THE IMPACT OF THE CUSTOMARY MARRIAGES ACT (ACT 120 OF 1998) ON THE PREVALENCE OF DIVORCE AMONG THE VHAVENDA IN THE VHEMBE DISTRICT OF LIMPOPO PROVINCE IN SOUTH AFRICA

BY

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DECLARATION

I declare that this Thesis entitled: *THE IMPACT OF THE CUSTOMARY MARRIAGES ACT (ACT120 OF 1998) ON THE PREVALENCE OF DIVORCE AMONG THE VHAVENDA IN THE VHEMBE DISTRICT OF LIMPOPO PROVINCE* is my own original work and all the sources which I have used or quoted have been cited and acknowledged by means of complete references, and this Thesis was not previously, in its entirety or in part, submitted by me for a degree at this or another institution.

Dhalalani ..... 28-08-2015 .....

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DEDICATION

This work is dedicated to the following people:

My wife, Tshifhiwa

My daughter, Aluwani

My sons: Khoḓani and Gudani

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ABSTRACT

This study investigates the impact of the *Recognition of Customary Marriages Act (Act 120 of 1998)* on divorce. The family is a critical part of the society that both the law and society have always sought to protect. This societal desire to protect marriage is what might have motivated a culmination of practices into customs that protect and promote the institution of marriage. Customary practices of the Vhavenḓa community zealously guarded the institution of the family, and for that reason, divorce was an extreme option. Within the last two decades though, there has been a crumbling of an oppressive legal order which was replaced by a new democratic South Africa. This new order does not seem to have affected only the apartheid legacy, but also other spheres of life, marriage being one of them. Concerning marriage, an Act of parliament known as the *Recognition of Customary Marriages Act (Act 120 0f 1998)* (RCMA) was enacted to give effect to the new legal order in particular to address inequality that had been midwifed by customary practices. This Act however seems to have impacted negatively on the institution of customary marriages as it appears to have modified, varied and even abolished the long established customary practices that sought to protect the institution of marriage. It is the reason for this study which investigates the impact of *the RCMA* on divorce among the Vhavenḓa of the Vhembe district, Limpopo, South Africa.

Key words: Family, marriage, practice, customs.

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CHAPTER ONE

INTRODUCTION AND BACKGROUND OF THE STUDY

1.1 INTRODUCTION

This part of the thesis lays the basis for the study. Among other things, it discusses the theoretical aspects of the concept of marriage, which is under investigation in this study, but also sets out the background to the study, its significance, the research problem, questions, aims and objectives, methodology and an overview of the other chapters. As noted, part of its focus is on the different forms of legal marriages that exist in South Africa, and how they came into existence. Its aim of this aspect is to demonstrate how different social groups, systems of personal law and cultural or religious beliefs are protected against any form of unfair discrimination by the Constitution of the country. More focus is on how the laws governing relations between parties in a customary marriage have evolved from traditional customary law to *the RCMA* as it forms the base for this study.

1.2 BACKGROUND

Marriage has been presented differently as can be shown by the following definitions that depict it. According to Soanes and Stevenson (2009), marriage is: 'the formal union of a man and a woman, typically as recognized by law, by which they become husband and wife.'

This is the definition that appears to be adopted by Horton and Hunt who define a marriage as the formal union of a man and a woman in which they become husband and wife (Horton and Hunt, 1989: 234).

Strong (2008:8) on his part defines a marriage as: '… a legally recognised union between two people, a man and a woman, in which they are united sexually, cooperate economically and may give birth to, or adopt, or bear children.'

Strong (2008) sees marriage, as an event which primarily concerns a man and a woman who agree to form a union and as something that the individuals can do by themselves. He further indicates that the woman's child-bearing capacity is not an issue. If a couple cannot biologically bear children, they may decide to stay as they are or go for an adoption.

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According to Heaton (2007:15) common law defines marriage in South Africa as 'the legally recognised life-long voluntary union between one man and one woman to the exclusion of other persons'.

The above common law definition of marriage is similar to the one given by Herbst and du Plessis (2008) who define marriage as a 'voluntary institution between one man and one woman to the exclusion of anyone else'. It means that marriage is for two individuals of opposite sex who are committed to each other for as long as they both live. Thus, 'until death do them apart'. Upon the death of one spouse, the remaining spouse is free to remarry. This union does not include or involve any other person, even family members or friends are excluded from this marriage.

The judge in the old English case of *Hyde v Hyde (1866) LR 1 P & D 137* defined a marriage to mean a union between a man and a woman to the exclusion of others. This definition is similar to the common law definition of marriage in South Africa which is cited above. It is basically the English common law position.

From the foregoing definitions, a marriage is in essence, an institution which is decided, organized and executed by two individuals of opposite sex with their full consent without the involvement of any other person. These definitions conceive a marriage as monogamous union. All the above are definitions derived from the conception of marriage from the Western ideology mostly by European scholars and judges.

What a marriage is in Africa is however at variance with what it is in Europe. In the African traditional customary law, marriage is not just an affair between two individuals, but also an alliance between two families. Thus, marriage in Africa is between two families (Radcliffe-Brown and Forde, 1975:46; Awodele: 2005). Marriage is a communal institution. All members of the family including parents, grand-parents, children, in-laws, brothers, sisters, nephews, cousins as well as the ancestors become involved in the marriage of one of their members (Ogbonnaya: 2009). African society regards marriage as a sacred institution that involves the welcoming of a new member into the clan. It has much say on how one enters and exits the marriage institution. By virtue of marriage being a communal institution, Africans put the needs and desires of the family

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above those of the individual to the extent where they deem it fit to arrange marriage partners for their children. According to Horton & Hunt (1989:234) marriage is 'the approved social pattern whereby two or more persons establish a family'.

This means that marriage involves at least two individuals and is the ideal way that society approves of to start a family. It also suggests that marriage can be amongst more than two individuals, which could mean that by definition this marriage is potentially polygamous.

This definition of marriage is more likely defining what marriage is in the African context. Divorce was a rare occurrence in the African marriage. If the couple had marital problems, they would invite elders of their family or the community to intervene and mediate. The elders would prevail upon the husband to treat his wife with passion, while the woman would be cautioned to honour and be submissive to her husband unconditionally (Ogbonnaya: 2009). Divorced, especially women, were regarded by the society as social outcasts, and no one wanted to be regarded as such (Ondicho: 2000).

Recently the marriage practices in Africa have changed from being a family concern to being an individual concern and from a point where relatives or long term neighbours were always ready to help and couples could go to them for consultation to a point where a husband and wife depend on one another for the satisfaction of each other's companionship and emotional needs (Ogbonnaya: 2009).

According to Popenoe, *et al,* (2001:280), South Africa practices two types of marriage which are monogamous and polygamous marriages. Monogamy is a one-man one-wife relationship and is the most common. It is not the law as it is in the Western marriage cultural practices. Polygyny – the custom of having more than one wife at the same time – is practiced by those who can afford more than one wife, e.g. rich men and members of the African royal families (Popenoe, *et al,* 2001:280). Divorce used to be uncommon in South African marriage cultural practices. South Africans had their own way of dealing with marital problems from a cultural perspective (Radcliffe-Brown and Forde, 1975:51).

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Historically the legal definition of marriage in South Africa provided that marriage is the legally recognised voluntary union for life in common of one man and one woman to the exclusion of all others while it lasts. In simple terms, marriage is about the two individual parties, by the two individual parties and for the two individual parties. This definition of marriage was derived from the Roman-Dutch law and is at variance with the South African customary law of marriages.

Post-apartheid constitution in 1994, South Africa being a multicultural democratic country, and with cultural tolerance and respect at the heart of the Bill of Rights, had to recognise customary law marriages, including polygamous marriages. This led to the enactment of *the RCMA* in pursuance to section 15(3) of the Constitution to cater for the diversity of South African customary law marriages. According to Ntlama (2012), '…this recognition is an acknowledgement of South Africa's rich diversity, which is deeply entrenched in the preamble to the Constitution, as it seeks to build a united and just society based on democratic values, social justice and fundamental human rights'.

It means that following the adoption of the 1996 Constitution, customary law marriage is given formal recognition and placed on an equal footing with common law marriages. Ntlama(2012) notes the following factors as having motivated the constitutional recognition of customary law: 'there was a need to incorporate on equal basis a legal system rooted in African cultural traditions…the majority of South Africans identified and conducted their lives in accordance with customary law'.

This implies that customary law is indeed the living law. Living African customary law is defined as 'a fluid and dynamic legal system practiced by the people and applied in various traditional and informal tribunals (Journal for Judical Science, Vol.23. 1998. No 1-2).

In 2006 another marriage law called the *Civil Union Act (Act 17 of 2006)* was enacted by the Parliament. It came as the result of the case of the *Minister of Home Affairs and Another v Fourie and Another; Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others.* In the above case it was ruled that persons of the same sex have a constitutional right to marry. The judgment led to the enactment of the *Civil Union Act (Act 17 of 2006)* which provides for same sex marriages.

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From the above, it is evident that marriage in South Africa exists in three different forms. In essence there are three different laws under which a marriage may be formed in South Africa, and each law defines the concept marriage differently. They are:

(i) *The Marriage Act (Act 25 of 1961),*

(ii) *The Recognition of Customary Marriages Act (Act 120 0f 1998) and*

(iii) The *Civil Union Act (Act 17 of 2006*).

The *Marriage Act (Act 25 of 1961)* defines marriage as

> *the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.*

This Act allows for the solemnisation of a civil or religious marriage between a man and a woman. This means that marriage is for the two individual parties, a man and a woman to the exclusion of anybody else. The two parties are bound to each other for the rest of their remaining life. By definition, this marriage is monogamous.

The RCMA defines marriage as a

> *marriage concluded in accordance with customary law.*

The RCMA gives further clarity to its definition of marriage by explaining what customary law means. It states that customary law means:

> *the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples.*

Under South African customary law, as in most other African societies, marriage is viewed as a communal institution. Thus, customary marriage is between two families and not between two individual parties. The interest of the family are put above those of the individual (Mamashela and Xaba, 2003). This Act allows for the registration of marriages under African customary law. By definition, this marriage is polygamous. *The RCMA* recognises polygamy subject to certain conditions. This means that the laws governing relations between parties in a customary marriage have evolved from traditional customary law to the *Recognition of Customary Marriages Act (Act 120 of 1998).*

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The *Civil Union Act (Act 17 of 2006)* defines marriage as:

> *the voluntary union of two persons who are both 18 years of age or older, which is solemnised and registered by way of either a marriage or a civil partnership, in accordance with the procedures prescribed in this Act, to the exclusion, while it lasts, of all others.*

By definition, *the Civil Union Act* allows two people, regardless of gender, to form either a marriage or a civil partnership. It allows same sex marriages. The legal consequences of a marriage under this Act are similar to those under the *Marriage Act (Act 25 of 1961).*

The three different forms of marriages that exist in South Africa which are cited above, demonstrate how different social groups, systems of personal law and cultural or religious beliefs are protected against any form of unfair discrimination as enshrined in the constitution of the country. From all the above deliberations on different forms of marriage that exist in South Africa, it is evident that South Africa does not have a single legal definition of the term marriage, but three.

The evolvement of traditional customary marriages law to *the RCMA* seems to have sparked some potential conflicts in the marriage institution to an extent that could lead to divorce. Lately the divorce rate in South Africa has increased drastically to the extent that one in two marriages is likely to end in divorce (Cameron, 2004:221).

The marriage institution of the Vhavenḓa in the Vhembe District resembles the preceding practices. This study seeks to document the customary marriage practices of the Vhavenḓa community in the Vhembe District, and to investigate whether the changes in their marriage practices from customary marriage practices to the Customary Marriages Act (Act120 of 1998) have an influence on divorce prevalence.

1.3 PROBLEM STATEMENT

Through a personal interview with the Registrar in the Department of Justice at Sibasa Regional Court, it emerged that approximately 316 divorce cases are instituted each year among Vhavenḓa couples within the Vhembe district.[1] This translates into approximately 26 divorce cases per

[1]Date of interview 24 June 2013

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month, 7 cases per week and 1 case per day. One could this is a high rate of divorce since it is unlikely that the marriages occur at a similar rate. It is for this reason that it is the thesis of this study.

If in one regional court of Sibasa they had registered such a huge number of divorce cases over a period of 12 month, it means that there exists a phenomenon that is threatening the institution of marriage. There is therefore a need for the research study to look at it. What factors are threatening the once stable institution of marriage? According to Higgins, *et al,*(2006:18), the enactment of *the RCMA* instead of recognising customary law practices as the name suggests, has altered a number of customary law practices in the sense that *the RCMA*:

- makes the consent of the parties themselves (as opposed to their families) a necessary element of a customary marriage.
- provides that dissolution of a customary marriage will be on the same terms as civil marriage including irretrievable breakdown.
- provides that spouses will have equal legal capacity during the marriage and perhaps more importantly, that the default presumption regarding property will be in community of property rather than separate property.

The above cited factors suggest that *the RCMA* could be one of the factors that are threatening the institution of marriage.

1.4 AIM AND OBJECTIVES

The main aim of this study is to investigate the impact of *the RCMA* on the prevalence of divorce within the Vhavenḓa in the Vhembe District.

The objectives are,

- To investigate the Vhavenḓa marriage practice before the enactment of *the RCMA.*
- To consider the divorce rate before the enactment of *the RCMA.*
- To investigate the Vhavenḓa marriage practice after the enactment of *the RCMA.*
- To quantify the divorce rate after the enactment of *the RCMA.*
- To compare marriage practices before and after the enactment of *the RCMA.*
- To compare the statistics of divorce before and after the enactment of *the RCMA.*
- To find out the extent to which *the RCMA* has reduced or increased divorce cases.
- This begs the question whether the enactment of *the RCMA* has impacted on the institution of marriage.

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1.5 RATIONALE

Marital status is of interest to many disciplines like Economics, Sociology and Anthropology (Popenoe, *et al*, 2001:281). In essence, it means that the institution of marriage is important in a society. The termination of a marriage by divorce is devastating and affects all segments of society and has for long been a matter of serious concern to all societal structures (Strong, *et al*, 2008:519). Obviously divorce is impossible without marriage. It follows therefore that marriage precedes divorce and 'is a requirement for divorce' (Munroe, 2003:10). Therefore, there is a need to explore the issue of marriage as a prerequisite for divorce for the purposes of establishing how one impacts or influences the other. For that purpose, scientific research is needed to show how the change from customary marriage regime to *RCMA* impacts on the prevalence of divorce among the Vhavenḓa of the Vhembe District. Hence, this study focuses on establishing the purpose indicated above.

1.6 RESEARCH QUESTIONS

Vockel (1983:255) says: a research question asks about the relationship between two or more variables. In this study the main research question is as follows: does the change from customary marriage practices to the current Recognition of Customary Marriages Act have an influence on the prevalence of divorce amongst the Vhavenḓa in the Vhembe District? In so answering that question, the following sub-questions will be pursued:

(a) Does *the RCMA* abolish the customs and the customary laws that regulate customary marriages?

(b) Does the gender equality promoted by *the RCMA* create problems in the marriage that can lead to divorce?

(c) Does the gender equality promoted by *the RCMA* undermine the men's dignity, and directly impact on divorce?

(d) Does the protection of women by *the RCMA* disadvantage men, to the extent that it impacts on the rate of divorce?

