT 38, 1927

According to Mamashela and (2003:2) the Act was designed to unite all provinces so that one law could govern them. Before its implementation, South Africa had four provinces each having different customary law. Its objective was to provide for better management of Black affairs. The Black Administration Act provided a partial recognition of customary marriages together with a uniform approach to the recognition of customary law. Separate courts were created to settle disputes between Africans (Bennett, 1991).

A customary marriage was defined in the Black Administration Act 38 of 1927 as:

An association between a man and a woman in conjugal relationship according to Black law and Custom, where neither man nor a woman is party to a subsisting marriage by civil rights (Bekker, 1989: 109).

As a consequence of this Act, customary marriages were partially valid. For example, if a man was married to two different wives, civil/Christian marriages nullified the prior customary marriage because of the latter's inferior status. Due to this, women in rural areas married under customary marriages were divorced without their knowledge. The implication of this is that in the event of having been divorced without her knowledge, and her husband dying, a woman in rural area would not inherit property from her deceased spouse.

In addition, women married in a customary marriage under the Black Administration Act were regarded as minors under their husband's guardianship. As minors, women could not own property, nor could they enter into a contract without the husband's consent. On the other hand, most of the property acquired by wives was deemed to belong to their husbands; a wife's property falls into her husband's estate to be distributed amongst his male heirs. Furthermore, they had no means of rearing dependants apart from a personal right from the State. These were the major limitations that discriminated against women in the Act. Therefore, this Act was found to be undermining women's right to equality, in this regard it was declared to be inconsistent with the Constitution.

The Act created a divided court structure, the normal court structure in South Africa for the application of South African Law, and, a set of courts which were only responsible for dealing with disputes between Africans and in which African customary law would be applied. Therefore, a dual legal system was introduced with African Law being the subordinate system.

This Act had unfavourable legal, social and economic consequences for African women in customary unions. This is clearly captured in the words of Sachs (2000:21)

It is painful that the Act still survives at all. The concepts on which it was based, the memories it evokes, the language it continues to employ and the division it still enforces, are antithetical to the society envisaged by the Constitution. It is an affront to all of us that people are still treated as "blacks" rather than ordinary persons...., and it is in conflict with the establishment of a non-racial society where rights and duties are no longer determined by origin or skin colour.

2.6.4 THE TRANSKEI MARRIAGE ACT 21 OF 1978

The Act granted a husband restrictive powers over wives. This Act was discriminatory (ss 37 and 39(2)) as men were granted restrictive powers over their wives; women were to be under the guardianship of the husbands. Marital power denied women various rights that they had before marriage; the right to acquire, hold and dispose property. The Act had negative implications for women in the area under study because the Maluti area belonged to Transkei before the 1994 government elections.

Another problem was that if a man was married in a customary marriage and decides to remarry another woman in a Christian or civil marriage, then the second marriage automatically invalidated the customary marriage because civil and Christian marriages are strictly monogamous. As a result, women were divorced without their knowledge through this Act. These women were normally regarded as discarded wives; this affected mostly those women in rural areas because of the urban migration of men. In the cities where men migrated to, they would be tempted to remarry, thus invalidating the customary marriage with the rural women. In the area under study the major source of income are remittances from men who have migrated to the cities. This heterogenous

nature of marriage laws in South Africa had negative implications for customary marriages.

2.6.5 THE RECOGNITION OF CUSTOMARY MARRIAGES ACT No. 120 OF 1998

The Recognition of Customary Marriages Act came into operation on 15 November 2000. It repeals certain sections dealing with customary marriages in the Black Administration Act 38 of 1927, the Transkei Marriage Act, 1978, the KwaZulu Act on the Code of Zulu Law, 1985 and the Natal Code of Zulu Law, 1987. The Act also amends ss 17 and 45*bis* of the Deeds Registries Act 47 of 1937.

In this Act, a customary marriage is defined as a marriage concluded in accordance with customary law. 'Customary law' is defined as the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples.

Mamashela and Xaba (2003) state that, the major objective of the Act was to introduce changes to the customary law in order to benefit women in customary marriages. In the new Act, those who were married both before and after its commencement are recognised as married couples. This is if the marriage was celebrated in a customary manner. It further adds that all these customary marriages should be registered (Sec 4(1)). The advantage of this is the ownership of a marriage certificate, as in other marriages that make it possible for a woman to apply for maintenance by the spouse. In addition, the Act provides certain powers to woman that they did not have before, namely equality of status between man and woman, equality of legal status between all types of marriage, the capacity to acquire and dispose of assets, and the right to enter into contracts.

Customary marriages can now be dissolved through divorce in a court proceeding (sec 8 (1)). The marriage is in community of property and in terms of profit and loss, the separate estates of the husband and wife are merged automatically into one joint estate, however the spouses have the right to apply for an ante-nuptial contract. This is a contract in which the parties agree in advance that whatever they own before or during marriage should remain the property of the individual and should not become common

property. In community of property, upon termination of the contract, all liabilities are settled from the joint estate and the balance is distributed equally between the husband and wife. These improvements indicate a major development in the traditional law, however it is uncertain how these rights could be exercised by the people who live in rural areas, such as those in the area included in this study.

This section reveals that there has always been a consensus among scholars and researchers that women in customary marriages were severely disadvantaged in relation to property ownership and control. As a result of this, the law governing customary marriages has always been under constant review. The major purpose for this has been the need for equity between men and women. Equality has been considered crucial due to the direct effect on the welfare of women and children. There was a common understanding that this would directly empower women, thereby improving their social and economic conditions.

However, each legal development regarding customary marriages has been marked by limitations as well as by positive change. This was confirmed by a significant number of cases reviewed to examine of the existence of limitations. The Customary Marriages Act 120 of 1998 is the latest legal development regarding customary marriages. There has been a widespread perception that it is the answer to the long-term problems facing women in these marriages since it is grounded on a Constitution that rejects inequalities. More research needs to be conducted in order to evaluate the extent to which the Act has been able to meet the intended objectives, and to identify the implementation and logistical problems; it is in this regard that this research is undertaken.

CHAPTER THREE: RESEARCH METHODS

3.0 INTRODUCTION

The purpose of this chapter is to describe sampling strategy undertaken for this study, the methods of data analysis, issues regarding validity and reliability, and the ethical considerations of the study.

The research was conducted qualitatively, in other words, the data was triangulated, where multiple sources of data collection were used. According to Denzin (Gilbert, 2001: 209) data triangulation serves to provide a solution to the problem of partiality which arises when only one method is used in data collection, therefore, he suggests, triangulation is a better approach. In this study, a total of 39 women together with six key informants were interviewed. From the 39, 26 women were individually interviewed and thirteen women were divided into three focus groups.

The research used qualitative methods; semi-structured interviews were used although they are more time consuming compared to other research methods. However, the advantage is that it has more positive response to the subjects and focuses on exploring as much detail as possible (Blaxter, 1996:60).

3.1 POPULATION AND SAMPLING

Maluti is divided according to different ethnic groups that are located within different villages. These ethnic groups are the Sothos, the Thembus, the Bhaca and the amaHlubi. This site was considered relevant because amaHlubi in this area still preserve the culture of customary marriages that is under investigation in this study.

The method used for selecting the informants is non-probability sampling in the form of purposive sampling. A purposive sampling method was used for selecting the informants. In each village, a person who is known to the researcher was used to assist by identifying the informants who meet the criteria. The criterion was that women should either be married in customary marriage, or still single and those who were married and

deserted women. In addition to the women, chiefs, magistrates, and home affairs officials informed the study since they are involved in issues of customary marriages. These informants' selection was determined by the accessibility, availability and willingness to participate.

The population of this study was amaHlubi women in the Maluti villages. The categories consist of women married in customary marriages and unmarried women, and deserted women. "As sample is described as a special subset of a population studied Gilbert" (2001:60). A sample of 39 women was selected from the population of women from different villages in Maluti in which they be divided into sub-categories. Three focus group discussions were conducted, two groups consisting of four members each and five members. Of the 39 women, twenty-six individual interviews were also conducted with women. Out of twenty-six, four women were widowed, eight were deserted women, ten were still married, and four were not yet married. The object of this categorisation was to get different experiences and perceptions of women in order to get a holistic picture. Among these women one was selected for case study because her life experiences were relevant to the study. The sample was designed with the following objectives: To have a reasonable geographical spread and to keep the costs of the field operation within a predetermined budget.

Magistrates, Department of Home Affairs and chiefs were also interviewed since the legal aspects of marriage are among their duties. The informant's selection was determined by availability, accessibility and willingness to participate. In Maluti there are two magistrates in total, at the time of interview one was on leave and I only interviewed the one that was available. In Matatiele, there is only one magistrate, he was the only one interviewed. All magistrates were males. The Clerk of the court is the only one in Maluti, so he was the only one available for interviews. Both in Maluti and Matatiele the home affairs officials were female, in each case, only a senior member made herself available for interviews. The area has a total of ten amaHlubi chiefs. Three chiefs were approached, and appointments for interviews were set up with them; but on the day of the interview they made some excuses showing that they were not willing to participate. Only magistrate one availed himself for the interview.

3.2 INSTRUMENTS

3.2.1 INTERVIEWS

Face to face semi-structured interviews were considered appropriate for this study since the intention of the study is to obtain an in-depth understanding of interviewee's perception of their own culture and conditions associated with it. Blaxter, Hughes and Tight (2001) consider semi-structured interviews as being naturalistic, in-depth, narrative and non-directive. Creative interviewing was employed for this study; by this is meant setting an occasion that encourages the interviewee's willingness to share their feelings and deepest thoughts. I achieved this by sympathising with the respondents and supporting where possible and also stressing the importance of their stories in the study. According to Weinberg (2002) this is done to assure respondents that they can in turn share their own thoughts and feelings. The researcher was aware that getting the respondent to deeply disclose requires much more work and time than obtaining mere opinions. In addition, Weinberg (2002) points out that creative interviewing is driven by friendly, caring and adoring feelings. This approach was appropriate for this study since the topic deals with a subject that involves re-leaving pain especially for women whose husbands have died and those whose marriages have dissolved.

In all interviews, the same questions were asked, but the phrasing was not the same, it depended on the understanding of the informant. I used these questions in order to guide the informant's responses so that they were able to answer the research questions. I was free to change the phrasing of the questions, to suit the understanding of the informant. Semi-structured interviews are considered to be the appropriate method since the study involves semi-literate people and since the purpose of the study is to provide a holistic picture of the circumstances (Gilbert, 2001:125).

During the interviews, the informants were asked to report their own experiences and those of the people whom they know who happen to have stories that are of interest in the study. On average, each individual interview lasted between 45 and 90 minutes depending on the informant's willingness to talk and the knowledge that she has. Only one deserted woman was not willing to be part of the study, all others were willing to participate and answer all questions.

3.2.2 FOCUS GROUP DISCUSSIONS

In contrast to the individual interviews, in the focus group discussions the questioning involved discussing issues with the informants. *Refer to the appendix.*

3.3 RESEARCH PREPARATION

In this study I collected and analysed the data personally. The tape recorder was the primary research instrument. Face to face semi-structured interviews were appropriate for this study, in which there were a set of pre-planned questions to ask from the informants in the form of open-ended format. The questions were also translated into isiXhosa, the language that is used by the informants. I used these questions in order to guide the informants' responses so that they were able to answer the research questions.

In preparation for the interviews, appointments were telephonically made with the government officials. However, some of them did not have access to telecommunication, for example the Home Affairs offices in Maluti. The appointment for this interview was made on arrival. With the individual respondents, together with the members of the focus group discussions, appointments were made face to face on arrival, due to the absence of telephones in the area. Those informants who were had time available allowed interviews to be conducted immediately. But a significant proportion of respondents were approached on the day and they proposed the day on which they were free. All interviews with the women were conducted in their homes. For the focus group discussions, women were asked to identify a place that was convenient for all of them; in this case it was the home of one of the participants.

3.4 RELIABILITY AND VALIDITY

In order to ensure that the respondents were reliable, initially they were asked to provide a historical account of how they moved from being girls to being married women with specific stages in the marriage process. Then later, in the interview follow up questions with specific questions were asked. This was done in order to ensure consistency in the interviewee's responses.

For validity purposes, before the fieldwork questions were tested by asking informants with the same level of understanding as those who were informing the study. This helped in order to identify vague questions and to establish whether questions measure what they were supposed to measure or whether they elicit the information that is required for this study. Where the informants had difficulty in understanding what the question required from them, questions were rephrased to ensure that they were easy to understand. This was undertaken as a preparation before the actual data collection.

3.5 ETHICAL ISSUES

“Ethics is a matter of principled sensitivity to the rights of others” (Gilbert, 2001:45). This involves respect for human dignity and protecting the interviewee’s anonymity. Because of this, certain ethical measures were taken into consideration in this study. This involved respecting the informants rights to privacy and getting informed consent from the participants. Firstly, the informants were verbally informed of the objectives of the study. They were also informed of their right not to participate, all this was communicated verbally, and permission to use a tape recorder was also obtained from them. They were also informed on how the results of the study would be presented including how the tapes will be kept. For example, that anonymity will be maintained at all times and informant names will not appear on the final presentation of the results of the study.

3.6 DATA ANALYSIS

The purpose of this chapter is to describe the steps that were involved in analysing of data. The first step in the data analysis process was transcription of the interviews; transcription was done simultaneously with translation since interviews were conducted in the language of the informants but were transcribed into English. A constant comparable method of analysis was used. This process involves identifying categories from the first interview transcript and then comparing these categories with the following interviews. Then similar categories are grouped together, whilst identifying more categories. I looked for significant statements in the interviews to back up the

established categories. Only the categories that are relevant to the research questions were considered. The next chapter presents analysed data.

3.6.1 CODING AND ANALYSIS

The categories were derived by categorising responses from single women; married women; deserted women and widows together with the key informants. The following section represents a summary of the organised data. The categories for analysis were set up from the interview questions; the following categories were used for coding and analysis.

1. Role of *lobolo*
2. The legal status of customary marriages
3. Property ownership
4. Knowledge about customary marriages Act
5. Limitations of customary marriages Act and problems
6. Domestic Violence

3.6.2.1 ROLE OF LOBOLO

UNMARRIED WOMEN

Four unmarried women were individually interviewed, they were of the opinion that *lobolo* is important, they would like to see it continuing to be paid irrespective of the marriage type in which one is engaging. The following quotations captured this:

lobolo is a good thing and it needs to be practiced and passed on from one generation to the other (Interview number: 25).