(e) Does *the RCMA* remove South Africans from their existing culture, and introduce them to a new system of life, thereby creating confusions that can lead to divorce?

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1.7 HYPOTHESIS

A hypothesis is a statement which states the expected answer to the research question (Vockel 1983:255). According to Cohen and Manion (1996:19) and Neumann (2011:150), a hypothesis refers to the statement about the relations between two variables. The hypothesis of this study is that the enactment of *the RCMA* has a negative influence on the prevalence of divorce amongst the Vhavenḓa in the Vhembe District.

1.8 SIGNIFICANCE

This study is of significance to the domain of the marriage institution. The results of this study will be of significance to various structures. According to Mukaro (2011) the African traditional society is communal in the sense that great importance is attached to the family unit, the village, and the community. Each village is under the leadership of a traditional leader whose main responsibility is to ensure smooth running and sustenance of the culture. The traditional leader achieves all these by maintaining traditional customs and dealing with disputes, including marital disputes. When dealing with marital disputes, traditional leadership promotes negotiation, mediation, collaborative law, arbitration as well as conciliation.

The enactment of *the RCMA* sought to modify, vary and even abolish some elements of the customary law with a view to aligning them to the Constitution. This realignment of some customary law provisions resulted in the stripping of some powers traditional leadership used to enjoy.

Marriage is an institution which is based on a number of factors which include economic, educational, social, cultural, and romance. Marriages seem to be falling apart. There is a need for researchers to consider investigating issues that would answer the following questions: Is the marriage rate increasing or decreasing? Is the divorce rate increasing or decreasing? What are the contributing factors to such increase or decrease? Why would a party intending to divorce decide to stay in a marriage while living separate lives but still officially married? What can the traditional leadership, parliament and the society do to remedy the said situations?

Currently there are three laws which marriage in South Africa, namely, *The Marriage Act (Act 25 of 1961)* provides for the solemnisation of a civil or religious marriage between a man and a woman.

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This means that it only provides for monogamous opposite-sex marriages. *The Civil Union Act (Act 17 of 2006)* provides for the solemnization of a civil or religious marriage or a civil partnership between two people regardless of their gender. This means that it only provides for same-sex marriages or marriages between persons of the same sex. *The RCMA* provides for the registration of marriages under African customary law. This means that it provides for the recognition of African customary law marriages, including those that are polygamous.

Currently the interpretation of some provisions of *the RCMA* poses a great challenge in the courts. For instance, in *Mayelane v Ngwenyama and other*, *CCT 57/12, [2013]* there was a great variation with regard to the interpretation of some provisions of *the RCMA*, which led to the case dragging from the High Court to the Supreme Court of Appeal and eventually to the Constitutional Court.

According to Mukaro (2011), traditional leaders are custodians of villages and communities. They are also the custodians of custom. This means that traditional way of life is largely regulated by traditional leaders. This suggests that the role of traditional leaders cannot be ignored in the administration of justice.

Traditional leaders and their traditional structures play pivotal roles in their communities. People in the rural areas have confidence in their traditional leaderships. This is inspired by their ready accessibility and availability.

The results of this study will contribute to the body of knowledge in various structures:

- Traditional leaders will know their position and role in customary marriages in terms of section 8(5) of *the RCMA.*
- Prospective spouses will know and understand the provisions of the three marriage laws in general, and the provisions of *the RCMA* in particular. The knowledge will help them make informed decisions regarding the choice of the marriage law they wish to be married under.
- Legal practitioners will become aware of some provisions of *the RCMA* which seem to be posing challenges in terms of interpretation, and what clarity and amendment can be made. Legal practitioners will also learn what the Vhavenḓa customary marriage laws entail.
- The Department of Education will understand the role traditional initiation schools play in preparing prospective spouses for marriage thereby hopefully reducing the current rate of

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divorce.

- The Department of Justice will reconsider the role that traditional leadership can play with regard to the administration of justice in customary law marriages thereby hopefully reducing rate of divorce.
- The Department of Home Affairs would consider engaging traditional leaders as agents of change and facilitators of development for their communities with regard to the registration of customary law marriages in terms of *the RCMA*.

1.9 DEFINITIONS OF OPERATIONAL CONCEPTS

Act for the purposes of this study means the *Recognition of Customary Marriages Act (Act 120 of 1998).*

Arranged marriage is a practice in which the parents or relatives organise partners for their children (Mbiti, 1989:262). Societies that arrange marriages for their children seem to put the interests of the family above those of the individuals.

Customary law refers to 'the customs and usages which are traditionally observed and form part of the culture of the particular tribe' (Government Gazette No 120 1998). African Customary law is not static but evolves as the people who live by its norms change their life patterns. It is therefore the living law. Customary law evolves continuously (Herbst and du Plessis (2008).

Customary marriage refers to the marriage which is negotiated and entered into or celebrated in accordance with customary law of the particular tribe (Government Gazette No 120 1998). South Africa is a multicultural democratic country, and each cultural group has its own customary law marriages which are regulated by *the RCMA*.

Divorce is the legal termination of a marriage, allowing the spouse to remarry anyone he/she wishes (Strong, 2008:21).Traditionally, divorce is a rare occurrence in the African customary law marriages (Radcliffe-Brown and Forde, 1975:51). It is even far more difficult for women to obtain a divorce under customary law than under the *Recognition of Customary Marriages Act (Act 120 of 1998)*

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Lumalo (Bride price) is a term used to denote the property in cash or in kind, 'which a prospective husband or the head of his family undertakes to give to the head of the prospective wife's family in consideration of a customary marriage' (Government Gazette No 120 1998).

Monogamy is a practice of having only one spouse (wife or husband) at a time (Strong, 2008:08). Under the Western culture, monogamy is the preferred marriage practice.

Polygamy is a practice of having more than one spouse (wife or husband) at a time. This practice allows a husband to have several wives, which is termed polygyny or a wife to have several husbands, which is termed polyandry. The latter practice is rare in African traditional society (Strong, 2008:08). Polygamy offers equality to both partners in the sense that they are both entitled to take additional partner/s which is in line with the provisions of section 9 of the Constitution (*Journal for Judicial Science, Vol.23. 1998. No 1-2).* For the purposes of this study, only polygyny shall be considered.

Polygyny is a practice which allows a man to take more than one wife. It means that polygyny is the marriage of a man to more than one woman simultaneously. This practice gives only the man the right to take additional wife or wives, which may be considered to be in violation of section 9 of the Constitution. This practice is widely practiced in almost every African traditional society (Mbiti: 1974:82)

Pre-arranged marriage is a practice where parents or relatives arrange and organise marriages for their children usually before the children are born. This practice takes place in most cases where one family owes the other a debt and is unable to pay back (Mbiti, 1989:135).

Puberty is the period of the body's development when it becomes sexually mature (De Wet, et al, 2010:147). It is the stage when it becomes possible for girls and boys to have biological children.

Wife capture (kidnapping) is a form of marriage arrangement in which a girl or a young woman is ambushed while she has gone to fetch water or firewood by a man and his friends or peers. The intention behind this practice is to compel the girl or the young woman's family to endorse marriage negotiations. By this practice the girl or the young woman is forced to enter into marriage without her consent (Maluleke 2012:11).

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1.10 ACRONYMS

RCMA is an acronym for *the Recognition of Customary Marriages Act (Act 120 of 1998).*

SANCO is an acronym for the South African National Civic Organisation.

SASSA is an acronym for the South African Social Security Agency.

TLAC is an acronym for the Tshwaranang Legal Advocacy Centre

1.11 THEORY BASE

As this research examines the relations between marriage and divorce among the Vhavenda as a consequence of *the RCMA,* some models of stable marriages which have been advanced over the years would be examined.

1.11.1 A companion model of marriage

Advocates of this model of marriage argue that stable marriages are characterised by, amongst others, the following: affection, empathy, quality time that spouses devote to intimacy (Wilcox and Nock, 2006:1322). This means that the ideal marriage predicted by this model involves at least two individuals who are in love with each other. Spouses according to this model of marriage share amongst others, similar work and household and responsibilities. By sharing the household and family responsibilities, couples build their conversations, empathy and mutual understanding of each other thereby enhancing their companionship. This model of marriage does not accommodate dominance of authority and power by an individual partner, as this could create a social distance that may impact negatively on the couple's intimate relationship. Spouses who subscribe to this model of marriage maximize expression of their own thoughts, desires and feelings. This means that if one spouse has an issue within their marriage, he/she does not hesitate to express his/her satisfaction or dissatisfaction. As this model prioritises the spouses' emotional wellbeing and depends on mutual emotional satisfaction, lack of it could lead to divorce. Such consideration of divorce could be made and finalised before they even tell any member of the family. In this model, couples feel obligated to no one but themselves for whatever decision they take.

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1.11.2 An equity model of marriage

Advocates of this model of marriage argue that stable marriages are characterised by equal distribution of household work and family responsibilities (Wilcox and Nock, 2006:1325). This means that in marriage there should be fairness and equity in the division of work and responsibilities. This model of marriage does not accommodate gender supremacy ideology which suggests, for instance that a wife's place is in the kitchen, from where she is supposed to operate, and the husband's place is outside looking for the things he would use to feed and support his family (Gibbs,1963:557). When couples are participants in inequitable relationship, they are not affected in the same way. The one who benefits from inequity becomes tolerant of the injustice, while the one who losses from such inequity becomes more intolerant (Utne, *et al,* 1984:324). In terms of the African customary law, the one who benefits from the inequity is the husband while the one who loses is the wife. Such inequity in the division of work and responsibilities could lead to marriage instability that could end in divorce. In terms of the African customary law, inequity in the division of work and responsibilities between the spouses is condoned.

1.11.3 An institutional model of marriage

Advocates of this model of marriage argue that stable marriages are characterised by spouses who have higher levels of normative and social support for the institution of marriage when they share their commitment to marriage itself (Wilcox and Nock, 2006:1323). This means that spouses who adopt an institutional approach to marriage have a stable marriage in the sense that they have a third party with a vested interest in the success of their marriage. The third party includes religious organisations (if they are actively involved in a religious congregation), extended family networks and the community at large. These third parties offer social support and control on behalf of the institution of marriage, thereby exerting pressure on the couple to make greater investments in their marriage. Spouses who subscribe to the institutional model of marriage are likely to enjoy high levels of marital trust because of their commitment to the ideals of marital fidelity and permanence. Spouses that are committed to the institution of marriage, unlike those that subscribe to the companionate model of marriage, are less likely to keep checking how their relationship is or is not serving their individual interest. With these social and normative supports, couples are better off since they are able to negotiate the contemporary challenges of marriage and to retain their marriage.

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In this study, the researcher intends to investigate the relationship between the institution of marriage (i.e. customary marriage Act) and the impact it has on divorce prevalence within the Vhavenḓa the Vhembe District. The guiding framework that the researcher has chosen to use is an institutional model of marriage. Customary marriages law has developed principles and guidelines of how an ideal and stable marriage should be. *The RCMA* has been promulgated to regulate and harmonise these principles and guidelines with the requirements of the Constitution. In this study there is a need to investigate the relationship between the customary marriages Act which regulates customary marriages and the current state of divorce.

The researcher engaged in communication with the married and once married members of the Vhavenḓa community to obtain data that were used to answer the research questions. A research of this nature mandates a qualitative research design. The researcher therefore employed qualitative design to collect data from married and once married Vhavenḓa members of the community in the Vhembe District by means of interviews. With this instrument the researcher was able to motivate the targeted respondents to participate spontaneously, and stimulate them through probing and tactful steering them towards the research topic. Close-ended questions and open-ended questions developed by the researcher were used to determine the impact that *the RCMA* has on the prevalence of divorce among the Vhavenḓa members of the community. Using the open-ended questions the researcher afforded the participants the opportunity to express themselves freely.

The researcher also obtained the statistical breakdown of the distribution of the two variables (marriage practice and divorce prevalence) in order to determine how one influences the other. To achieve the statistical breakdown, the researcher had to embark on collecting quantitative data. For that purpose, the researcher made use of a questionnaire instrument to collect quantitative data that did not need probing. All the above shows that this study, being a single study comprises a mixed methods research in that data were collected in two different research methods, i.e. the qualitative and the quantitative methods in order to address qualitative and quantitative questions respectively. Using mixed methods in a single study such as this one broadens and strengthens findings of the study (Yin: 2006).

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CHAPTER TWO

THE CONCEPT OF CUSTOMARY MARRIAGE AND ITS PRACTICE IN THE SOUTH AFRICAN CONTEXT

2.1 INTRODUCTION

This segment conceptualizes the meaning of custom and customary law and also gives an appraisal of the legal background on customary marriages. Its aim is to lay the theoretical perspectives on the basis of which the impact of the law on customary practices will be assessed. It first describes the meaning of custom, then the circumstances under which a custom may be varied or abolished, and the theoretical perspectives on customary law marriages in the legal system.

2.2 UNDERSTANDING A CUSTOM

A key to understanding customary law is in understanding the meaning of the term custom. The phrase customary law derives from practices that have culminated from legal standards. In understanding what a custom is, the following ordinary English definitions are guiding.

Soanes and Stevenson (2009) define a custom as: 'a traditional way of behaving or doing something that is specific to a society, place, or time'.

Wolff (2006) on her part defines custom as a: 'long-established practice common to many or to a particular place or institution and generally recognized as having the force of law'.

Webster (2011) on the other hand advances the following definition: 'an action or way of behaving that is usual and traditional among the people in a particular group or place'.

From these presented definitions, a custom can be understood as a traditional habitual practice which is common to a specific group of society in a specific place. It is essentially a way of life of a people that has been practised for a considerably long period of time. As was noted in the medieval judicial pronouncement in the English case of *Mills v Colchester Corporation, (1867)CR CP,486*, a customary right accrues only when practiced *nec vic,nec clam nec precarrio*.

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The House of Lords of England in its opinion in the case of *Regina v Oxford Shire Country Council and others ex parte Sunning Hill Panish Council*, explained that such user must not be by force, or stealth, or license. This means that a practice must be freely engaged in without coercion and not forcefully or by fraud to be a custom. A practice becomes a custom if it is long-established and is repeated over and over again by people in a particular group. Such group's habitual practice is usually unmodified and is transferred from one generation to another.

2.3 TRANSMISSION OF CUSTOMS

Customs are usually transmitted from one generation to another through various ways. These are mostly informal and include through oral tradition or folklore. Folklore is an expressive genre which consists of legends, music, oral history, proverbs, jokes, popular beliefs, fairy tales, stories, riddles, ceremonies and rituals (Mukaro, 2011). Stories in particular are very important to the traditions and customs of all African people in the sense that besides entertaining, they serve to teach a lesson of a moral value and sometimes survival strategies. It means that customs are used to regulate social life.

2.4 MODIFICATION OF CUSTOMS

According to Bellack, *et al*, (2007), custom as an established pattern of behaviour can be modified. Behaviour change techniques can be employed to either increase or decrease the frequency of behaviour. The unwanted behaviour's frequency can be decreased to an extent that it becomes completely abolished. Behaviour change techniques include positive and negative reinforcement.

Positive reinforcement increases the required behaviour while negative reinforcement reduces the unwanted behaviour. One may give positive reinforcement in behaviour modification by providing compliments, approval, encouragement, affirmation and reward for displaying the desired behaviours. One may also give negative reinforcement in behaviour modification by withdrawing compliments and not rewarding the unwanted behaviour. Punishment, though not recommended as it may yield different unexpected results (such as anxiety, hostility and anger), may also be used to deter would be 'offenders' from engaging in an unwanted behaviour.