I think *lobolo* is very important in marriage it gives the woman dignity. Further than that I think it would be unfair that the parents can raise a child and end up getting nothing when their child is getting married. However, I do not mean that *lobolo* is a sale of woman; it is a custom that has social significance (Interview number :26).

I would prefer to be married the Christian way because I grew up attending church therefore everything we do we see it through the eyes of the church. We do not believe in tradition in my family. I would definitely

choose the Christian marriage. However, I would like *lobolo* to be paid for me. I think *lobolo* is about a person's dignity since people seem to be taking it for granted these days. If you are a man and you really worked hard for your wife, I do not think divorce rate would be high. I think *lobolo* strengthens the marriage, although I am not looking at it as a sale of women. *Lobolo* is something that your parents can hold on, while you leave them for your husband (Interview number:28).

The above quotations confirm the significance of *lobolo* among unmarried women, it is something that makes them and their parents proud. In civil and Christian marriages *lobolo* is not a prerequisite for marriage to take place, but women prefer to have it paid for them to show a number of things, for example that they are being loved, valued and for the purpose of preserving culture. In addition, they also think customary marriage is easier and less expensive compared to other marriages that is why people in rural areas resort to it.

MARRIED WOMEN

When married women were asked to state the role of *lobolo* in marriage there was consensus among them that *lobolo* is still relevant and important. In support of this, a number of reasons were mentioned which have been captured in the following quotations from individual interviews and focus groups.

lobolo is very important to us as women, because in the community where we live, if no *lobolo* has been paid for you, you are taken as cohabiting and you not treated as a wife. For instance, if you got married without *ilobolo* you are not treated with dignity compared to others in the community (Interview number:10).

Marriage exists because of *ilobolo*, which means without *ilobolo* there can be no marriage (Interview number: 12).

DIVORCED/ DISSERTED WOMEN

lobolo is very important in this regard, when there is crisis in marriage, for example he once deserted me, for the whole year. I was scared to go back to my brother and report that things were not right. Whenever he deserts me, my brother would fine him a cow, until such that there were ten cows in total. I think the only thing that strengthened our marriage is the payment of *lobolo*. I say this because all the women who were married with me in this village, whom we were sharing the same

problems, they all gave up because *lobolo* was not paid for them (Interview number:19).

lobolo is very important because it makes men to take care of their wives and it makes the wives happy. The marriage without *lobolo* does not last long because the little argument you have with your husband he does not care much about you because he did not pay *lobolo* for you. A man cannot chase you away because the first thing that comes in his mind is *lobolo*. I think that is why our marriage did not last simply because my husband did not finish paying *lobolo* (Interview number:22)

The two quotations reveal that despite the fact that these women have been deserted, they still consider *lobolo* to be important and that its payment should continue to exist.

I am glad that he didn't pay any *lobolo* because if he did I would be forced to remain his wife. I do not think that *lobolo* is a good thing; I am saying this because of what happened to my sister. He has been a victim of domestic violence, the man claiming that he paid *lobolo* therefore he had a right to discipline her (Interview number :24).

The above response is only one out of the total sample where the respondent was of the opinion that women are abused because of *lobolo*, but those who have been victims of domestic violence still believe that it should continue to exist.

WIDOWED WOMEN

My husband went to pay *lobolo* for the second time on the 20th of October. He paid six goats and money. We got married in a traditional way (customary marriage). He died before we got a marriage certificate (Interview number: 17).

Just four months after I completed at college, before I got a job my husband died. This was in May 2001. Since I did not have a marriage certificate, I had to go to Johannesburg with my mother-in-law so that she could witness that I was married to the deceased. Finally, I inherited all the estate together with the homestead (Interview number: 31).

FOCUS GROUP DISCUSSIONS

lobolo is still important even today, because even during our great grandparent's time *lobolo* has been very vital in our culture. *lobolo* is practised by black culture (Focus group discussion: no.1).

Ilobolo is very important in our culture. Men need to pay *ilobolo* so that women can bear children in return. Tradition is a good thing but somehow it is not especially when a husband abuses you and does not want to set you free. He keeps on telling you about the *ilobolo* that he paid for you. In that way it seems as though he was buying you so as to be his slave. Somehow *ilobolo* gives men power to play women like a yoyo (focus group discussion: No.3).

In customary marriages *lobolo* plays a very important role because in the absence of marriage certificate in case the man dies, the magistrates use payment of *lobolo* as evidence in support that the woman was married to the deceased. *Lobolo* serves the same purpose as the marriage certificate. For example, women cited above were treated in the same manner as if they were in a possession of the marriage certificate although they didn't have. They inherited all the property from their diseased husbands.

The data indicates that *lobolo* is still valued by women in all categories, they would even prefer to have dual system of marriages where there will be *lobolo* and marriage registered in civil or Christian as long as there will be a certificate.

3.6.2.2 THE LEGAL STATUS OF CUSTOMARY MARRIAGES

UNMARRIED WOMEN

I don't know as to whether all marriages are equal, but I do not think that marriages are of equal social status with customary being of lesser status. I have heard of the Customary Marriages Act but I wouldn't like to be in that situation. I think it is good to have CMA so that for those who want to engage in it should be recognised and becomes protected (Int.No.28).

I heard somewhere that all marriages has the same legal status, in addition, CMA emphasises that all marriages should be registered (Interview number: 26).

There is a difference between the way married and unmarried couple (considered unmarried because they did not marry in public) especially are treated in our society. Those who get married in public are treated with dignity and respect unlike those who marry in private (customary marriage) (Interview number: 25).

Marriages are perceived to have the same legal status. The responses are based on the assumptions and on what has been the case before the dispensation of the new Act. Women talk about how other members of the society views customary marriages rather than its legal status. This difference is also observed in the manner in which people who are married in customary marriages are treated in particular by the civil servants. They treat people who are married in customary marriages with no dignity and respect, in particular the home affairs offices.

In contrast to this, both magistrates confirmed that women are treated equally irrespective of the existence of marriage certificates. In the event of death of a spouse, their duty is to make sure that the person who claims the inheritance is the right heir, if there is a dispute they try by all means to obtain the evidence from the chiefs, the in-laws and all people who can be of assistance in resolving the matter. They reported that a dispute normally arises when the in-laws do not want to admit that their son was married and they want to inherit the entire estate for themselves.

They further confirmed that wives are treated equally, even if one is married in an unregistered customary married and the other one in civil or Christian marriage. All what they do after they have gathered the evidence is to divide the estate equally between both wives, the only difference arises when the other woman has got more children than the other. The one with more children receives proportionately to the number of children she has.

It is not surprising to find that magistrates have a different version because they are the legal representatives so they have all the information regarding people whom they serve.

MARRIED WOMEN

There are a number of women that are faced with serious problems because they do not have the documents that show that they are married. The husbands end up abusing them. There is a big difference between those women that are married in a traditional way and those that are married with documents that prove that they are married by law (Int. No.10).

Marriages are all equal, the only difference is expenses involved, civil costs less compared to the other types (Interview number: 27).

GOVERNMENT OFFICIALS

The evidence indicates that marriages have the same legal status. The evidence from the magistrates and the clerk of the court confirmed this.

In this regard the one with a marriage certificate brings it along as evidence and the one without certificate brings along the in-laws and the chiefs to witness the existence of marriage. We give equal amounts to both wives; furthermore each child receives the same amount. Problems where there are two or three wives are very common in this area (Clerk of the court).

They qualify for equal rights as married women irrespective of the presence of the marriage certificate or not (Chief).

The evidence from women indicates that for those who have not experienced any problems or any person known to them, think that marriages have the same legal status. Their responses are based on observations from the community. However, those who have experienced problems have a different view. The reasons for the problems are that administratively, customary marriage was not recognised. Even now that it is recognised some civil servants are still discriminating against people based on this, in particular the Home Affairs offices.

3.6.2.3 PROPERTY OWNERSHIP

MARRIED WOMEN

I believe that as we are married with my husband whatever he owns is mine and what I own is his, same goes with children they are ours. The head of the house is my husband, mostly comes with the idea and we discuss it and reach makes the decisions together. If our marriage can dissolve, I would prefer to leave with nothing because I didn't bring anything with me when I came to the marriage. I say this because I see that many women are doing the same. At home I won't be welcomed because when you leave home you are told to sort things out with your husband which means divorce is not a solution (Interview number: 10).

In case there could be a dispute that results in dissolution of marriage I would prefer to leave my husband together with the children because I will not have accommodation and food to provide them. I would better suffer alone (Interview number: 20)

Should it happens that our marriage is in a state of dissolution I am not prepared to leave this house unless I am tired of him, but if he is the one who is tired of me he should leave me with the children. The household belongs to both of us. In my opinion I think the person who is supposed to be left with the house is the one who will remain with the children although this has not been happening. In my view the situation has changed since we also have rights as women (Interview number:8).

All married women's responses share the same view; they are based on the assumption that during marriage they share property equally, in the same way as after the death of the husband. The problem lies with the dissolution of marriages. They mentioned that traditionally, a man would take a second wife if their differences were too great and unbridgeable, this did not mean the same as a formal divorce. However things have changed. The women expressed that they have observed many marriages breaking up, women leaving with children without any provision for land, housing, livestock or anything. This is a major concern for women, especially these days where elders have little role to play in their marriages and in the context of new legal developments, which are unfamiliar to them.

DESERTED WOMEN

My children's birth certificates are written with their fathers surname and my identity book calls my surname to show that we are not married (Interview number:26).

Traditionally, a first born in the family is expected to stay at home with his wife and look after his parents even if the parents' die a first-born needs to carry on with a family name. Those that come after him can go and build anywhere they like (Interview number: 12).

My question was how am I going to leave my house with children, where will I stay? I realised that the court order does not have a value. When I think of divorcing I think about that my children will no longer have a home. I don't know divorce procedure and not sure where it will leave me. I am also tired of this (Interview number: 9).

The maintenance matter has been reminded for the 15th of January 2004 because we were initially advised to contribute equal amounts out of the pocket. We were informed to go to Maluti and show up the money we are contributing every month. This was written down without being sent to the magistrate (Interview number: 9).

All deserted women reported that their ex-husbands are not paying towards the maintenance of the children. Those who tried to apply discovered that the process was not effective at all. This matter raises questions on the functioning of the courts in the area, because the man in question works for the government, as to why was the debit order system was not put in place in this occasion. It further shows that this was not an isolated case, rather one among many similar cases.

The evidence from the women whose marriages have dissolved reveals that marriages are not formally dissolved either traditionally or legally, as a result women have been left with no property at all. Few women who tried to exercise their rights through applying for maintenance have not been successful and have been intimidated by the husbands.

GOVERNMENT OFFICIALS

On death in this case the women qualifies to inherit the estate (Chief).

According to the constitution all wives should get the same rights the difficulty arises on how one proves this and get the facts rights in court. In dealing with these issues we get the chiefs and tribal councillors because they have known these people for many years. We get all this as a backup even the indunas in the absence of the chiefs to confirm what the family is saying (Matatiele Magistrate).

Even in the absence of all the required amount of *lobolo* the woman is entitled to apply for a piece of land via the family of the man. There's also assistance in terms of application for maintenance for both the wife and the children. They qualify for equal rights as married women irrespective of the presence of the marriage certificate or not (Chief).

The evidence suggests that women are treated equally in division of property where there is more than one wife, despite the fact that a significant proportion of women do not have marriage certificates. Magistrates showed willingness to obtain all the evidence in order to exercise justice to all women.

Use of property on desertion requires that the women informs the in-law family members in order to allow her to use property such as selling of live stock in the absence of the man. It is the family in consultation with the chief can allow the woman to sell property. Major decisions by women in relation to property depends agreement reached on consultation with the husband's family (Chief).

The chief reported that on the dissolution of marriages, women leave with their belongings only, they do not get any share of property, such as homestead, livestock or anything, whilst they are the ones who are left with the responsibility to raise children. In addition, he confirmed that on the death of the husband, women have the right to inherit property.

During marriage, it is commonly believed that women have equal access to property, its use, and its devolution, however, these rules are not documented anywhere, it is taken for granted that everyone is aware of them. Both magistrates reported that they have never dealt with divorce cases in customary marriages, so the question of division of property during dissolution of marriage remained un-answered.

The above quotation from the chief reveals that even the traditional structures do provide property to women when marriages are dissolved in the same manner as in formal divorce.

Those whose marriages are registered have done that because of the different reason, either they have learned from the experiences of others or because they belong to a certain religion, not because they have been informed. For example, the following lady expressed that she did if for security reasons.

We went to Home Affairs to get the marriage documents to show the world that my husband is already taken/ he is mine. Before we registered our marriage he used to beat me every now and again. Now that he knows that I had rights too, behaves differently (Interview number: 11).

Another quote in support of the lower levels of knowledge about the need for registration of customary marriages is cited below.

According to the constitution all wives should get the same rights the difficulty arises on how one proves this and get the facts rights in court. In dealing with these issues we get the chiefs and tribal councillors because

they have known these people for many years. We get all this as a backup even the *indunas* in the absence of the chiefs to confirm what the family is saying (Matatiele Magistrate).

3.6.2.4 KNOWLEDGE ABOUT CUSTOMARY MARRIAGES ACT

UNMARRIED WOMEN

I have heard of the Customary Marriages Act but I wouldn't like to be in that situation (Interview number: 28).

The customary marriage is taken as a marriage that is not legal because you do not get marriage certificate after getting married. That is why people end up doing more than one marriages so as to be acceptable in their societies and for their marriages to be computerised. I haven't heard about the Act that allows all marriages to be registered (Interview number :27).

The evidence suggests that there is very low level of knowledge about the Act and its provision among unmarried women, despite the fact that all of them had obtained grade twelve and they were studying towards tertiary qualification. The same results were found in focus group discussions, irrespective of their marital status and location. All the government officials further confirmed this.

MARRIED WOMEN

The lower level in the status of knowledge is also reflected in registration of marriages. The evidence from both the Fad's and Individual interviews indicate that a significant proportion of marriages are not registered. For example:

We have not yet registered our marriage because our parents have not informed us to do so because *lobolo* is still incomplete (Interview number: 27).

Most of the people are married but do not have marriage certificate. These kinds of people tend to experience some difficulties because their children are not allowed to have identity books. In Home affairs offices they need a people to produce their marriage documents (focus group discussions: 18).

DESERTED WOMEN

I haven't heard about the customary marriage act, which allows people that get married traditionally to have marriage certificate (Interview number: 23).

I don't know divorce procedure and not sure where it will leave me (Interview number.9).

The responses indicate that women whose marriages have dissolved the dissolution did not follow formal divorce. The reason that they did not apply for divorce is that they are uncertain as to how the process works and that they didn't know that they could gain anything in the form of property by applying for divorce.