2.5 IMPACT OF RELIGION ON CUSTOMS

According to Mutua (2005), Africans are notoriously religious. The two messianic faiths, Islam and

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Christianity have spread into the continent like bush fire. Those two faiths have demonized the African religions in a process that Mutua (2005) says is akin to cultural genocide. Since traditional religions in Africa including Vhavenḓa of Vhembe, have strong basis in the traditional god, customs and customary practices have significantly been varied by the two messianic faiths, particularly Christianity. Under most cultures furthermore, ancestors play a vital role. They are considered part of the community as they are thought to link the living with the spirits. Though not gods themselves, they play a key role in bringing good or ill fortune. This role attributed to the ancestral spirit has however lost its legitimacy in the Christian African society.

According to Smith (1950), traditionally, the Vhavenḓa are a patrilineal, virilocal people, who worship their families' ancestors. The high god of the Vhavenḓa is Raluvhimba. In 1872 the first Berlin Lutheran missionary came to settle amongst the Vhavenḓa. It was not until 1899 that the Vhavenḓa finally submitted to the authority of the missionaries. The missionaries first established churches, schools, and hospitals around the Venḓa district. In spite of these developments, European influence remained relatively superficial. The Vhavenḓa were the last of the Bantu-speaking peoples of South Africa to be seriously affected by contact with Europeans. Their contact with the missionaries has negatively impacted the Vhavenḓa traditional marriage practices in the following sense: currently, young persons move from villages to the major industrial towns and cities; the young men and women marry for love; cross-cultural marriages have become more common. This suggests that Vhavenḓa traditional marriage practices are diminishing.

From the above, one can conclude that customs and customary laws can be modified, amended or adjusted. These could be best achieved by legislation since customary law is subject to the Constitution. Modifications, amendments or adjustments can be made for the purposes of bringing customary law provisions in line with the Constitution which is the supreme law of the country.

Currently, as a result of close contact with the religion of Christianity, many of the Vhavenḓa people find themselves in a transitional phase somewhere between traditional African religion and Christianity. For instance, with the Christians, some would conduct their marriages under civil marriage law in churches, and then later also conduct their marriages in terms of the Vhavenḓa customary marriage practices.

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2.6 ABOLITION OF A CUSTOM

Given that a custom is a long established practice does not mean that it cannot cease to exist. As noted, a practice is a custom if exercised *nec vic, nec clam nec precarrio*. This means that where people are for instance, coerced to practise a particular way of life or where they have to do it secretly, because of societal changes, then it must cease to be a custom.

The law is one of the tools that extinguishes many customs. For instance, the Constitution is the supreme law and where a customary practice is inconsistent with the Constitution, the practice is nullified by the Constitution. This also happens when statutes are enacted that abolish a custom in effect. The abolition of a custom by law is an interesting phenomenon because customary law is a living law in the sense that sometimes it is codified in the collective conscience of the society even where the law prohibits it. The society consciously or unconsciously finds itself doing it. A good example is the case of female circumcision. There exist a number of pronouncements and declarations condemning it, but some societies still practise it.

Where the law abolishes a practice, it may now not be practised *nec vic, nec clam nec precarrio*, meaning that it loses its status of being a custom. In South Africa there are a number of practices that have been either abolished or significantly varied by legal norms. Some of them concern the institution of marriage. The gender and human rights crusade for example has had far reaching implications on customary practices.

Regional and international human rights organisations as well as women's rights groups in many countries are calling for example, for the abolition of polygamy. This practice has been found to be in violation of the International Covenant on Civil and Political Rights in the sense that it is a form of human rights abuse and violates the dignity of women; hence, the United Nations has recommended that the practice be abolished. South Africa is a signatory to many regional and international instruments that are aimed at protecting the citizens in general and women in particular. Apart from the Constitution, the state is obliged to meet the obligations of both the regional and international human rights organisations. It means that customs and customary laws that are not in line with the provisions of the Constitution must be eliminated by means of legislation.

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South Africa recognises polygamy as customary law marriages practice in terms of *the RCMA*. However, In a bid to reiterate the legal prohibition of bigamy, *the RCMA* provides in sections 3(2) and 10(1) that:

> *3(2) Save as provided in section 10(1), no spouse in a customary marriage shall be competent to enter into a marriage under the Marriage Act, 1961 (Act 25 of 1961), during the subsistence of such customary marriage.*
>
> *10(1) A man and a woman between whom a customary marriage subsists are competent to contract a marriage with each other under the Marriage Act, 1961 (Act 25 of 1961). If neither of them is a spouse in a subsisting customary marriage with any other person.*

2.7 ARRANGED MARRIAGES IN VHAVENḒA COMMUNITY: A THEORETICAL INTRODUCTION

The Vhavenḓa community of Vhembe, an African cultural group, engages in a peculiar cultural marriage practice. Parents have an obligation to ensure that their children are trained on how to become suitable marriage partners from a cultural perspective. This is done to ensure that children meet all the cultural expectations in a marriage. For this reason parents send their children to cultural initiation schools, where they progress from phase to phase, starting at an early age.

In the Tshivenda culture, only a girl that has been through the *domba (*group rites as preliminary to marriage for girls*)* ceremony is eligible for marriage. Similarly, only a boy who has been through the *thondo (*circumcision rites for men*)* is eligible for marriage (Van Warmelo, 1989:31).A girl would be compelled to attend the 'school' in order for her to get married. If a girl has not attended this school, when suitors come to the family to propose for marriage, parents would reply on behalf of the girl that she should first attend the *domba* school. This is a school meant for girls who have reached a marriageable stage. A girl who has not attended this 'school' is not fit to be married because she is considered to be still 'too young' (van Warmelo, 1989:31).

In the Tshivenḓa culture, marriage is not just an affair between two individuals, but also an alliance between two families. It is regarded as a sacred institution precisely because it involves the welcoming of a new member into the clan. For that reason, it is not often left in the hands of an individual to decide, that is an individual may not choose his or her own partner for marriage. It is the responsibility of the head of the family to organise marriages for their children. The aunt (father's sister) in the family serves

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as both an overseer and a consultant. The two families of the groom-to-be and that of the bride-to-be, engage in the formal processes of negotiating on behalf of their children.

If a male member of the family has reached an age that he can marry, he would report to the parents through acceptable ways of communication which are through his aunt. He would suggest the name of the prospective wife which may be accepted or rejected by the parents. In circumstances where they accept, they would authorise some investigations on the background of the prospective wife. This would include the prospective wife's parents, family background, and particularly her behaviour. If he comes with a suggested name, the parents would not just accept it. The parents will send people to investigate the suggested bride's parents. They would be looking at whether she is from a good family; a family of parents who do not bewitch people. Another factor to be investigated is whether she behaves properly. If she is found lacking in these aspects, the parents will not allow the young man to marry her. However, if they are satisfied with the family, they would send an intermediary to the girl's family to propose the girl for the boy. If the boy does not suggest a name, the parents will take some time to search among the local girls. If none of the local girls is suitable, the family will find out from relatives who are far away if they can make any recommendations.

In all their deliberations, they take the interests of the two families into account, from a cultural perspective. They believe that the needs and desires of the family are the ideal basis on which to establish a lasting marriage. Romantic love is never considered important in marriage, as it is considered to be a by-product of the Western culture. During the formal process of negotiations the families need to come to a mutual agreement regarding the *lumalo*, usually in the form of cattle, that the groom has to give (pay) the bride's parents.

Lumalo is an age-old Tshivenḓa custom that brings the families together. It is a gesture of gratitude on the part of the groom's family for looking after and bringing up the young bride. Once *lumalo* is paid, the marriage is concluded. The intended groom and the bride cannot object; they have to abide by their parents' arrangement. Arranged marriage is the only way to marry in the Tshivenḓa culture, and it is believed to ensure stronger and happier marriages than any other way.

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2.8 UNDERSTANDING CUSTOMARY LAW IN SOUTH AFRICA

Regarding the definition customary law, Olivier, *et al*, (1995: 173) state that 'no generally accepted definition of customary law exists'. However they offer the following as their definition of customary law:

> *Customary law denotes those legal systems originating from African societies as part of the culture of particular tribes or groups that have continued to exist.*

Section 1(4) of the *Law of Evidence Amendment Act* (Act 45 of 1988) defines customary law as

> *The Black law or customs as applied by the Black tribes in the Republic or in territories which formerly form part of the Republic.*

The RCMA defines customary law as:

> *customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the cultures of those peoples.*

Ordinarily customary law is not codified. In some countries it is regarded as a question of fact. In the Constitutional Court case of *Mayelane v Ngwenyama and Another (CCT 57/12) [2013] ZACC*, it was established that:

> *customary law is a system of law that is practised in the community, has its own values and norms, is practised from generation to generation and evolves and develops to meet the changing needs of the community; customary law is not a fixed body of formally classified and easily ascertainable rules. By its very nature it evolves as the people who live by its norms change their patterns of life.*

It means that customary law is not static. It is the living law that keeps continuously changing (Herbst and du Plessis, 2008).

Chapter 1 of the Constitution under founding provisions of the Republic of South Africa provides as follows:

The Republic of South Africa is one, sovereign, democratic state founded on the following values:

a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.

b) Non-racialism and non-sexism.

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c) Supremacy of the constitution and the rule of

It shows that the post-apartheid democratic state of South Africa is anchored on non-discrimination and the principle of equality.

These principles are also affirmed in international human rights instruments that South Africa is a party to. The most important ones include the United Nation's Convention on the Elimination of Discrimination Against Women commonly referred to as CEDAW and the Protocol on the rights of women in Africa which is commonly referred to as the Maputo Protocol. Both of these discourage gender -based discrimination and advocate for the abolition of customary practices that further the insubordination and oppression of women and their rights in domestic and public spheres of life.

There is a constitutional obligation on the courts to develop customary law in a manner that promotes the Bill of Rights. This was the proposition of the court in the *case of Bhe v The Magistrate, Khayelitsha, 2005(1) SA 580(CC),* in which the court held that:

> *[40] The system that flows from the above legislative framework purports to give effect to customary law. It is a parallel system, different in concept and in effect, to that which flows from the Intestate Succession Act, which is designed to apply to all intestate estates other than those governed by section 23 of the Act.*
> *[41] It is important to appreciate the distinction between the legal framework based on section 23 of the Act and the place occupied by customary law in our constitutional system. Quite clearly the Constitutions itself envisage a place for customary law in our legal system. Certain provisions of the Constitution put it beyond doubt that our basic law specifically requires that customary law should be accommodated, not merely tolerated, as part of South African law, provided the particular rules or provisions are not in conflict with the Constitution.*

This means that where customary norms conflict with the constitution, they have no place in the legal order. There are rules of customary law which at first glance seem to be in conflict with the Bill of Rights, for example, those that discriminate on the grounds of gender will be in conflict with the right to equality. This contradiction is more complicated than it appears, and was a subject of grapple by the law. The South African Constitution enshrines the realisation of equality as a value and as a right. Crucially, when dealing with customary law and customary marriages the Constitution implies that they must be in accordance with the rights contained in *the Bill of Rights*. The Constitutional Court has indeed reinforced the supremacy of the Constitution when dealing with gender issues. The debate on the recognition of

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customary law within a human rights dispensation is based on the idea that customary law *per se* is in conflict with the Constitution, and especially the equality clause.

According to the *Bhe case,* the development of customary law cannot be forced into a specific format that will fit into an individualistic human rights dispensation but should be reconciled with *the Bill of Rights*, taking into account the communal nature of customary law. This is what the Constitution of the country seeks to affirm. The supporters of this idea argue that the nature of customary law and human rights are at odds. Customary law is based on the idea of community and communal rights while human rights focus on individual rights (Herbst and du Plessis, 2008). Bennett (1991:23) summarises points of conflict between customary law and human rights as follows: 'human rights emphasise the individual while customary law emphasizes the group or community. Common law stresses duties, human rights regimes naturally stress rights and customary law is imbued with the principles of patriarchy'.

Amongst the different schools of thought, one school regards African customary law 'as a patriarchal male dominated system which is highly discriminative towards women, and incompatible with human rights. As a result this school regards many of the central rules of African customary law as unconstitutional' (Journal for Judical Science, Vol.23. 1998. No 1-2).

The RCMA was enacted in terms of section 15(3) of the Constitution which provides as follows:

(a) *"This section does not prevent legislation recognising*

i) marriages concluded under any tradition, or a system of religious, personal or family law; or

ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.

(b) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution.

The RCMA was signed by President Nelson Mandela on 20 November 1998 and came into force on 15 November 2000 amidst much fanfare. It provided a legal basis for remedying the denial of legal recognition and consequently legal protection for women married under customary law. This was to give effect to the equality clause.

The RCMA is no doubt a commendable and timely step in redressing the collusion between the formal legal system, patriarchy and customary law which appears to be discriminatory against black women in

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effect. The challenges emanating from the interpretation and implementation of *the RCMA* pose a new set of disadvantages for the intended beneficiaries (Ndashe, 2009). When courts interpret any legislation or developing customary law, they must promote the spirit, purport and objects of the Bill of Rights, which includes a set of individual rights, principal among them the right to equality.The Constitution of South Africa provides as follows:

> *9(3) 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, sexual orientation,age,disability,religion,conscience,belief,culture,language and birth.*

> *9(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.*

African customary law endorses certain patriarchal traditions of Africa in most countries. Patriarchy vests authority and power in men except in matrilineal societies (Wilcox and Nock, 2006). This suggests that most customary norms are tilted in favour of men and to the disadvantage of women. They afford unequal treatment to men and women in various spheres of life. With respect to marriage, there is a large reflection of unequal treatment between husbands and wives which is the subject of this thesis.

The RCMA makes provision for protection and recognition of spouses, and sets out the requirements that make a customary marriage valid. It also establishes a system for the registration of customary marriages and establishes the equal status and capacity of spouses. It also regulates the dissolution of customary marriages.

Unequal treatment between husbands and wives under customary law is so evident in the following respects: consent to enter marriage; status and capacity; gender roles; polygamy; dissolution of customary marriages; proprietary implications of customary marriages. Following here is the discussion of each of them.

2.8.1 Consent

In most customary laws women have a silent voice on the issue of consent. In customary law marriages, the parties to the marriage are often not involved in the marriage negotiations. Marriage issues are dealt

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with entirely by the two families, the groom's and the bride's. Marriage proposals are initiated by the grooms' family in many African communities (Olivier, 1995:19). The validity of marriage is not based on the free and voluntary consent of the partners in any case (Bennett, 2008:212). The consent of the woman in particular, for a customary law marriage is not required as it is regarded as irrelevant. The consent of the bride's father is essential for a customary marriage to be valid. This means that women in particular, are generally forced to enter into customary marriages without their consent. According to Maluleke (2012:11), sometimes a girl or a young woman is kidnapped "by a man and his friends or peers with the intention of compelling the girl or young woman's family to endorse marriage negotiations". By kidnapping, the girl or young woman, she is forced to enter into marriage without her consent. There are also instances when widows are also compelled to marry the brother or any male relative of the late husband. This mostly is done without her consent (Maluleke, 2012:11). According to Higgins, *et al,* (2006:24), the husband's family enforces this practice because "the family had paid the bride price, she must remain with them". The payment of *lumalo* in this instance creates a sense of entitlement on the part of the husband's family and seems to comodify the woman. Many wives married under customary law stay in the marriage not by choice or consent.