FOCUS GROUP DISCUSSIONS

There is a law that encourages people who are married to go and make marriage documents so that your partner dies then you may have access on his/her property (focus group discussion:17).

GOVERNMENT OFFICIALS

The recipients of customary marriage are not aware that they need to register their marriages. They do not know it at all. They just stay traditionally, the problem arise when the husband dies (Clerk of the court).

I have got no knowledge of the Recognition of Customary Marriages Act. Occasionally we are called as the traditional leaders to be made aware of the new laws that affect the people in rural areas but not this one (Chief).

There is no knowledge among both women and men that their customary marriages should be registered. Another problem is that I do not think that women know that they have all these rights (Matatiele Magistrate).

Our major problem is that people married in customary marriage are not aware that they are supposed to register their marriages with the department of home affairs. I would recommend that people be informed of this development and that the chiefs have the right to confirm the existence of these marriages and they should accompany the couple during its registration. The major problem is the lack of knowledge among the chiefs together with the people that it is important to register marriages (Clerk of the Court).

The chief further confirmed this.

I have got no knowledge of the Recognition of Customary Marriages Act. Occasionally we are called as the traditional leaders to be made aware of the new laws that affect the people in rural areas but not this one (Chief).

In addition, this was captured in the words of the Matatiele Home Affairs official.

There is high proportion of women whose marriages are unregistered. This becomes evident when the children are on grade twelve since they need to have the Identity documents. What normally happens is that at school the children use their father's surnames. In cases like we are forced to use our own discretion, for instance we even call the child's aunt. The people in these villages are not aware that all marriages need to be registered. In this office we deal a lot with people from rural areas that have less knowledge.

The females do not know most of their rights otherwise it's a good Act. And also the question that still remains is that of empowering the people inside the offices.

I have never heard of people educating about the importance of registering marriages. I have only heard about this over the radio. To my knowledge there are still people whose marriages are still unregistered. In my view I think it is necessary that people should be motivated to register their marriages in order to avoid the problems that normally result from non-registration during death of one spouse (Matatiele Magistrate).

3.6.2.5 DOMESTIC VIOLENCE

Those who know about their rights fail to access property because of a number of reasons. The following quotation shows that women are being kept in silence by being threatened. The lady quoted narrates the story of another woman who was killed for trying to access maintenance for the children.

She is scared of applying for maintenance for the children because there is a case where a woman was murdered in Matatiele through trying to access this right. The father of the children was working in Cape Town, when he discovered that the woman had applied for maintenance, he made efforts to meet her in town on the day of arrival, pretending to be responsible. On his arrival he went to Checkers store to buy a new knife. He used it to kill the woman together with the child. They both died, the child was between the ages of two to three. Every time when there is a hearing for this case in the court the women join hands by matching to the court. This is something that took place last year. He is still in jail, the

women are pleading through the matches that he should not be given bail. Therefore all women are scared to apply for maintenance for their children. I cannot apply for it too because I am scared, I would prefer to leave him like that. Women are leaving in fear, especially when you are no longer staying with him he is very dangerous. In my view women are not protected at all, they are victims of physical and economic abuse. Some of them are rising on average five children while their fathers are free. As a result we see an increase in the number of street kids, some of them are together with their mothers in the streets with no accommodation. I strongly feel that women are not protected at all, due to the things that are happening (Interview number: 8).

The problem started again because of this child. I decided to take the protection order again with me to show them that I am still being beaten irrespective of the court order. I went to the police with all those bruises. He was taken to jail and stayed for that weekend on Monday it was the case hearing. He came out through bail, he paid the amount of one thousand five hundred rand. I went to one of the prosecutor and asked as to how I am going to survive since my husband is released on bail. He informed me that the law allows the he should be out through bail. I asked his suggestion on the solution to this and he advised that I could ask people to sleep over, alternatively to go home. My question was how am I going to leave my house with children, where will I stay? I realised that the court order does not have a value (Interview number: 9).

Since he came out of jail, he is telling people that he is planning to kill me. Somebody came and informed me, stop this and leave. After having heard this news I decided to leave with my children and my belongings back to my home (Interview number.9).

I only enjoyed for one week, after that he started drinking everyday before coming from home. He would bit me everyday, asking why I come to Johannesburg. I stayed in those conditions while writing letters to my parents informing them of the circumstances. I decided to send the child back to my parents while my staying there was not improving. He used to chase me every night with stick and knife. I phoned my parents home requesting that they should sent me money so that I can come back home. They did that; I also informed him that I am going back home since you do not know why I am here (Interview number: 22).

The evidence suggests that domestic violence is high in the area under study but the problem is that it is not reported to the police. Therefore it does no get into the statistics. It takes different forms from women battering to economic abuse. For example, failing to maintain your children serves as domestic violence under economic abuse. It could be argued that the reason that survivors are not reporting is because they are scared of further victimisation. Secondly, even those who report it do not get protection because

men continue to hit them in the presence of court order. Women do not see an incentive in reporting domestic violence.

3.6.2.6 PROBLEMS & LIMITATIONS OF THE CUSTOMARY MARRIAGES ACT

The elders used to play a very important role in solving the problems that the married couples were faced with. They did all of that so as to avoid divorce, because in the olden days it was taken as a taboo. However, when the problems were beyond their control then divorce would occur (Interview number: 14).

Common problems related to inheritance are cases where the parents and relatives of the deceased spouse (son) do not accept that their son was married; instead they want to inherit the estate. If the in-laws fail to disclose that the woman is the rightful heir of the estate they are charged in terms of the criminal law. Sometimes the in-laws together with the chiefs give evidence that the deceased was unmarried whereas he was married (Maluti Magistrate).

These quotations reveal some of the difficulties that women are faced with in trying to access what the law provides them as their right.

In my opinion I think the limitation of the Customary Marriages Act is that if a man wants to enter into a second marriage he needs the concern of the first wife. Further than these services are out of reach, people have to travel long distances between Mt Frere and Maluti in this area, which is too costly. This distance is approximately 150 km that bring the issue of costs. Another limitation is that we have got no computers; this is the result of the failure of the HOD's to bring facilities to the service providers (Maluti Magistrate).

One of the major problems that women are faced with is that if you are married to the firstborn son, the in-laws expect married couple to share the property with the elders so that they can take care of them. In case of divorce that property cannot be shared between the married couple because it belongs to the extended family. This is a reflection of a cultural imperative that equally affects both men and women.

Some educated people are not helpful at all. If you ask them to explain something that you do not understand they just ask you a question that "We do not have time for people that ran away from school while had a chance". If they do explain they explain in the language that you do not understand. They confuse you even more (focus group discussion:18).

Women expressed the same problems as those mentioned by the government officials and women in FGD's such as accessibility in terms of distances to be travelled are too long thus resulting in high transport costs, and attitude of staff. For example, people around Maluti villages need to travel to Mt Aylif to have their marriages registered in customary marriages because there are no such services in Maluti and in Matatiele Home Affairs. In addition, they mentioned general problems that affect women irrespective of the type of marriage. These are ineffectiveness of the maintenance system, the court orders and extreme levels of violence against women.

The next chapter discusses some of the research findings. The concepts are discussed based on the interviewees' understanding. Other issues that have been explored include the assessment of the impact of customary marriages on the lives of women.

CHAPTER 4: PROPERTY RIGHTS IN CUSTOMARY MARRIAGES

4.0 INTRODUCTION

This chapter discusses the findings of the study, the discussion is structured around categories that were used to analyse data and research questions. The first issue that is discussed is the question of distribution of property on dissolution of marriages. This is followed by discussion of the legal status of customary marriages as reported by the women. Challenges that are experienced by the married women are also examined and their impact on the lives of women and children. The impact of customary marriages Act is elaborated with specific emphasis on the death of the husband, procedure to marry the second wife, and empowerment of women. In this section some possible solution to the problems experienced by women are also suggested.

4.1 DISTRIBUTION IN THE CASE OF MARRIAGE DISSOLUTION

Women who are still married expressed that they have equal access to property, its use and its devolution while they are in marriage. The total sample of women whose marriages have dissolved reported that they did not get any share of property from what accumulated during their marriages. They further indicated that their husbands are not contributing towards the maintenance of the children. Some of them had been able to build homesteads in different villages from their husbands. Others were still renting or leaving with relatives. Women from dissolved marriages further reported that their efforts to apply for maintenance have failed.

According to the culture of the amaHlubi, the man who decides to marry the second wife is expected to obtain a new land for the new wife for housing and both farming, and is not expected to take anything accumulated from the old house, be it livestock or furniture. What is currently happening is not approved by culture, and also not by law. What normally, happens is that once the husband and wife get involved in a disagreement or experiences of domestic violence or desertion, the wife just leaves

without taking the matter to the traditional structures. Some women expressed that their husbands were so violent to an extent that they do not respect the decisions of the traditional structures. According to the information gathered both from the women and the magistrate courts none of the marriages were dissolved by the court. This is could be a result of lack of knowledge by women or ignorance.

Another issue that complicates the situation is that as it was evident in the literature review that in extended households the property does not belong to the married couple, instead to the whole family. On dissolution, women from such households are not entitled to any property. In addition, even though women who are still married reported that they have equal ownership of property, when the marriages dissolve that equality does not materialise. Even in case of widowers, if they were coming from extended households on death of their husbands, they can only inherit money, but not homesteads and livestock. This is a reflection of the cultural imperative rather than male domination. This implies that there is a difference between access and control. Married women have access not control, because all what they have access to does not belong to them when marriages dissolve. Women do not have the power or command over property, it is only available to them for use while they are still within the same premises with the husband.

Another example of cultural imperative is that a woman who has never been married cannot be allocated a piece of land unless she is represented by a male alternatively, if she has got a male child, otherwise she is denied access to land. This guides the chief when allocating land to females.

Equality between the marriages have been achieved in the legal arena, this is evident in cases of death. Customary marriages are now given the same recognition as civil and Christian marriages. Equality is also maintained when dividing the estate between the wives. They are all treated equally, even where one owns a certificate and the other does not. The only area that still has a gap is when marriages dissolve. The Act makes a provision for equal division of property; however, due to lack of access to knowledge, deserted women do not access this right because of their failure to dissolve their marriages legally. Deserted women do not report to the court in trying to apply for equal division of property or maintenance for their children. Their lack of access to property is

due to the lack of knowledge on what they are entitled to and what procedures should they follow. Even when they approach the legal offices they are given a cold shoulder or improper responses. Also the treatment that they get is degrading.

4.2 THE LEGAL STATUS OF CUSTOMARY MARRIAGES

Women are of the view that customary marriage has the same legal status with other marriages; however, they do not like the fact that it allows polygamy. They expressed that this marriage is good for people in rural areas in that the costs involved are less compared to other marriages. Although they would not prefer this marriage for themselves, they wanted payment of *lobolo* to continue despite the fact that it is not a prerequisite in other marriages.

The women together with the magistrates confirmed that customary marriages have the same legal status with other marriages, and that women are treated equally in the law, even the absence of marriage certificates does not make them null and void. There is a perception among the unmarried women that customary marriages are for the uneducated or poor people, however all women get equal treatment in the community.

4.3 THE CURRENT CHALLENGES EXPERIENCED BY WOMEN IN CUSTOMARY MARRIAGES

A problem that was discovered during the interviews is that marriage dissolution is extremely high in the area, and it goes unreported, therefore unrecorded. These marriages are not dissolved in the traditional way, they are also not dissolved by formal divorce in the courts. The traditional way in which marriages dissolve is that of informing the families of both husband and wife, the matter is then discussed. If no consensus could be reached at this stage the matter is referred to the local tribal court where there will be families, the chief and other villagers. The formal way is that of reporting the matter by one of the couples to the divorce courts, where the courts try to resolve the matter in a legally prescribed manner. The husband and wife fight and the wife decide to go back home where she was born. As a consequence the property accumulated from that marriage is not divided between the husband and the wife. The husbands automatically acquire all the property. Women go without houses, without land and

without any livestock and yet they are the ones who are left with the responsibility to raise children. Almost all those women whose marriages have dissolved do not have higher educational qualifications that would earn them better paying jobs. As a consequence they end up working as domestic workers and hawkers selling in the streets. The kind of jobs that they occupy does not provide them with enough money to build houses and the maintenance of the children.

One woman reported that her husband was physically assaulting her and she went to report the matter to the police. A court order was issued inhibiting her husband from hitting her again. However, the man continued to violate her regardless of the court order. When she went back to the court, she was advised to get someone to sleep with in her house because there was no other way she could be assisted. This evidence shows the inefficiency of police services in the area. It was also evident that the chiefs do not only lack knowledge about the Act, but some of them are also perpetrators of violence against women and children.

Due to lengthy process of *lobolo* payment and other related activities, the actual registration of marriage becomes delayed such that other marriages get dissolved before registration. When the parents part ways children born out of this becomes the responsibility of grand parents. The problem for older women is to register these children; and this is further complicated by the complex system of application of births certificates. According the women the system is complex because it is difficult complete the application in one day. Some of the information required is difficult to obtain, for example getting hold of both the biological parents. Since the grandparents sometimes do not know the fathers of these children, it becomes very difficult for them to register their grandchildren since officials insist that both biological parents must submit Identity Documents in order to register the births of the children. As a result of this, a significant proportion of children who should be benefiting from the child support grant are excluded from this benefit.

4.4. THE IMPACT OF CUSTOMARY MARRIAGES ACT ON WOMEN

The study reveals that Customary Marriages Act is very good, however there needs to be some adjustments within the government for it to work successfully. It only faces limitations regarding implementation and most of these are resulting from the legacy of the past. An example of these is the distances that rural people have to travel to the service centres and negative attitude of the civil servants towards the people. They have been reported to treat people with disrespect. With regards to property relations, the Act will have positive results once the implementation problems are addressed, such as education of men and women about their rights; responsibilities and procedures to be followed such as divorce.

Traditional systems of resolution of disputes in the family have proved to be ineffective, since the perpetrators of violence no longer respect these structures. In the same manner as with courts, they have proved to be ineffective, because when a husband beats a woman, there are no police in the area to come to her rescue, not to mention public phones, any reception for cellular phones. The situation is further worsened by the fact that there are not enough personnel and vehicles in the police stations.

4.4.1 ON THE DEATH OF THE HUSBAND

The evidence suggests that women have achieved much through the Act with regards to property on the death of the husband; more specifically, women from rural areas where it is common to find out that there is one wife whose marriage is registered and another whose marriage is unregistered. Whether there are one or more wives involved in unregistered marriage, the magistrates ensure that they obtain the necessary information so that the beneficiaries are assisted without any biases.