The customary law marriage practice cited above shows that women are discriminated against as they do not have the same right as men to enter into marriage with free and full consent. Seeking to ensure that women have the same right to enter into marriage by choice with free and full consent, section 3(1) (a) (ii) of *the RCMA* provides that for customary marriages to be valid:

> *the prospective spouses must both consent to be married to each other under customary law.*

This means that the RCMA would not recognise a customary marriage which is entered into without the consent of both spouses. It gives individuals, especially women the right to reject the customary marriages they do not wish to enter (Higgins, *et al,* 2006:1671). The above cited provision of *the RCMA* directly contradicts the provision of customary law marriage in which the consent of parties, especially the bride, is considered irrelevant and is not even required.

2.8.2 Status and capacity

Under most customary laws, the husband heads the family. According to Mamashela and Xaba (2003), 'the husband is the head of the family and the wife is under his guardianship'.

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He is the sole holder of decision-making power and authority in the family. The wife is considered inferior while her husband is regarded as her legal guardian (Maluleke2012:11). Bennett (1991: 03) quoting Ramphele and Boonzaier, (1988) states the following regarding the status of a woman from the Inkatha's *Ubuntu-Botho* (Good Citizenship):

> *The woman knows that she is not equal to her husband. She addresses her husband as 'father' and by doing so the children also get a good example of how to behave. A woman refrains from exchanging words with a man, and if she does, this reflects bad upbringing on her part.*

The wife is not generally permitted to take any decision without the husband's authority or approval. Even in his absence, she may have to wait for his authorisation irrespective of the urgency of the decision that has to be taken. This suggests that the husband has the decisive voice on most matters (Higgins, *et al,* 2006:1659). The legal capacity of women under African customary law was at a certain stage regulated by the Black Administration Act 38 of 1927. Section 11(3) (b) of the Black Administration Act 38 of 1927 provides that:

> *A Black woman (excluding a Black woman who permanently resides in the province of Natal) who is a partner in a customary union and who is living with her husband shall be deemed to be her guardian.*

Women residing in the province of Natal were excluded because their customary marriages were regulated by the provisions of the *KwaZulu Act* on the Code of *Zulu Law (Act 16 of 1985).*

Women are perpetual minors under African customary law. As the head of the family, the husband is in charge of the marital property, he has full capacity to use, abuse or dispose of matrimonial property. The woman lacks the capacity to do so and would need the permission and approval of her husband (Tshwaranang Legal Advocacy Centre (TLAC). This demonstrates that the wife does not enjoy on the basis of equality with her husband full status and capacity. Customary marriage does not provide for the equal status and capacity of the spouses (Olivier, 1995:5).

Seeking to improve the status and legal capacity of women in customary marriages, Section 6 of *the RCMA* provides for the equal status and capacity of spouses. It states the following:

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> *A wife in a customary marriage has, on the basis of equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity, including the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that she might have at customary law.*

This means that all the assets and liabilities which the husband and the wife have fall in terms of *the RCMA*, into the joint or communal estate of both the spouses subject to the matrimonial property system that governs their marriage. Unless otherwise stated in the antenuptial contract which regulates the matrimonial property system of their marriage, both the husband and the wife in a customary marriage own all property and other assets equally. They are likewise jointly and severally liable for all debts and liabilities.

2.8.3 Gender roles

According to Manabe (2010:64), it is the gender socialisation in customary law that teaches people that males and females have different tasks. This means that in customary law marriages, there is a highly gendered division of labour between the wife and the husband. Olivier, *et al*, (1995:04) state that under customary law:

> *generally, there is an accepted division of labour between the sexes.*

The roles of husbands and wives are clearly defined as follows: Husbands are generally responsible for livestock, ploughing and building of homesteads. They also hold the positions of authority in almost all social institutions, including religion and work. They are responsible for the family's monetary and physical survival. They are perceived as warriors and should be able to protect themselves and their families.

Wives on the other hand are responsible for harvesting as well as all the domestic chores which include managing and directing the affairs of the household such as cooking, cleaning and taking care of the children. This means that they are considered homemakers and nurtures.

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According to Higgins, *et al,* (2006:9), these social and cultural patterns of conduct of men and women,

> *...are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.*

In a quest to eliminate customary law patterns of conduct of husbands and wives, which prejudice and practices that reflect the inferiority or the superiority of either of the sexes or on stereotyped gender roles for husbands and wives, *the RCMA* has sought to neutralise gender roles. In terms of *the RCMA*, the division of work and responsibilities within customary marriage is not based on gender. In essence, there is no specific task meant for the husband and for the wife. If a spouse carries out a particular task, it should be by choice or consent, not being compelled by gender ascriptions. In terms of *the RCMA* there is nothing wrong with the husband cooking, cleaning and taking care of the children which in terms of customary law would be defined as feminine tasks. The same applies to a wife (Higgins, et. al 2006:1659). This position is in line with the equity theory which proposes that husbands and wives in equitable marriages should be fairly content and satisfied.

2.8.4 Polygamy

Polygamy is a practice of having more than one spouse (wife or husband) at a time. This practice allows a husband to have several wives, which is termed polygyny or a wife to have several husbands, which is termed polyandry. It simply means a plurality of husbands or wives. Cases of polyandry where a woman can have more than one husband at the same time are rare under African customary law (Bennett, 1991:03). For the purposes of this study, only polygyny, which is the marriage of a husband to more than one wife, is considered. Polygyny is widely practiced in almost every African traditional society (Mbiti: 1974:82). Under customary law generally, husbands are free to enter into as many subsequent additional marriages as they can afford to support (Higgins, *et al,* 2006:1684). Customary law does not require the husband to obtain the consent of the first wife to engage in further marriages. The same freedom granted to husbands to enter into further marriages by customary law is not granted to wives. Thus polygyny denies wives their right to equality by increasing the factors that engender unequal power relations. This denial is in violation of equality clause in section 9 of the Constitution.

Seeking to protect the rights of the first wife or wives, section 7(6) of *the RCMA* provides that a husband

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who wishes to enter into an additional customary marriage with another woman after the commencement of *the RCMA* must apply to court to approve a written contract which will regulate the future matrimonial property system of his marriages (i.e. the existing marriage and the prospective one). This implies that *the RCMA* protects the rights of the wife by specifying a change in the matrimonial property regime and a division of existing matrimonial property. *The RCMA* seeks to ensure that the first wives become parties to polygamy by choice or consent.

2.8.5 Dissolution of customary marriages

In terms of the customary law, whenever there is a marital dispute, it is a matter for the families to attend to. The aim of the family in resolving the dispute is reconciliation, and divorce is not an option they recommend. According to Olivier, *et al*, (1995:51),

> *in traditional societies dissolution of marriage is not easily resorted to; the complex personal relationships, the property implications, the care of the children, moral and social considerations and the subordinate status of the wife, all factors tend to stabilise the marriage and cause dissolution to be resorted to only in exceptional circumstances.*

Customary law provides that in case of a marital dispute, the aggrieved spouse complains or registers his or her dissatisfaction and intentions to file for divorce with the husband's senior family members, particularly the senior aunt (Olivier, *et al*, 1995:50). This means that the wife is not even allowed to consult any member of her family before consulting her husband's family. It also suggests that under customary law, it is difficult for a woman to obtain a divorce. Upon receiving the grievance or intention to divorce the matter would at first be attended to by the husband's family which could be biased in their determination in that the same misconduct could be condemned if committed by the wife and condoned if committed by the husband. Under customary law, the grounds available to men for divorce are more than those available for the women. According to Herbst and du Plessis(2008),

> *If a woman returned to her father's household owing to ill-treatment by her husband or any other valid reason, a husband may phutuma (fetch) his wife by paying a fine to his wife's father.*

This means that it is relatively hard for a wife to divorce her husband. If she wants to exit from customary marriage, the option would be to flee. A phrase exists in most customary law marriages, including the Vhavenḓa that *ḽivhida ḽa musadzi ḽi vhuhadzi*" which literally means the grave of a woman is at the

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husband's home. This suggests that the wife's access to divorce is in terms of customary law, limited, meaning that the husband and the wife do not have equal access to divorce (Higgins, *et al,* 2006:30). Sometimes women are forced to stay in demeaning marriages because their families are unable to make *lumalo* repayment to the husband's family (Gibbs, 1963:558). They would compel her to stay in the marriage regardless of her comfort (Report 90:55). This suggests that *lumalo* payment limits the wife's ability to exit marriage. This means that wives married under customary law may stay in marriage not by choice.

Seeking to level the playing field in women's access to divorce, Section 8(1) of *the RCMA* provides that "a customary marriage may only be dissolved by a court by a decree of divorce on the ground of the irretrievable breakdown of the marriage".

This means that women, on an equal basis with men, may choose to exit a customary marriage with legal backing and enjoy the same rights as men during divorce.

2.8.6 Proprietary implication

Given that in most customary marriages the husband is the head of the family he has seemingly absolute control over matrimonial property. Upon divorce he gets virtually everything and the wife would be entitled to virtually nothing but her personal belongings only (Higgins, 2006:1659). Her personal belongings under Venḓa customary law are cited by Olivier, *et al,* (1995:51) as including

> *her clothing and ornaments; all gifts given to her by her family, e.g. cattle, poultry, domestic appliances, and the increase of these animals; earnings of the wife, e.g. as a herbalist when she learned the art from her family.*

She would not even have a say in the administration of the marital property as she is regarded as a property (Bennett, 2008:247).

This means that in terms of customary law, the default matrimonial property regime is not in community of property, but separate property. This default matrimonial property regime is based on contributions to property acquired during a marriage. Gender roles attached to husbands include making a contribution to the matrimonial property, while gender roles attached to the wives, which include discharging household duties, are considered as minimal or no contribution at all. Hence, upon divorce she can only take her

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personal belongings (Higgins, et. al, 2006:1659).

In a quest to ensure equitable division of marital property upon divorce, section 7(2) of *the RCMA* provides that:

> *a customary marriage entered into after the commencement of this Act in which a spouse is not a partner in any other existing customary marriage, is a marriage in community of property and of profit and loss between the spouses, unless such consequences are specifically excluded by the spouses in an antenuptial contract which regulates the matrimonial property system of their marriage.*

It means that *the RCMA* in the determination of marital property, accords financial and non-financial contributions of the husband and the wife, the same or equal weight, unlike under customary law in which other contributions, such as raising children, and discharging household duties by the wife are viewed as non-contribution. Most often such non-financial contributions by the wife are the ones that enable the husband to earn an income and increase the marital property (Higgins, *et al,* 2006:1659)

The default matrimonial property regime under *the RCMA* is in community of property. According to Mamashela and Xaba (2003), this new matrimonial property regime,

> ...i.e. community of property, implies a drastic change in the matrimonial regime of the customary marriage.

Deviation from the above cited default regime is by choice, which still needs to be approved by the court (Higgins, *et al,* 2006:1659).

In a quest to promote both the right to gender equality and to culture (including the application of customary law), the South African Constitution (Act 108 of 1996), and *the RCMA* seem to have set up a potential conflict in the context of customary marriage in that men who are strongly committed to customary norms may feel that their practices are being curtailed. Given the patriarchal structure of marriage under African customary law, this could even drive one into divorcing his wife.

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2.9 THE IMPACT THE RECOGNITION OF CUSTOMARY MARRIAGES ACT, 1998 (ACT NO. 120 OF 1998) ON CUSTOMARY PRACTICES

Under *the RCMA* marriages performed under African customary law, including polygamous marriages, are recognised as legal marriages. *The RCMA* reformed among others, the law relating to the legal status of women in customary marriages, the proprietary consequences of a customary marriage and the dissolution of customary marriages. It means that many customary law practices are being replaced with the statutory provisions. in the *case of Bhe v The Magistrate, Khayelitsha, 2005(1) SA 580(CC),* Langa DCJ states that:

> *The Constitution envisages a place for customary law in our legal system. Certain provisions of the Constitution put it beyond doubt that our basic law specifically requires that customary law should be accommodated, not merely tolerated, as part of South African law, provided the particular rules or provisions are not in conflict with the Constitution.*

As indicated earlier in this section of the study, customary law is the living law and should be afforded legal recognition, protected and considered as important as any other South African law. Such recognition, protection and value are provided for in sections 30, 31 and 39 of the Constitution which state that:

> *(30) everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.*
>
> *(31) (1) persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community:*
>
> *(a) to enjoy their culture, practice their religion and use their language; and*
>
> *(b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.*
>
> *(2) the rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.*
>
> *39(3) the Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law or customary law or legislation, to the extent that they are consistent with the Bill.*

The above cited provisions of the Constitution seem to put common law and customary law at a par.

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Ntlama (2012) indicates that what is referred to as the constitutional protection of the customary law is actually the conveyance of the dominant status of common law principles over the customary law principles. This is evident in the provisions of section 8.1 of *the RCMA* which state that '*a customary marriage may only be dissolved by a court by a decree of divorce....*'

Prior to *the RCMA*, customary marriages would be dissolved by the traditional leaders who would consider it as a last resort. Only marriages under the Marriage Act (Act 25 of 1965) were dissolved by a court by a decree of divorce in terms of the *Divorce Act* (Act 70 of 1979). *The RCMA* applies the civil divorce law, i.e. the Divorce Act (Act 70 of 1979) to customary marriages, meaning that a customary marriage can only be dissolved by a court by a decree of divorce and only on the grounds of irretrievable breakdown of the marriage. *The RCMA* also brings to an end the power traditional leaders and other customary institutions had to grant divorces. Their duty to mediate in spousal disputes before the legal divorce is retained.

One of the consequences of *the RCMA* is that common law and customary law are no longer at par since customary law marriages are dissolved by a court by a decree of divorce under Divorce Act (act 70 of 1979) which used to regulate common law marriages. It means that in terms of significance, common law principles are a step above the customary law rules. The reason for this is that dissolution of marriages under the customary law were found to be inconsistent with the provisions of the Bill of Rights enshrined in the Constitution, hence divorce in customary marriages is regulated in terms of the Divorce Act (Act 70 of 1979).

The unequal treatment of common law and customary law is also evident in the provisions of sections 3(2) and 10(1) of *the RCMA* which regulates for the change of marriage system. These sections provide that:

> '*3(2) Save as provided in section 10(1), no spouse in a customary marriage shall be competent to enter into a marriage under the Marriage Act, 1961 (Act 25 of 1961), during the subsistence of such customary marriage.*
> *10(1) A man and a woman between whom a customary marriage subsists are competent to contract a marriage with each other under the Marriage Act, 1961 (Act 25 of 1961). If neither of them is a spouse in a subsisting customary marriage with any other person.*'

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Section 3(2) of the *Recognition of Customary Marriages Act (Act 120 of 1998)*, states that none of the parties to a customary marriage will be allowed to conclude a marriage in terms of the Marriage Act, 1961 (Act 25 of 1961), while section 10(1), states that two parties in a monogamous customary marriage may conclude a common law marriage but not the other way round. It is evident from the two provisions of *the RCMA* cited above that the intention of section 10 is to promote monogamy rather than polygamy.

2.10 CONCLUDING OBSERVATIONS

It seems as if when *the RCMA* was introduced, many traditional communities misunderstood it and thought it has come as a replacement of customary law marriages. Hence they neglected their fundamental obligation of marriage negotiations.