4.4.2 PROCEDURE TO MARRY THE SECOND WIFE

According to the literature, traditionally, a man who marries a second wife has to provide a homestead, property and everything for the new wife without taking anything from the first wife to be used in the second wife's house. Not even the cattle for the payment of *lobolo*. Presently, the law requires that a man should apply formally to the

court for the second marriage, in his application he needs to state how much estate does he own and state how property will be divided between the wives. Based on these, the marriage could be approved or rejected.

Women are of the opinion that this portion of the Act serves to work at their disadvantage for two reasons. The first wife normally has made a contribution towards the husband's property; part of her contribution is to be divided for someone who has not contributed, that is, the second wife. Secondly, these marriages are normally registered in cases where there are children already existing between the man and the second woman. Should the court fail to register this second wife due to the failure to meet the demands of registration, the second woman and her children are severely disadvantaged in terms of using the correct surname especially for the children. This particular legal requirement is in direct contradiction with the culture. In addition, it is in contradiction with the objectives of the Act, which is to empower women. Besides that, the process is legally complex for the people in rural areas, in terms of costs and accessibility. The amount required for the application is out of reach for many couples, and also the fact that the couple should be legally represented. Only the provincial courts have got the powers to deal with the application for these marriages. Some of the places are very far from these courts, for example, a couple in one of the Maluti villages would need to apply in the court in Umtata, which is approximately 600 kilometres away.

4.4.3 EMPOWERMENT OF WOMEN

The findings from women in all categories reveal that they have little knowledge about the existence of Customary Marriages Act. A significant proportion of women are in unregistered marriages, the reasons being that they have never heard about the importance of registering their marriages, while others are still waiting to get permission from the parents of the woman. They only give permission to register the marriage when they are satisfied with *lobolo* that has been given to them, or when they realise that the children of their daughter are getting old. In order to avoid complicating matters for them they give permission to marry. For example, when the children are old enough to obtain their identity documents, in order for them to inherit the correct surname and any other benefits from their father.

Some women, who are deserted, applied for maintenance and applications have been unsuccessful, this has been due to the inefficiency in the system. They state that the husbands agree to pay specified amounts whilst they are still in court, but the agreements never materialised. When this happens, they went back to report that the husbands are not honouring the agreements, but nothing is being done about them. Women also gave examples where their husbands for application of maintenance have killed other women known to them, together with their children. All women live in fear and they do not see the government assisting them in this regard. Those who are still married, when asked what are they going to do in case their marriages dissolve, mentioned that they would leave their husbands with the homesteads, and everything because things have been taking place in this manner in the area and it has become the norm.

The question of empowerment remains unresolved, since the women are not yet in control because they have no knowledge of the Act and its provision. Issues of access to the service centres, access to transport and knowledge are central to empowerment. Land is life and security which man cannot do without (Ngubane, 2004). The evidence has shown that the above limit the chances of women to be empowered. Woman who have been deserted do not have access to land, housing and maintenance, this is an indication of being dis-empowered. However, this could not be attributed to the failure of Customary Marriages Act, because provisions are there to enable women to access their property rights. The limitations can be attributed to implementation problems not the Act.

4.5 POSSIBLE SOLUTIONS TO THE PROBLEMS

Women have suggested that their culture of marriage should be documented, be made available in books and other kinds of knowledge dissemination, this was perceived by women as a powerful tool that could assist those in powerful positions to know about their existence and the problems which they are facing. As things stand now, the Home Affairs administration does not seem to cater for the problems resulting in these marriages.

Women also thought that education of both men and women on issues of gender could play a major role. Education about the culture, Customary Marriages Act, and any other Acts that have gender implications should be implemented to the rural communities. According to these women, educating people through the radio is inefficient since not all of them have access and that they can not ask questions since they do not have access to telephones. They also suggested that it would be more appropriate to have a school curriculum that includes issues of culture because the role that elders use to play of teaching was taken over by formal education.

The results of the study are in support of the hypothesis which states that, despite more positive developments in law that aims at empowering women, the day to day living conditions of women in amaHlubi marriages have not yet improved.

CHAPTER 5: CONCLUSION

This section serves to establish whether the objectives of the study have been met and also whether the study has been able to answer the research questions. The major competing argument is, whether women married in customary marriages have equal ownership of property or not. The evidence suggests that women in customary marriages used to benefit before law regulated these marriages. Recently, the law that governs customary marriages has failed the rural people because they cannot keep up with the legal requirements and because implementation problems, including the absence of an evaluating mechanism.

The evidence obtained from the interviews indicates that the study has been successful in answering all the research questions. In addition, it is anticipated that this study will form the basis from which further research could develop. The study has also been able to identify other social problems encountered by people in the area, which would not have been possible had this study not been conducted. It is also hoped that this study's results, together with other similar studies in different provinces in South Africa, will serve as an evaluation tool for the Customary Marriages Act 120 of 1998. Combined they could be used as a yardstick with which the policymakers will be able to assess the effectiveness of Customary Marriages Act and other policies.

This study aimed at presenting the culture of the (amaHlubi) customary marriages. It also aimed at producing findings from raw data about the property relations in customary marriages. The emphasis was on investigating whether there is equality in the division of property in these marriages during their existence, on dissolution, or on the death of the husband and also in cases where there is more than one wife. In addition, the study served to assess whether the Customary Marriages Act has improved the day to day living of the women in these marriages. The categories were developed from the data, and then conclusions were drawn.

The study was designed qualitatively and used in-depth interviews with individuals together with focus group discussions. Field notes were transcribed, translated and subjected to coding for analysis. The categories were identified from the raw data that made it possible to meet the research objectives through constant comparative analysis.

The following categories were identified: Role of *lobolo*; the status of customary marriages; Property ownership; Knowledge about customary marriages Act; Limitations of customary marriages Act or Problems. These concepts were equality, domestic violence, and empowerment and property relations.

It is clear from the study that customary marriages are still practised by a significant proportion of the population in the Maluti region, although the procedure has changed. The most common procedures are abduction and marriage that occur when a woman is pregnant. The study also reveals that women both married and unmarried would like *lobolo* to be paid. However, all women were of the view that even in the absence of *lobolo*, marriage still exists. The evidence reveals that most marriages were not registered because *lobolo* payment was incomplete. If the husband dies while the marriage is not yet registered, both the community and the legal sphere treat women in the same manner as those who are in possession of a marriage certificate.

It was evident from the research findings that despite the absence of marriage certificates, people share a common understanding regarding property ownership. Women who are still married believe that they equally share the property. On the death of a husband, the property is equally divided among the existing wives even in the absence of a marriage certificate.

A major problem arises when a customary marriage is dissolved. The evidence reveals that a significant proportion of marriages are dissolved informally. Traditional and legal structures of marriage dissolution are not used. Women expressed uncertainty about how the legal recourses work and also expressed a fear of being physically abused by their husbands if they applied for divorce. They cited a number of incidents where women were killed for having applied for maintenance and divorce. Thus domestic violence serves as an obstacle to women; they are unable to enjoy the benefits of the Customary Marriages Act.

The evidence reveals that despite the existence of the Customary Marriages Act that seeks to empower women and to better their lives, they are still faced with violence that manifests itself in the form of physical, emotional and economic abuse which continues to threaten their safety, prevent their freedom and endanger their children's survival.