Some spouses from the traditional communities, who are indigent, may not register their customary marriages with the Department of Home Affairs due to lack of knowledge or ignorance. When the need for property division arises in case of death or divorce, they would be shocked to discover that the matrimonial property system governing their customary marriage is in community of property and of profit and loss. Not being well informed about what led to the default matrimonial property system applied in the particular situation, other spouses, the husbands in particular, may also be shocked and start to blame the provisions of *the RCMA*. This could lead to husbands divorcing their wives to avoid having to deal with the same problem.

Section 6 of *the RCMA* explicitly confers equal status on women married in terms of customary law. This provision of *the RCMA* has far-reaching consequences for spouses living in traditional communities who grew up in a patriarchal society which enforces general subordination of women to men. When registering their marriage under *the RCMA* they may hear for the first time that they enjoy equal status with each other. The husband being a traditional patriarch may after registering the marriage in terms of *the RCMA* not always adhere to this provision of the law.

Section 7(6) of *the RCMA* requires that a husband who wishes to enter into an additional customary marriage with another woman after the commencement of *the RCMA* must make an application to a court to approve a written contract which will regulate the future matrimonial property system of his marriages (i.e. the existing marriage and the prospective one).

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Being poor, husbands who wish to enter into additional customary marriages may not afford a lawyer who would draw them marriage contracts. Being rural and illiterate, they (husbands) may not even be aware of the free legal services offered by the Department of Justice through its legal board. This suggests that a husband who is poor to an extent where he cannot afford a lawyer or resides in the deep rural area and is not aware of the free legal services of the Department of Justice may end up deciding to divorce his existing wife so that he may legally move on to the next customary marriage.

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CHAPTER THREE

LITERATURE REVIEW

3.1 INTRODUCTION

This literature review concentrates on literature which is directly relevant to the study, particularly previous research on customary marriage and divorce practices. The following sources were consulted for information regarding the study: journal articles, scholarly books, government documents, dissertations, marriage and divorce laws and the internet. Throughout the world, marriage is an institution for all societies regardless of religious convictions, and the practice differs from one culture to the other (Bennett, 2008:188).

3.2 MARRIAGE PRACTICES IN THE WESTERN CULTURE

According to Horton &Hunt (1989:234) marriage is, 'the approved social pattern whereby two or more persons establish a family. 'This means that marriage involves at least two individuals and is the ideal way that society approves of to start a family. Strong (2008:8) defines marriage as, '… a legally recognised union between two people, a man and a woman, in which they are united sexually, cooperate economically and may give birth to, or adopt, or bear children'.

Strong (2008) sees marriage, in the Western culture, as an event which primarily concerns a man and a woman who agree to form a union and as something that the individuals can do by themselves. He further indicates that in the Western culture, the woman's child-bearing capacity is not an issue. If a couple cannot biologically bear children, they may decide to stay as they are or go for an adoption.

In the Western culture, monogamy is the law. Romantic love is the ideal basis on which Western culture establishes a lasting marriage (Popenoe, *et al,* 2001:289). This means that when romantic love dies, marriage may also end by divorce. Awodele (2005) states that Western culture looks at marriage issues from an individual's point to an extent where if things go wrong in a marriage, the couple would consider divorce before they even tell any member of the family. They feel obligated to no one but themselves.

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3.3 AFRICAN CUSTOMARY MARRIAGE

Marriage in Africa is between two families as against the concept of just two people in Western countries [Radcliffe-Brown and Forde, 1975:46; Awodele: 2005]. When an African is getting married, the two families would, by means of an intermediary (family council) arrange everything pertaining to the marriage, including the *lumalo* (Popenoe, *et al*, 2001:280). Permission by both the bride and the groom to the marriage is not a prerequisite to the marriage. All members of the family including parents, grand-parents, children, in-laws, brothers, sisters, nephews and cousins become involved in the marriage of one of their members (Ogbonnaya: 2009). By virtue of marriage being a communal institution, Africans put the needs and desires of the family above those of the individuals to the extent that families deem it fit to arrange marriage partners for their children. In terms of customary marriage laws, only individuals that have been through initiation schools are eligible for marriage. Though there is no specific age requirement for marriage, for girls, puberty stage was regarded as the minimum requirement as the ultimate goal of marriage was procreation (Radcliffe-Brown and Forde 1975:51). Under African customary marriages law, arrangement for marriage by parents for their children is essential for different purposes which differ from one cultural group to the other. Some common purposes for arranging marriages shall be discussed briefly.

3.3. 1 Rationale for arranging marriages

3.3.1.1 Arranged marriages for strengthening friendship

Sometimes parents do arrange marriages for their children to enhance their friendship with an individual person from the other family. This is clearly described by Sigogo (2002) where in the introduction we find Mr. Maswuhanyise offering his daughter Vhulahani for marriage to Mr. John Khavhatondwi, his friend. Mr. Khavhatondwi had been divorced twice previously and lives with his children from the previous marriages. Mr. Maswuhanyise's reason for offering his daughter for marriage to Mr. Khavhatondwi, who is old enough to be her father, is to strengthen his friendship with Mr. Khavhatondwi. She refuses the offer and eventually elopes to get married to Vhangani whom she loves. They leave for the Gauteng Province where Vhangani finds a job. They live there together as husband and wife. Having been unsuccessful in his endeavour to marry his daughter to his friend, Mr. Maswuhanyise ends up crying like a baby. This shows that he is seriously disappointed by his daughter who in terms of the African tradition should have heeded his instructions without query.

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Mr. Ṋetshivhera, a retiree who resides in Sibasa, told the researcher on 19/09/2012 that sometimes marriages are arranged by women friends. If the friendship has been good, the women may agree to be married to the same man. That is why there is a song in Tshivenḓa which loosely translated says 'it is good for the wives of the same man to wear matching outfits', which means it is good for women with the same husband to have the same preferences.

He also indicated that parents may sometimes create opportunities for their children to get married to the person they as parents want. For instance, if a young man visits the home of a girl, the parents will excuse themselves to give him a chance to propose. This happens only when the parents are in favour of a relationship between their daughter and the young man. This may eventually lead to marriage. However, when the parents are not in favour of the relationship, they will not excuse themselves, thus making it impossible for the young man to propose love to the daughter.

Upon further probing he pointed out that there are instances where women who are friends let their favourite man marry one of their friends.. If the two women are friends, they will always be together. In that way, the young man can propose love to one of the women. The friend will then excuse herself to give the young man a chance to propose the other woman. In Tshivenḓa, young men who are friends would marry women who are also friends in this way.

3.3.1.2 Arranged marriage for financial or material benefit

Sometimes rich families with children who have reached a marriageable age are seen attracted to each other. The girl or the boy from a rich family does not want to marry from a poor family for financial reasons. There is likelihood that a boy from a rich family will marry a girl from a rich family. It is believed that both the husband and wife are afraid of the problems that emanate from a poor family.

This type of marriage is reflected in Maumela (1991), where marriage is not out of love. Two persons come into a marriage just because one is after material things attached to one's life. A girl called Tshinakaho wants to marry Ndaedzo if and only if he becomes a ruler. The girl says that she can only marry Ndaedzo only if he is enthroned to the chieftainship. If not, she says that she will not marry him. In this marriage the two arrange that the girl will marry Ndaedzo after he has been enthroned to

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chieftainship.

3.3.1.3 Arranged marriage on the basis of societal class

Sometimes people from the royal families marry from only a specific family. One cannot inherit chieftainship if one is not from a royal family. In addition to having a mother from royal family, she should have been married by *dzekiso* (a term used for a special bride–price for royal family daughters) for a wife paid by parents of the husband. It should not be money that the husband has worked for. It has to be the money which married the *makhadzi* (aunt) of the family. This is why most royal families do not marry from commoners. They would arrange the marriages from the royal families out of which the rulers would be born. The rulers are not born from anywhere in the family. They are born out of persons from a royal family. If one is not born into such a family, he will not inherit chieftainship, even if he is a first born in the family. These are the requirements for one to inherit chieftainship.

The empirical evidence is that royal family parents sometimes arrange marriage for their children to protect their family status. The Mphaphuli's, the Rambuḓa's and the Tshivhase's royal families, to name just but a few, do not marry a commoner. That is why a *khosi (*traditional leader*)*, according to Tshivenḓa culture, is a person borne by a woman married from royal families.

Sometimes men want to marry girls from the same class because they are rich families. This arrangement is made by families or their children. The girl is scared of being married to a poor family because she is afraid that she would suffer also. Rich girls do not want to marry a man from a poor family. This is also true of educated families. Girls from educated families do not want to be married to an uneducated family; for fear that they would not be in the same class with new family. Usually the Vhavenḓa want to marry a person from the same profession. It is believed that the couple will understand each other better. This is different from a person who is a teacher who wants to marry a medical doctor. These people are not considered compatible. Rather, they marry because the marriage has been arranged by circumstances.

3.3.1.4 Arranged marriages for payment of debt

Parents sometimes arrange a marriage for their daughter to a man as payment for a debt that the family is unable to pay back. In order to repay back the debt the parents find that the only way out is to offer their daughters for marriage to the man or family they owe.

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This is clearly described in Maumela's (1965) work in the introductory part we find Mrs. Mutshinye being angry at her husband, Mr. Rabele, who had been away in the Gauteng Province for the previous eight years. She is worried that since he left for the Gauteng Province, they have not heard anything from him. He has not sent money to support the family either. Mrs. Mutshinye then borrows money from one young man called Ntakuseni so that she could support herself and her three daughters. Realising that she could not pay back the money to Ntakuseni, she arranged that Ntakuseni marry her eldest daughter. Her proposal is supported by both Ntakuseni and her daughter. Ntakuseni therefore ends up marrying one of the daughters as payment for the money owed.

Sometimes parents would arrange marriage for their daughters to a traditional healer in exchange for medical services that a member of the family had received, that the family could not pay for. In the case where the girl is too young, the man would wait for her to grow up before she assumes her marital obligations. In all these cases, the individual's feelings are never taken relentless.

3.3.1.5 Arranged marriage for cultural purposes

Parents sometimes arrange a marriage for their children to ensure cultural continuity for their family. For instance, the Vhalemba ethnic group residing in Venḓa. This group has its own tradition and customs. The Vhalemba parents are expected to bring their children up according to the Vhalemba tradition. They practice endogamy in that they limit their choice of marriage partners within the Vhalemba cultural group. This means that a Mulemba should marry a Mulemba (Mathivha, 1999).

3.3.1.6 Arranged marriage for maintaining family relationship

Sometimes parents arrange a marriage for their children to cement the family relationship that is in existence. The same practice is depicted in Munyembane (1990) where we find Mr. Mafharalala and his sister, Mrs. Maṱamela, arranging marriages for their children who are cousins. Tshifhiwa who is Mrs. Maṱamela's son is made to marry Shonisani who is Mr. Mafharalala's daughter. By this marriage the relationship between the two families which was existing would be maintained and cemented. Secondary purpose for arranging this marriage is to prevent Tshifhiwa from marrying Fulufhelo whom he had proposed himself. They accuse him of not consulting them before he made the choice of a marital partner.

They tell him that had he consulted them, they would not have allowed him to even consider Fulufhelo

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for marriage as she is the daughter of a woman that accuse of practicing witchcraft. They go to an extent of even trying to remind him of an incident that happened many years ago in which Fulufhelo's mother was accused of killing Mrs. Maṱamela' elder sister through her witchcraft practices. As a result they cannot allow him to marry Fulufhelo, he can instead marry his cousin who happens to be Mr. Mafharalala's daughter. It is clear from the above that parents arrange marriages for their children to their cousins. This means that an arrangement is made for a boy to marry his mother's brother's daughter. This is done to cement the relationship which is already there between the children's parents who are a brother and a sister. Such an arrangement also serves to avoid infiltration by outsiders who might practice witchcraft.

The *Daily Sun* Newspaper (2013, 03, 26) had an article about a man named Amos Mkhonto who was married to his first wife Anna Mathebula. As time went on Anna persuaded her husband Amos to marry a second wife citing lack of rest and her unavailability as the reasons behind. Amos made the arrangement for a second marriage and finally got married to Merch Ntimbaas his second wife in terms of the customary law. His second wife Merch also did what the first wife Anna did, that of persuading her husband Amos to marry another wife, this time a third wife, citing the amount of housework she was faced with as the reasons behind. The story tells that he got married to Joyce who happened to be Anna's niece. Although Amos was persuaded by Merch to marry the third wife, his customary marriage to the third wife was probably arranged by Anna since he got married to her niece Joyce.

The reason behind Anna's arrangement for Amos to marry Joyce her niece might probably be to cement the already existing relationship between her family and her maiden family. The above cited scenario depicts what is happening within the Vhavenḓa cultural marriage practice.

3.3.1.7 Arranged marriage to acquire cattle for agricultural purposes

Sometimes parents arrange a marriage because they need cattle for a span in the family. In such an instance they could arrange a marriage for their daughter to a man in exchange for cattle that are needed for agricultural purposes. The parents would then arrange for their daughter to be married in exchange for eight cows as *lumalo*.

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3.3.1.8 Arranged marriage for a person who is away from home

Mr. Mauḓa, a pensioner, who resides in Hamagidi told the researcher (on 19/09/2012) regarding the rationale for arranging marriages under customary law that sometimes a customary marriage may be arranged by the parents for their son who is away from home due to the nature of his occupation or work. When he reaches marriageable age, he may for some other reasons not come back home to do so. The parents of the man may choose a family where to propose love on behalf of their son. In such a situation, they would arrange the marriage with the other family through the intermediary. All the customary marriage procedures including the payment of *lumalo* would be followed until the woman is accompanied by the bride-maids to her new home. This is done with the belief that when the son returns, he would accept her as his wife while the wife would accept him as her husband.

The matter may be complicated if the son does not return home to meet the wife. In such a situation, her in-laws would pretend as if she was married for their son by someone else. They may organise a diplomatic way of sending her back to her maternal home. Other unfortunate situation may arise if the son comes back home and does not accept the woman, the mother may take care of her as her wife. In such a situation the wife belongs to the mother. Hence, in terms of the Vhavenḓa cultural principle, the husband does not have any jurisdiction over his wife, she belongs to the entire family including the extended family. This means that if there are marital problems, he has no power to divorce her by himself. He has to make their marital disputes known to the senior heads of the family for intervention.

3.3.1.9 Arranged marriages for medical attention

The *Sowetan* Newspaper (2013, 02, 31) had an article on a *Sangoma* who got married to a 12 year –old girl. It happened in the Limpopo Province, where it is reported that, a 12-year old Limpopo girl is now the second wife of a local sangoma in a village near Mahwelereng in Mokopane. That girl was married early that month to a man, 44 years her senior. The mother said that her daughter was diagnosed with epilepsy and would faint at any time. She said her daughter's situation worsened as time went by and she was advised to seek help from the sangoma. "We took her to the sangoma, where she underwent treatment for two years. And she was healed," her mother said. She said the 57 year-old sangoma told the family that the girl was being troubled by ancestors and that she needed to be closely monitored. The sangoma offered to marry the girl and the family had no choice but to agree to his (the sangoma's) suggestion because they wanted her to be healed. The girl's uncle, who is 47 years old, echoed the mother's sentiments. He said the family was poor and could not afford to pay for the girl's treatment, which forced

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them to accept the marriage. Although the marriage was later nullified by the courts, this trend is similar to the Vhavenḓa male traditional healers who marry a person because the family cannot afford to pay for that person's medical treatment.

3.3.1.10 Arranged marriages after two families have agreed

Mrs. Baloyi, an old lady who resides at Hamuraga, is well versed with the Vhavenḓa tradition and customs told the researcher (on 20/09/2012) that there is another type of marriage which is by mutual agreement between two families. After a girl has been proposed, the parents of the bridegroom would send an intermediary to propose. After the parents have agreed, the parents of the bridegroom would arrange the cattle to marry the bride. The basic price of marriage is eight (8) heads of cattle. In addition to the *lumalo*, they also buy some clothes for the bride. Thereafter, wedding arrangements are made.

The intermediary pays for all the marriage rites. There-after, the bride requests the bridegroom to *kwasha tshitolo*, literally meaning, to break or smash the store to pieces, meaning to go on a shopping spree. The bride shops for all utensils for the new family. She will buy *mufaro/ tshitundwana* (basket), *mpfo* (ladles), *pheṭho* (porridge stirrers) and everything else that would be used in the new family. When they have acceded, they will lead the bride to a store where she would make all the purchases. Besides this formal procedure, the bridegroom may use another way say of capturing and eloping with the girl as an acceptable way of marriage.

When the couple returns from buying the goods, a day is set when the intermediary will lead the bride to her new home. Before they leave, the bride chooses some friends to accompany her to her new home. In the evening, they bid farewell and walk to the bridegroom's new home where they are accepted. Upon acceptance, the bride covers herself with a towel so that she is not seen.

At the groom's home, the bride-maids are kept for one week in the house (in seclusion), before they are allowed to come out and perform all the house chores. Thereafter they are expected to *tswalushika (*go to the river to draw water) and pound the maize. When the time is up for the bride-maids to return to their respective homes, one of them remains behind with the bride for some days. She would stay with her with the intention of not leaving until the object has been achieved. She would only leave when the bride has noticed her menstrual periods. This is a way of ensuring that the bride is not coming into the marriage being pregnant.

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3.3.2 Forms of marriage proposals

Although it is the primary responsibilities of parents to arrange marriages for their children, there are other forms of marriage proposals that are irregular but accepted in terms of Vhavenḓa tradition and customs. Irregular marriage proposals include arranging a marriage for unborn child, kidnapping and eloping.

3.3.2.1 *U mala tshikunwe* (Arranged marriage of unborn child)

There are instances where marriage is pre-planned by the parents even before the children are born (*U mala tshikunwe*). This type of marriage practice is called pre-arranged marriage. A family pays *lumalo* whilst the mother is pregnant. This is even before the parents know whether the baby would be male or female. If it is a male, the groom's family would wait until she gives birth to a female child. It does not matter how long one waits. When the woman gives birth to a girl, the girl grows up knowing that she will become the wife of the person with whom marriage has been arranged. The girl child would marry the man even if she does not like him. The marriage is binding and she cannot refuse. This practice takes place in most cases where one family owes the other and is unable to pay back (Mbiti, 1989:135).

3.3.2.2 Arranged kidnapping as a form of marriage

Sometimes the bridegroom is unable to meet all the requirements of a customary marriage, such as what the bride would demand which include *mufaro* or *tshitundwana* (basket), *u kwashatshitolo* (to buy utensils) for a new family. Often, these things are costly. When a young man cannot afford such things, he would follow the young woman everywhere, be it on the way to fetch water or to collect firewood. With the help of others, he will wait for her to be alone and take the woman by force. At the bridegroom's home they will say *o khurumedzwa* (covered her face by force), meaning that one is married by force. The family of the bridegroom will send an intermediary to the family of the bride with some money as a fine, to inform them they should not look for the woman; that she is actually with the in-laws. Upon receiving the news, the in-laws would accept it as an official marriage.

3.3.2.3 Eloping as a form of marriage.

This is another accepted form of marriage proposals which according to Baloyi (2012)is irregular but accepted under Vhavenḓa customary law marriages. Usually, the woman runs away secretly. The arrangement is between a man and a woman to run away secretly with the intention of getting married, usually without parental approval. After this has happened, the man contacts his parents, informing them

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that he has taken the girl without the permission of her parents. His parents would then send an intermediary with money and information, telling them that they should not panic, thinking she has disappeared, that she is with their family. The money will be used as a fine called *luṭoḓelangeno* (find your daughter this side). When they receive the information, they will accept this arranged marriage.

3.4 CURRENT SOUTH AFRICAN MARRIAGE LAWS

The South African government has sole authority for passing the laws which regulate marriage. Currently there are three laws which provide for the status of marriage in South Africa, namely:

- The Marriage Act (Act 25 of 1961): This Act provides for the solemnisation of a civil or religious marriage between a man and a woman. This means that it only provides for monogamous opposite-sex marriages.
- The Civil Union Act (Act 17 of 2006): This Act provides for the solemnisation of a civil or religious marriage or a civil partnership between two people regardless of their gender. This means that it only provides for same-sex marriages or marriages between persons of the same sex.
- The Recognition of Customary Marriages Act (Act 120 of 1998): This Act provides for the registration of marriages under African customary law. This means that it provides for the recognition of African customary law marriages, including those that are polygamous.

South African couples may choose which of the three marriage laws they wish to be married under. Of the three marriage laws cited above, only *the RCMA* is of interest to this study, hence, further discussions shall be made along it.

3.5 RECOGNITION OF CUSTOMARY MARRIAGES ACT (ACT 120 OF 1998)

The RCMA was enacted in terms of section 15(3) of the Constitution of the Republic of South Africa Act (Act 108 of 1996). The primary purpose of *the RCMA* is to recognise customary marriages. In other words, customary marriages are recognised in terms of the *Recognition of Customary Marriages Act (Act 120 of 1998).* The Customary Marriages Act (Act 120 of 1998) defines customary marriage as a union which is 'negotiated, celebrated or conducted according to customary marriage law'. Since customary marriages are potentially polygamous, it implies that *the RCMA* also recognises polygamy. *The RCMA* requires that the prospective spouses be above the age of 18 years and that both consent to marriage in accordance with the customary law. A wife married in terms of *the RCMA* has full status and capacity to enter into contracts in addition to rights and powers that the customary law provides. Couples who are

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married in terms of this law should understand that their marriage is in community of property and of profit and loss between them, unless a valid antenuptial contract has been entered into before the marriage. Should a husband married in terms of this Act wish to marry another woman, he should make an application to the court for approval. The court would consider the written contract that regulates the future matrimonial property system of his marriages before it approves the application. A marriage in terms of this Act can only be dissolved by a court in accordance to the Divorce Act (Act 70 of 1979). Before the court issues a decree of divorce on the ground of the irretrievable breakdown of the marriage, it takes into consideration the role of family members, traditional leaders or any other person in the mediation, as provided for by the customary law.

Very few people are aware of the existence of *the RCMA.* It was evident from the respondents interviewed that, very few people are aware of the existence of this legislation. The few that claim to be aware of this legislation which governs their customary marriages said they hear about the legislation on the radio. A radio seems to be accessible and afforded by most members of the community. Phalaphala F.M which is one of the SABC's radio stations which broadcasts in Tshivenḓa has a program on Mondays called *Dial a Lawyer*. On this programme, legal practitioners explain amongst others, issues related to customary law marriages and customary law divorces in terms of *the RCMA.* Listeners are afforded an opportunity to phone in and ask clarity-seeking questions. University of Venḓa community radio station (Univen F.M) also hosts a similar programme on Thursdays called *People and Law*. Some claim to have become aware of the legislation through watching the prime time soap opera known as Muvhango which broadcasts on SABC 2 from Mondays to Fridays at 21h00. In this soap, challenges associated with African customary marriages law versus *the RCMA* are aired. The soap started with Mashudu, a traditional leader in waiting, dying of heart attack leaving his two wives, Masindi and Catherine as well as his five children. He had married Masindi in terms of the customary law in Venḓa and later went to marry Catherine in terms of the Marriage Act (Act 25 of 1961) in Johannesburg where he had his businesses. What Mashudu did by marrying Catherine in terms of the *Marriage Act (Act 25 of 1961)* while still customarily married to Masindi was illegal in terms of the *Recognition of Customary Marriages Act (Act 120 of 1998).* Section 10(1) of *the RCMA* provides that a couple is competent to contract a marriage in terms of the *Marriage Act (Act 25 of 1961)* if neither of them is a spouse in an existing customary marriage with any other person. In essence, customary marriage cannot exist with civil marriage. One can either have one wife in civil marriage or multiple wives in customary marriage. It means that Mashudu should have first divorced Masindi before he went on to marry Catherine in terms of

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Marriage Act (Act 25 of 1961). As a result of Mashudu's illegal marriage to Catherine, the soap shows many problems that came up when he died. These include

- Mashudu's wives (Masindi and Catherine) fighting over the right to bury him,
- the three children of Masindi who are Azwinndini, Lufuno and Tshianeo engaging in a bitter fight with Catherine's two children who are Edward and Agnes over Mashudu' estate,
- Mashudu's sons Azwinndini and Edward fighting over who was the rightful heir to the throne
- another woman called Mukoṋdeleli pitched up claiming that she believed that her son called Lambani was the rightful heir to the throne.

From the interviewee's responses, one could conclude that even from the above cited soap, they just pick up pieces and bits of what *the RCMA* is all about. This shows that those majorities of the interviewees that claim to know about *the RCMA* actually do not know or understand what it is about.

3.6 AFRICAN CUSTOMARY MARRIAGES LAW VERSUS *THE RECOGNITION OF CUSTOMARY MARRIAGES ACT (ACT 120 OF 1998)*

In the case of *Mayelane v Ngwenyama (CCT 57/12, [2013] ZACC 14*, the Constitutional Court ruled in favour of Modjadji Florah Mayelane, a Tsonga woman who had married Hlengani Dyson Moyana on 1 January 1984 in terms of the customary law, to invalidate his second marriage to Mphephu Maria Ngwenyama whom he had married on 26 January 2008 without her consent. She only found out about his second marriage to Ms Ngwenyama upon the death of her husband in 2009. The consent requirement which *the RCMA* provides for was found to have been violated. Hence the Constitutional court ruled in her favour. The Constitutional Court considered Ms Mayelane's case although her marriage was not registered with the Department of Home Affairs. In short, the judgement is as follows: The Constitutional Court held that, if a man wishes to marry more than one wife under Xitsonga customary law, he must get consent from his existing wife. This means that his first wife Ms Mayelane must have first agreed to allow her husband Mr Moyana to marry Ms Ngwenyama. Since in this case the husband's first wife Ms Mayelane did not agree to allow him to marry another woman and he decided to marry again without her agreement, his new marriage to Ms Ngwenyana was rendered invalid under law. This means that his new marriage was not legal and Ms Ngwenyana was not considered Mr Moyana's wife under *the RCMA*.

The above case reached the Constitutional Court after both Ms Mayelane and Ms Ngwenyama subsequently sought registration of their respective customary marriages under *the RCMA* with the Department of Home Affairs, with each disputing the validity of the other's marriage. Ms Mayelane then

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made an application to the High Court for an order declaring her customary marriage to Mr Moyana valid and that of Ms Ngwenyama null and void, since she had never consented to his marriage to Ms Ngwenyama. The High Court having interpreted section 7(6) of *the RCMA* as creating an obligatory requirement for the validity of an additional customary marriage that, if the husband fails to obtain court approval of the written contract regulating the matrimonial property regime of the subsequent marriage, such marriage is void, granted both her applications to the dissatisfaction of Ms Ngwenyama. She (Ms Ngwenyama) then took the matter on appeal to the Supreme Court of Appeal. The Supreme Court of Appeal having interpreted that the requirements for validity of customary marriages are to be found in section 3 of *the RCMA* declared both marriages valid, and this was to the dissatisfaction of Ms Mayelane who then took a leave to appeal against the Supreme Court of Appeal's order to the Constitutional Court. Hence, the above final order was given by the Constitutional Court.

Conflict between the African customary marriages law and *the RCMA* is also evident in the case of one ANC Member of Parliament, an academic and Chief of the Mvezo Traditional Council, Chief Mandla Mandela who is the grandson of former president Nelson Mandela, who faced a charge of bigamy *(City Press Newspaper dated 19 February 2012).* Despite being married in terms of a civil marriage to Mabunu in 2004, he engaged in further marriages by marrying Anais Grimaud (who has been given the new name Nobubele), and Mbali Makhathini (who has been given the new name Nodiyala) in March 2010 and December 2011 respectively. During the funeral of former president Nelson Mandela's sister in February 2012, Mandla's young wives, Nobubele and Nodiyala, presented a united front to the people. They had been seen giggling together as they peeled vegetables and minded pots on the fires with other women from the village *(The Witness dated 20 February 2012).*

It is clear from the case cited above that, because Mandla was married under civil marriage, his further marriages were in conflict with the provisions of *the RCMA.* He should have first divorced his first wife before he could consider engaging in further marriages.

When Mabunu realised that he was intending to engage in further marriages, she had to address it from the provisions of Marriage Act 1961(Act No. 25 of 1961) as she was civilly married. She filed for a divorce, and while the divorce was still pending, she had to obtain an interdict to stop Mandla from marrying Nobubele. Mabunu's actions were in line with section10 (4) of *the RCMA* which states that "… no spouse of a marriage entered into under the Marriage Act, 1961, is, during the subsistence of such

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marriage, competent to enter into any other marriage. As such she had to stop him from marrying Nobubele while still validly married to her as polygamy cannot co-exist with a civil marriage. This means that one cannot enter into civil and customary marriages simultaneously. He ignored the interdict and married Nobubele in terms of the customary law in March 2010.

The following year he married Nodiyala similarly and a traditional ceremony was held at Mvenzo Great Place on Christmas Eve in 2011*(Sowetan Newspaper dated 15 August 2012).* His traditional wedding celebrations were led by local traditional chiefs and the invited guests were the royal kings including AmaXhosa King MpenduloSigcau and AbaThembu King Buyelekhaya Dalindyebo. The Congress of Traditional Leaders of South Africa (Contralesa) President Chief Patekile Holomisa and the Eastern Cape chairman for traditional leaders Chief Ngangomhla Matanzima of Western Tembuland were also part of the invited guests to his traditional wedding celebrations*(citypress.co.za accessed on 24 July 2012).* The caliber of the invited guests shows that his further marriages are approved by the family and the traditional leadership in terms of the customary law. Nobubele as well as the third wife Nodiyala married similarly had been seen presenting a united front during the funeral of former president Nelson Mandela's sister. This again shows that their marriage is approved by the royal council. In response to his estranged wife Mabunu's plea to the court to declare the further marriages null and void, Mandla filed an answering affidavit saying he needed to marry more wives for traditional reasons *(Sowetan Newspaper dated 15 August 2012).*

The Mandla Mandela's case discussed above shows that the vast majority of customary law-orientated people of South Africa have little or no knowledge of the laws which provide for the status of marriage in South Africa. This is showed in the following cited incidence:

- Had Chief Mandla Mandela known that as a chief he would need to marry more than one wife, he would have chosen initially to marry Mabunu in terms of t*he RCMA* which allows polygamy instead of the Marriage Act (Act 25 of 1961) which prohibits one from entering into further marriages.
- If the community that he leads knew the provisions of the marriage laws, they would not have attended his further marriage ceremonies, knowing that they were in violation of *the RCMA*.
- If the traditional leadership structures such as the local chiefs, the kings and the President of the Congress of Traditional Leaders of South Africa knew the provisions of the marriage laws, they would not have attended and conducted his traditional marriage ceremonies. Their attendance

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shows that they approve his deeds.