The inefficiency in government structures together with the absence of government subsidised transport in the area, and coupled with a complex administrative system in the home affairs offices, make it difficult or impossible for women and children from dissolved marriages to access other social services such as obtaining birth certificates and identity documents.

The literature reveals that among the Nguni, domestic violence is severely punished. In addition, formal divorce had not existed among the Nguni people in South Africa before the colonial administration. Instead, where the couple decided to part ways, the man would still be responsible for the maintenance of the woman and children. The extended family members were responsible for ensuring that the married couples are happy, this was embedded in the culture. Both families of the married couple served to ensure this. Failure of the people to use their cultural systems has led to the current problems. This does not mean that the cultural systems did not have limitations, they did, but when they were in place the level of domestic violence and homelessness among women was not as high as it is presently.

The results of the study suggest that development of rural women should focus on raising awareness, providing housing and infrastructure. Empowerment of women through raising awareness will allow women to claim the rights provided for in the law.

APPENDIX

QUESTIONS FOR KEY INFORMANTS (Magistrates, Clerk of the court and Chiefs)

- What is your role in customary marriages?
- What kinds of problems in customary marriages are normally brought to your attention?
- In your view, what are the causes of these problems?
- What arrangements do these marriages have in relation to control, use and ownership of assets?
- In your view, has the Customary Marriages Act 120 of 1998 empowered women married under this marriage? If not why?
- What have women achieved through the new Act?
- What are the limitations of the Act? (Magistrates, clerk of the court and chiefs)
- What is your role in customary marriages?
- What kinds of problems in customary marriages are normally brought to your attention?
- In your view, what are the causes of these problems?
- What arrangements do these marriages have in relation to control, use and ownership of assets?
- In your view, has the Customary Marriages Act 120 of 1998 empowered women married under this marriage? If not why?
- What have women achieved through the new Act?
- What are the limitations of the Act?

INTERVIEW QUESTIONS FOR WOMEN

- Can you describe how you entered in your current marriage from your first day to the present with specific stages?
- If you were given the opportunity to choose, which type of marriage would you prefer and why?
- How do you feel about the status of your customary marriage compared to other marriages?

- In customary marriage, what ownership do women have in terms of land for household, land for farming and livestock?
- How are major decisions in the family made?
- What happens to the assets if the husband dies or when the marriage is dissolved?
- Can you describe *lobolo* in customary marriages, its role and how do you perceive it and whether it is still necessary?
- Do you have a marriage certificates, if not, why?
- How is knowledge about customary marriage obtained?
- Is there anything you would like to add?

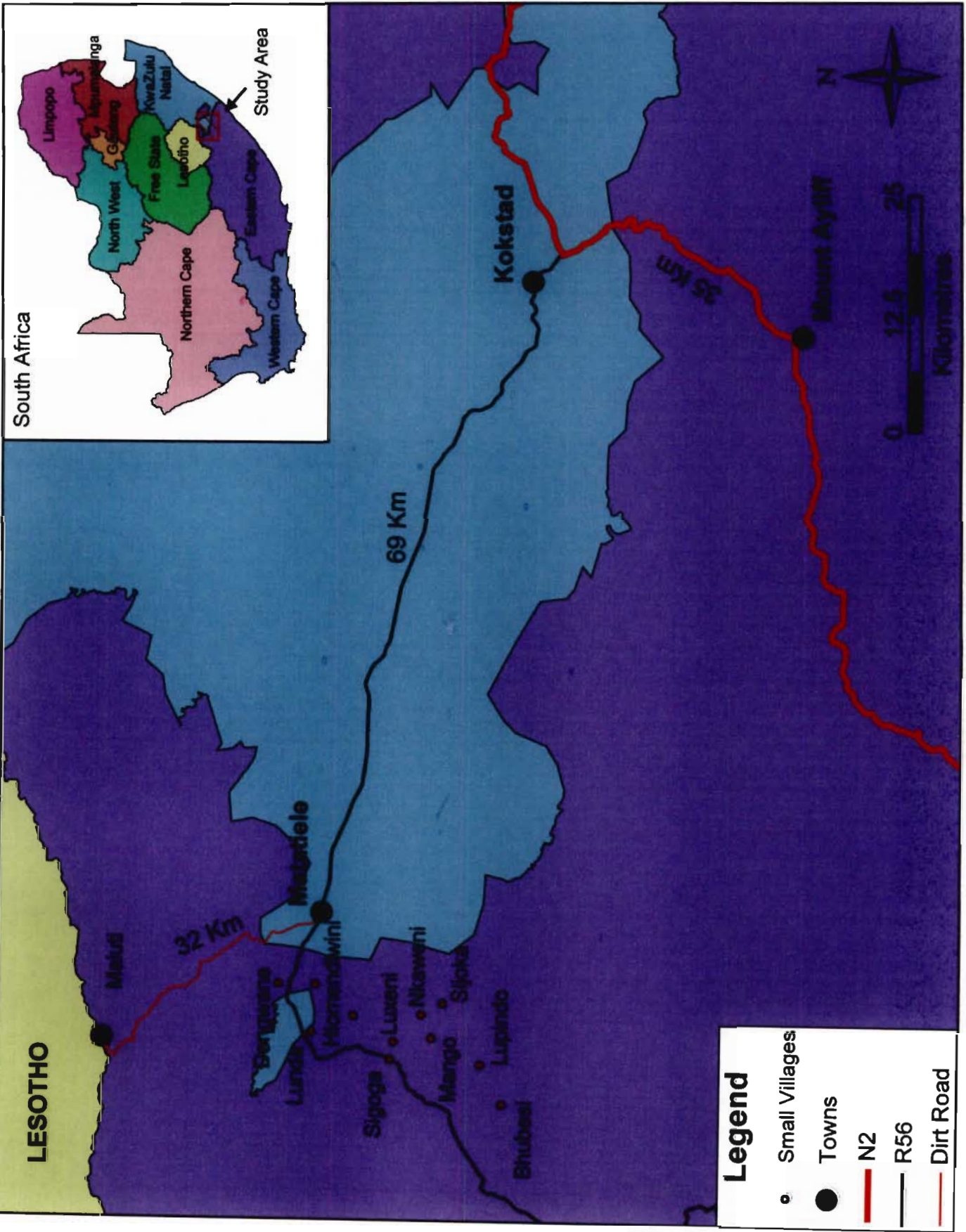
INTERVIEW QUESTIONS FOR THE UNMARRIED WOMEN

- If you had the opportunity, which type of marriage would you prefer and why?
- In your view, what is the role of *lobolo* in marriage?
- What is your view of the status of customary marriages compared to other marriages?
- Have you ever heard of the Recognition of Customary Marriages Act 120 of 1998?
- If so, how did you obtain knowledge about the Act?
- What do you think are the major challenges facing the women who are married in customary marriages?

RESEARCH THEMES

- Perceptions of women regarding the legal status of customary marriages
- Perceptions towards *lobolo*
- Challenges faced by women married in customary marriages
- Women's knowledge of the Customary Marriages Act
- Women's achievements obtained through the Act
- What can you say about the status of women's knowledge of the new Act?
- What happens to property and assets in the case of a man dying before the marriage is registered?
- Is there anything you would like to say?

The actual data collection was conducted between December 2003 and early January 2004. This time was convenient for me since I was employed full time at the University and has childcare responsibilities.



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