- If the family knew the provisions of the marriage laws, they would not have allowed Mandla's newlyweds Nobubele and Nodiyala to present a united front during the funeral of former president Nelson Mandela's sister.

It is worth noting that when President Zuma married his fourth wife Bongi Ngema, many questions were raised regarding the legality of his customary marriages (Parker, 2012). Some of the questions raised were as follows: Did he ask his other three wives for their consent in line with the provisions of *The Recognition of Customary Marriages Act (Act 120 of 1998)*? If so, was the consent freely given? Did he conclude a section 7(6) of *the RCMA* contract requirement with Ngema and the other three wives? If so, what was the content of the contract? When the above questions are raised with him, he speaks of his customary marriages and his traditionalism with great pride and maintains that his marriage matters are private (Parker, 2012). His refusal to answer the public concerns is an indication that he might not have concluded a section 7(6) of *the RCMA* contract requirement with Ngema as required by *the RCMA*. If this is true, it is an embarrassment to the country and the black majority of South Africa that the head of state is found to be violating the provisions of the marriage laws which he is expected to uphold.

3.7 DIVORCE

Divorce is the legal ending of a marriage. According to Robson (2009:9) divorce is 'to leave one's marriage partner'. The above definition does not clearly differentiate between spouse separation and legal divorce. Qualifying it he states that an absolute divorce is the one that 'completely and permanently dissolves the marital relationships and terminates marital rights (as property rights) and obligations (as fidelity)'. Similarly, Munroe (2003:9) defines divorce as 'the physical and legal termination of a marital vow that was intended to last forever'.

The above definitions indicate that divorce is devastating and affects almost every area of one's life, which according to Walther (1992:34) includes relationship, finances, physical surroundings, personal identity, home, health, family and social situation. Many scholars rank divorce as the number 2 life crisis after the death of a spouse.

Robson (2009:9) distinguishes amongst three different forms of divorce, stating that there is 'an absolute divorce that is based on either spouse's fault, divorce that is usually granted on the grounds of an

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irretrievable breakdown, and divorce that comes as a result of the husband and wife having lived apart for a statutorily specified period of time'.

He further cites the following as the most common grounds for divorce: 'absence from the marital home, drug or alcohol addiction, adultery, cruelty, conviction for a crime, desertion, insanity, and non-support'. On the other hand, couples may decide to end their marriages for simple and basic reasons some of which), as follows:

> *they stop loving each other; they lose interest in being married; they don't make enough effort within the marriage and at some point decide that things are just not working out; they grow apart; they stop respecting each other; they have different needs; they fall in love with someone else; they are unfaithful; they stop talking to each other; they stop having sex;-they stop doing things together; they become emotionally disconnected; they forget about balance and, with this, forget that they have a family; they believe that they are unhappy within the marriage and that things will be better once they are divorced or they feel abused within the marriage- whether emotionally, physically or mentally' (Robson,2009:9).*

A marriage may end as the results of varied factors. Some marriages end as the result of some disastrous event, life happening or emotion that has caused the marriage to completely break down. Some end as the results of drug or alcohol abuse, sexual difference or preferences, infidelity, physical violence, difficulties with the balance of power, money problems, children and in-laws.

Biblically, Munroe(2003:95) states that 'in all of the commandments, statutes and civil regulations handed down to Moses by God, there is no provision specifically set out by God giving grounds for divorce. The only thing Moses dealt with was how to protect the helpless wife when her husband walked out on her'.

This means that in the law regulating Israelites customary marriages, God did not make provision for divorce. It is said that divorce was a decree from God's servant Moses, meaning that is it was Moses' idea or plan to ensure that there was peace in families and the Israelites nation at large (Munroe,2003:95). Thus divorce was never part of the original plan of God. Jesus having been cornered by Pharisees regarding divorce replied that 'Moses permitted you to divorce your wives because your hearts were hard.

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But it was not this way from the beginning. I tell you that anyone who divorces his wife, except for marital unfaithfulness, and marries another woman commits adultery' (Matt 19:8-9). This means that Jesus mentions marital unfaithfulness as the only ground for divorce. He seems to consider the ground for divorce applicable to the husband to the disadvantage of the wife.

From the above it is evident that indeed divorce is devastating. Seemingly, it creates more problems than it solves. Many scholars rank divorce as the number 2 life crisis after the death of a spouse. From the foregoing discussion on divorce, it is evident that divorce is impossible without marriage. This suggests that marriage should precede divorce. Thus marriage is a requirement for divorce (Munroe, 2003:10). Normally, no one marries simply to get divorced (Robson, 2009:9).

Divorce was a rare occurrence in the African marriage (Radcliffe-Brown and Forde, 1975:51). According to Julian and Kornblum (1995:348), divorcees, especially women, were regarded by the society as social outcasts, and no one wanted to be regarded as such. If the couple had marital problems, they would invite elders of their family to intervene and mediate. Depending on the magnitude of the marital crisis, the elders of the clan and the traditional leadership would also be involved in trying to keep the marriage from falling apart. The elders would prevail on the husband to treat his wife with passion and respect, while the woman would be warned to honour and be submissive to her husband (Ogbonnaya: 2009). This means that the family and community concepts might have had an impact on the reduction of divorce in African culture. Mamashela and Xaba (2003) argue that 'there was no divorce under customary law'. They indicate that where there was irreconcilable differences between the husband and the wife, the husband instead of divorcing his wife, would simply stop giving the wife conjugal rights and take another wife. The importance of the extended family, including grandparents, aunts and uncles, must be recognized for the purposes of maintaining marriage stability and prevent divorce (Robson, 2009:9).

Radcliffe-Brown and Forde (1975:51) say that, 'an African man marries because he wants children. The most important part of the value of a woman is her child- bearing capacity'.

This means that in the African culture, children are an integral part of a marriage and incapacity to bear children is viewed from a cultural perspective as a curse. In such circumstances, both families, that of the husband and that of the wife would do everything within their power to ensure that children are born in

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the family (Radcliffe-Brown and Forde 1975:51).

As a mechanism to avoid divorce under customary law, traditionally there is a pre-marital initiation school which youth should attend without fail. The initiation school normally consists of different phases that youth should progress from one phase to the next in line with their age. In the initiation schools, boys and girls are taught many aspects of life which are related to marriage and social life in general. Amongst the many lessons they are taught, girls in particular are taught how to avoid teenage pregnancy, handle future husbands and ways of learning to cope with pressures of marriage. They are also warned of the pitfalls and dangers that they are likely to come across during the course of their marriage life (Spencer, 1985:64).According to Stayt (1931:112), in the initiation school boys and girls are taught to understand the 'true' significance of marriage from the cultural perspective. Virginity is held in high esteem in the African culture.

These previous studies on divorce just illuminate the concept of divorce but do not deal with the intricate issues that this study addresses. In particular, they do not show the exact impact of *the RCMA* on divorce.

3.8 SOUTH AFRICAN DIVORCE LAWS

Divorce laws differ from one culture to the other, with the exception of the Philippines where divorce is non-existent (Elterman, 2012).It is disheartening to learn that in South Africa, one in every two marriages ends in divorce (Cameron, 2004:221). Family relations specialists are concerned by the increase in the number of divorces in South Africa (Popenoe, *et al*, 2001:281). In South Africa, marriages can only end if there is a court order. In terms of the Divorce Act 70 of 1979, there are only two grounds for divorce that South African courts of law consider applicable to all three marriage laws, namely, 'the irretrievable breakdown of the marriage and the mental illness or continuous unconsciousness of one partner' (www.homeaffairs.gov.sa).It is interesting to note that one of the factors that is considered `irretrievable breakdown of the marriage` is lack of love between the partners *(www.edivorce.co.za).* This means that South Africa practises a "no fault divorce".

In instances where divorce is uncontested, couples can consider divorce online where they can access an online DIY (Do It Yourself) divorce service on the following website address: *(www.edivorce.co.za).* According to Julian and Kornblum (1995:341), divorce affects all segments of society, for example, schools and economic institutions. Other consequences of divorce that these researchers cite include the increase in the number of single people in the population, more complicated family relationships when

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divorcees remarry, and the issue of grandparents' rights to see their grandchildren after a divorce (Popenoe, *et al*, 2001:281).

The divorce process depends on whether the marriage is a civil marriage or a customary marriage. Civil marriages are dissolved according to the rules and procedures set out in the Divorce Act (Act 70 of 1979) while marriages in terms of Customary Marriages Act 120 of 1998 are dissolved according to the civil law, but some of the consequences are determined by the tradition. Civil marriages and marriages in terms of the Customary Marriages Act are similar in that a court of law must issue a divorce order and the divorce will only be granted if there are grounds for it (that is irretrievable breakdown, mental illness or continuous unconsciousness) *(Divorce Act (Act 70 of 1979)).*

3.9 CONCLUDING OBSERVATIONS

Marriage issues have been dealt with extensively by different scholars. They approached the institution of marriage from different perspective including amongst others, the Western cultural perspective and the African cultural perspective. They view marriage in the Western culture as an event that primarily concerns the two individuals, a groom and a bride, who base their marriage on romantic love. Marriage in the African culture is viewed as communal and primarily concerns the families. Under African marriages law, marriages are arranged by parents for their children for different reasons. Some of the reasons behind the arrangement of marriages by parents are evident in their Literature books. Some of the arrangements are irregular while other are regular. Interestingly, both forms of marriage proposals are accepted. With the coming into force of *the RCMA*, customary marriage practices are regulated. The regulation seems to have brought some misunderstandings in some sectors of the community regarding some provisions of *the RCMA*. This is evident in court cases where one realises that even people of high political status are found to have violated some of the provisions of *the RCMA*. They seem not to understand when for instance, customary law divorce has to be dealt with according to rules and procedures set out in the Divorce Act (Act 70 of 1979).

Previous studies on marriage and divorce just illuminate the concepts but do not deal with the intricate issues that this study addresses. In particular, they do not show the exact impact of *the RCMA* on divorce. This study investigates the impact of *the RCMA* on the prevalence of divorce. It does this by exploring marriage as an institution which precedes divorce.

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RESEARCH DESIGN AND METHODOLOGY FOR MARRIAGE PRACTICES IN SOUTH AFRICA: A CASE STUDY AMONG THE VHAVENDA IN THE VHEMBE DISTRICT

4.1 INTRODUCTION : DEFINITION OF RESEARCH DESIGN

De Vos (1998:81) defines a research design as

…the plan or blueprint, according to which data is to be collected.

This means that a research design is a general plan which indicates how the research is set up, what happens to the participants and which methods of data collection the researcher is going to use.

According to Gray (2009: 131), a research design describes three things, namely,

a) Methods that the researcher is going to use for collecting data;
b) Approaches that the researcher is going to use for selecting samples; and
c) How the data are going to be analysed.

This study is a mixed-method design in that both qualitative and quantitative data were collected to investigate the marriage practices of the Vhavenḓa in the Vhembe District and the impact they have on the prevalence of divorce in the district.

4.2 METHODOLOGY FOR COLLECTING DATA

It is required of every researcher to collect data using one or more techniques which Neuman (2000:35) categorises into two groups as quantitative and qualitative. Quantitative design collects data in the form of numbers while qualitative method collects data in the form of words (Macmillan and Schumacher, 2006:26). This means that the quantitative design approaches social phenomena through quantifiable evidence and the qualitative design approaches social phenomena through communication with participants.

The choice of method depends on what the researcher intends to investigate. In this study, the researcher intends to investigate the relationship between the marriage practices and the divorce prevalence within the Vhavenḓa in the Vhembe District. The research concerns human beings' interpersonal practices, i.e. marriage practice and divorce prevalence. This is a type of mixed method research in that the quantitative portion of the study will be used to expand on the

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qualitative findings; but the emphasis will be on the qualitative portion (Macmillan and Schumacher, 2006:403).

The researcher engaged in communication with the participants to obtain data. According to Leedy (1993:37), a research of this nature constitutes a qualitative research design. The researcher therefore employed qualitative design to collect data from married and once married Vhavenḓa citizens in the Vhembe District by means of interviews. This instrument allowed the researcher to motivate the participants to participate spontaneously, and to stimulate them through probing and steering them tactfully towards the research topic (De Vos, 1998:90). An interview schedule (guide) consisted of closed-ended questions as well as the open-ended questions. Open-ended questions allowed the participants to express themselves freely (De Vos, *et al*, 2007: 296). The researcher also made use of a questionnaire instrument to collect data. This instrument allowed the researcher to gather data that did not need probing. The researcher also took related works of other scholars into consideration for qualitative data collection.The researcher also used the quantitative design as there was a need to obtain the statistical breakdown of the distribution of the two variables (marriage practice and divorce prevalence) in order to determine how one influences the other. (De Vos, *et al,*2007:71).

4.3 SAMPLING AND SAMPLING METHODS

According to Babbie (1992:142), sampling is the process of selecting a manageable subset of a population. A population here refers to the entire group that the researcher is intending to investigate (Neuman, 2000:100). It means that a sample consists of elements of the population. The researcher studies the sample in an effort to understand the entire population from which it was drawn (De Vos, *et al*, 2007:194). He actually analyses statistics derived from the sample in order to draw inferences regarding the whole population. According to Erickson and Nosanchuk (1983: 128), there are two types of sampling, namely, random and non-random sampling.

Random sampling is a process in which every unit in the population has a chance of being selected for the sample. It includes simple random sampling, systematic sampling, stratified sampling, cluster and stage sampling. Non-random sampling is one in which some units in the population have no chance of being selected in the sample. It includes purposive sampling, quota sampling,

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convenience sampling and snowball sampling (Babbie, 1992:144)]. Random sampling process is central to social research and is preferred over non-random sampling (Babbie, 1992:144)].

In this study the researcher used simple random sampling to select a manageable subset of the community because it is the process which afforded everyone an equal chance of being selected for participation in the study. The target population consisted of all married and once married Vhavenḓa in the Vhembe District. The sampling frame (i.e. the actual list of sampling units from which a sample is selected) was the record list from the traditional leaders of the married or once married Vhavenḓa in the Vhembe District at least 24 months before the enactment of *the RCMA.*

The researcher randomly selected 30 Venḓa villages for sampling. The researcher then arranged with the traditional leaders of each of the 30 sampled villages to organise a meeting of all married and once married persons whose marriages were "registered" with the traditional leadership to his kraal. From the traditional leader's kraal the researcher distributed the designed participation information sheet to all gathered, and read from one of the participation information sheet, interpreting, amongst others, the aims and objectives of the research study as well as the moral principles (code of ethics) which guide research study to the villagers. The researcher then randomly sampled3 participants who each was handed a questionnaire to complete and return at an agreed date and venue. The purpose of the questionnaires was to collect primary data. Questionnaires allowed the researcher to gather data that did not need probing. On an agreed date the researcher returned to the agreed venue to collect completed questionnaires and conduct interviews. All the interview sessions that the researcher engaged in with the participants was tape-recorded. By using the tape recorder, the researcher ensured having the details of what would have been said (Hitchcock and Hughes, 1995: 170).

Regarding the recorded data of the Vhavenḓa couples in the Vhembe District that were married in terms of the Customary Marriages Act 120 of 1998 after its enactment, the researcher approached the Department of Home affairs for the records. From the same ministry, the researcher also got data regarding the divorces granted in the previous 24 months. The above was conducted to obtain the statistical breakdown of the distribution of the two variables (marriage practice and divorce prevalence) in order to determine relationship between them (De Vos, *et al,* 1998:71).The

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quantitative portion of this study was used to expand on the qualitative findings(Macmillan and Schumacher, 2006:403).

4.4 DATA ANALYSIS

Once data have been collected, it is important to locate those data in the overall context and aims of the study. Only then can the researcher start analysing them. How we analyse data depends on what we want to know (Hitchcock and Hughes, 1995:172). De Vos (1993:129) distinguishes amongst three factors which influence the analysis of data:

a) The number of variables being analysed;
b) The level of measurement of the variables; and
c) Whether we want to use data for descriptive or inferential purposes.

4.5 METHODS OF DATA ANALYSIS

According to de Vaus (1993:129), the number of variables the researcher wants to analyse, falls amongst the following three types of methods of data analysis:

(a) Univariate (one variable) method.
This is the method which is used where the researcher wishes to analyse one variable of the sample.

(b) Bivariate (two variables) method.
This is the method which is used where the researcher wishes to analyse two variables of the sample.

(c) Multivariate (many variables) method.
This is the method which is used where the researcher wishes to analyse more than two variables of the sample.

In this study, the researcher was interested in two variables, namely, marriage practice and frequency of divorce. The researcher therefore used the bivariate method of analysis to investigate the concept of relationship between marriage practice and divorce prevalence. The relationship was based on how marriage change and divorce prevalence simultaneously change.

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4.6 LEVELS OF MEASUREMENT OF THE VARIABLES

Any variable consists of two or more categories (De Vaus, 1993:129). In this study, marriage is a variable with the following categories: practice before the enactment of *the RCMA* and practice after the enactment of *the RCMA.* Divorce is a variable with the following categories: divorce before the enactment of *the RCMA* and divorce after the enactment of *the RCMA*. Finally, the way to estimate divorce was to identify the percentages of married couple who got divorced over the specified periods of time, which is the previous 24 months.

Data obtained would be used for inferential purposes to the entire Vhavenda married and once married members of the community.

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CHAPTER FIVE

CUSTOMARY LAW MARRIAGES

5.1 INTRODUCTION

This chapter generally considers customary marriages. It examines the requirement for a valid customary marriage as well as some of the practices that characterizes traditional customary marriages like bride price or *lumalo*. It also exposits divorce as an aspect of traditional marriage. This it does within the lenses of customary law.

5.2 UNDERSTANDING CUSTOMARY MARRIAGES IN SOUTH AFRICA

Marriage is one of the fundamental institutions that the African society has cherished since time immemorial. For that reasons there exists practices that have been followed for a long period of time, most of which have acquired the status of customs and have received recognition in law as such. Some of these practices include the process and procedure of entering into a marriage, what the marriage entails as well as the procedure for coming out of marriages. As a matter of fact, the most developed aspect of customary law actually relates to issues of marriage.

In South Africa there are many tribes, namely: the Tswana, the Swazi, the Tsonga, the Ndebele, the Xhosa, the Zulu, the Pedi, the Sotho and the Venḓa. Each of these tribes has a peculiar marriage practice. However, some of the practices cut across all cultures. A silent example is the payment of bride price. This section of the thesis therefore reflects on the customary law marriage of the Vhavenḓa before the coming into force of *the RCMA.*

It is noteworthy that some of these practices have been modified by phenomena such as religion and the change in the political orientation of the country. As noted in the theoretical chapter, Christianity has modified the manner in which some of these practices are undertaken. There also has been a significant change in some of these practices occasioned by political changes, one of which includes the enactment of law to give effect to the constitution. *The RCMA* defines customary marriage as the marriage which is 'negotiated and entered into or celebrated in accordance with customary law of the particular tribe'.

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According to Maluleke (2012: 11), customary law marriages are mostly prevalent in the rural areas where communities are strongly committed to traditional norms and practice. This chapter discusses the position of customary marriage in terms of the customary law with reference to the South African ethnic groups.

5.3 REQUIREMENTS FOR ENTRY INTO A VALID CUSTOMARY MARRIAGE

A valid customary law marriage must comply with certain requirements. These requirements include capacity, consent, and bride price ceremony. This section now proceeds to discuss these requirements one by one.

5.3.1 Capacity

For any parties to enter into a marriage under customary law they must have the capacity to do so. Capacity has two requirements. The first is the capacity to marry or to get married, and the second is the capacity to marry each other. Regarding the first one, there is no stipulated age at the attainment of which somebody would have the capacity to marry. For a man he must at least be capable of taking care of a family, while a woman should be capable of bearing children and undertaking domestic chores. Some communities prepare their children for marriage through the initiation ceremonies that are intended to make them 'mature' (Spencer, 1985:64).

Regarding the second requirement, the people who propose to marry each other must have the capacity to marry each other. People would be said not to have the capacity to marry each other if for example, they are close relatives or if there exists a feud between the families. Regarding the capacity to marry each other, Herbst and du Plessis (2008:20) state that 'each community had their own rules pertaining to the prohibited degrees of relationship'.

Some communities would not allow blood relations to marry one another while others would not allow people of the same tribe marrying one another. If there exists an enemity between the two families they will ordinarily not allow their children to marry each other. When circumstances arise when they have to marry each other, it would take the form of reuniting the two families which have problems.

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5.3.2 Consent

Consent is another requirement for a valid customary marriage. Most of the time this would be the consent of the parents, particularly the fathers of the prospective spouses. A customary marriage will be invalid if the consent of the parents is not sought or obtained, or where it is obtained by fraud. Most of the time, the consent of the parties themselves is not relevant, even though in the current society there has been a modification of this custom in that the consent of the parties is always considered.

In customary law there are practices which do not have room for consent of a woman, for instance, customary law marriages. In terms of the customary law the validity of marriage is not based on the free and voluntary consent of the partners but on the arrangement of their families. In many African communities, parents would choose and arrange marriages for their children without seeking their consent (Bennett, 2008:199). This means that family consent is generally required for a customary marriage to be valid. As marriage proposals are initiated by the grooms' family in many African communities, at least the consent of the bride's father is essential for a customary marriage to be valid (Olivier, 1995:19).

Initially, the consent of the girl did not matter at all. There were instances where they were dragged into marriages without their consent. In some instances, they were even traded for gifts or favours, or even food in extreme circumstances. Girls are sometimes viewed as a source of wealth. Thus, they could be married off at an early age without their consent so that money can be reealised. When the husband of a woman died there are instances when she would be forced to enter into a marriage with a male relative of the husband.

In conclusion, while consent is generally a requirement, it was biased as against women. Without consent however, a customary marriage would be invalid.

5.3.3 Bride price (*lumalo*)

There are diverse and divergent opinions regarding the real meaning and function of *lumalo*. *Lumalo* is a term which is used to denote the property in cash or in kind, 'which a prospective husband or the head of his family undertakes to give to the head of the prospective wife's family in consideration of a customary marriage' (Government Gazette No 120 1998).

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Bennett (2008:220) defines *lumalo* as a term used to denote a transfer of property, preferably livestock by a bridegroom' family to the bride's family as part of the process of constituting a marriage. In other words, *lumalo* is a marriage payment that the groom has to pay in order to marry the bride. According to Higgins, et. al. (2006:19), *lumalo* is a very widely practiced custom across ethnic groups and enjoys widespread support. As an institution, *lumalo* is 'central to the African conception of marriage' (Higgins, et. al, 2006:23). Communities have different practices pertaining to the payment and nature of *lumalo* which should be taken into account in disputes pertaining to customary marriages.

Lumalo is an institution that does not constitute a purchase and sale transaction where the husband can purchase and sell the wife like when he purchases and sells a vehicle (Kunene, 1995). *Lumalo* is not to be equated to a dowry system that exists in other societies. According to Radcliffe-Brown and Forde (1975:46) the dowry system does not exist in Africa.

According to Bennett (2008:229) one essential feature which validates a customary marriage is the payment of *lumalo.* This is supported by Wanjohi (1999) who says that customary marriage is characterised by the payment of *lumalo.* This means that *lumalo* is an integral part of a customary marriage through which legal customary marriages are established. According to the Report on Customary Marriages: Project 90, '*lumalo* is the language that the ancestors understand and bless'.

This means that with the payment of *lumalo* comes the blessing of the marriage from the ancestors. *Lumalo* is a requirement which is negotiated by the two families when they arrange and organise marriages for their children. When negotiating, the two teams need to agree on the *lumalo* that the groom has to pay in order to marry the bride. In the case of *Chali v Rasello, 683/2011, [2011] ZAFSHC190*, Judge Rampai says the following with regard to marriage negotiations which include *lumalo* agreement:

> *When a young man is interested to marry a young woman, his parents customarily send a delegation to the young woman's parents to formally convey the young man's proposal, to negotiate "bohadi", to formally establish relations and to cement the ties between the two families. Once a date for the meeting has been agreed between the respective parents, the young woman's parents customarily invite selected relatives on the side of the young woman to join the young woman's parents during the negotiations.*

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Since African cultures are diverse and varied, *lumalo* could consist of sheep, goats, cattle, or any other property as agreed to by the two negotiating families (Olivier, 1995:24). Traditionally, African peoples' wealth is determined by the number of cattle they own, hence cattle were mostly used for payment of *lumalo*. Cattle are a highly treasured asset. According to Bennett (2008:224), cattle serve as the currency in many customary social relations. What a wife is worth differs from culture to culture. According to the Zulus, Xhosas and Swazis, a daughter of a commoner is worth 10 heads of cattle and 15 for the daughter of a chief (Bennett, 2008: 225). According to Bennett (2008: 225), over and above the prescribed heads of cattle, there are many other gift formalities that the bride's team receives on behalf of the bride's parents from the groom's team. The gift formalities are aimed at the welfare of the parents of the bride (Radcliffe-Brown and Forde 1975:185). In the case of marital disputes, the two families (the groom's family and the family of the bride) and traditional leadership are compelled to intervene if the marriage negotiations had taken place regarding the *lumalo.* It is the duty of the bridegroom's father to pay *lumalo* for his son's marriage. On the other side, it is the duty of the bride's father to receive *lumalo* payment (Bennett, 2008: 228). Mothers have a muted role in the whole process of customary law marriages. Since the payment of *lumalo* validates a customary marriage, the following section considers the importance of *lumalo*.

5.3.3.1 Importance of *lumalo*

5.3.3.1.1 It is a token of appreciation to the in-laws

Lumalo is considered as a gesture of gratitude on the part of the groom's family to the bride's parents for bearing and rearing a wife for them. Higgins, *et al,* (2006:23) giving a typical contemporary explanation of the importance of *lumalo* state that it 'involves compensating the bride's family for the loss of a daughter reflecting in large part the expenditure on her upbringing and education'.

The payment of *lumalo* should not be looked at as a commercial transaction where women are regarded as goods that have been paid for. Though the bride's family 'loses' their daughter to the husband's family for the purpose of bearing children and extending the husband's clan, she still remains the daughter of her parents and sister to her brothers and sisters.

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This means that a girl is thus not a commodity to be disposed of (Bennett, 2008:223). In some communities, like the Lobedu, *lumalo* received by the bride's family, can be used to obtain a bride for her brother. In such an instance, *lumalo* serves as a compensation or indemnity to the bride's parents for a loss of a member (Radcliffe-Brown and Forde 1975:53).

5.3.3.1.2 It builds and binds the relationships between two families

Lumalo is a unifying force which builds, binds and cements the relationship between the bride's and groom's families. According to Wanjohi (1999), *lumalo* 'is a means of keeping the relations between the two families alive and strong'.

This means that without *lumalo*, marriage relationship between the families are loosely held. In other words the union of the groom and the bride is in terms of customary marriage not recognised as a marriage by their respective families. In some communities, the bridegroom's ideal partner is the daughter of a maternal uncle, that is, cross-cousins are encouraged to marry. In such an instance, the *lumalo* payment serves to strengthen the family relationship that already existed between a brother and a sister.

5.3.3.1.3 It gives the groom's family rights over children

According to Olivier, *et al*, (1995:35), the primary importance of the payment of *lumalo* is to transfer the reproductive capacity of the bride to the family of the bridegroom. This means that *lumalo* entitles the father and his family to claim rights to any children born to his wife during marriage. According to Bennett (2008:285), 'if obligations under agreement have been fulfilled, the husband and his family are entitled to any children born to the wife.

This means that in case of the husband's death, children's custody is with the husband's family if *lumalo* obligations have been met. Regarding the custody of children, Tshwaranang Legal Advocacy Centre (TLAC) states that the wife has 'no custody over her own children even after her husband's death'.

In addition, Olivier, *et al*, (1995:35) state that from a customary legal perspective,

> *the marriage is only complete if the woman has fulfilled the expectation of bearing a sufficient number of children, ...including one or more sons to provide for an heir and to*

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continue her husband's lineage...and on the other, when the commitment to transfer the lumalo has been fully satisfied.

This means that over and above the expectation of giving birth, a woman whose *lumalo* has been paid for is expected to also ensure that she gives birth to the sons who are going to remain with the family name since daughters are likely to be married and lose the family name.

Regarding the family's rights over children, Higgins, *et al,* (2006: 24) note that 'the payment of *lumalo* may create a sense of entitlement on the part of the husband and his family to the labour of his wife'.

As it is with the patriarchal system, the mother's family has no rights of custody to children.

5.3.3.1.4 It ensures parental intervention in times of marital crisis

Conflicts in a marriage are inevitable. The collapse of a marriage or divorce as a result of conflicts leads to an embarrassment to both families. *Lumalo* ensures family support and intervention in order to save the marriage from collapse in times of marital crisis. Regarding family support in times of marriage crisis, Herbst and du Plessis (2008) state that although communities have different practices pertaining to the payment and nature of *lumalo*, generally '*lumalo* is taken into account in disputes pertaining to customary marriages'.

Problems in a marriage would often be discussed with both families and solutions devised (Radcliffe-Brown and Forde, 1975:65). Decisions of the family are to be implemented as such by the couple and without delay. According to Higgins, *et al*, (2006:23), *lumalo* 'emerges as the fulcrum for family control over marriage decisions'.

It means that the spouse's decisions are not final unless authorised by the family, more particularly the husband's family.

5.3.3.1.5 It gives the father the legal custody of the children

Lumalo gives the father an absolute legal right to the custody of children in case of divorce. According to Radcliff-Brown and Forde (1975:80), the "possession of children is determined by the

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marriage payment". This means that even if the children's best interest would better be achieved if custody is granted to their mother or any member of the mother's family, custody of the children has to be granted to the father because of *lumalo*.

5.3.3.1.6 It gives the husband's family a right over the wife

Where *lumalo* obligations have been fulfilled, the death of the husband does not terminate a customary marriage. The husband's family ordinarily has a right over the wife. This means that the widow continues to be a wife in her late husband's family. She is supposed to marry a brother of her late husband because of the payment of *lumalo* (Mbiti, 1990:140). The husband's family must provide a brother to the widow (Olivier, *et al,* 1995:8).

According to Higgins, *et al*, (2006:24), *lumalo* may 'also encourage another traditional practice, marriage by substitution or widow inheritance, in which the widow is encouraged or forced to marry her brother-in-law'. It means that the in-laws make explicit reference to *lumalo*, claiming that since *lumalo* had been paid for her, she must remain with the, and she is theirs. Upon the death of her husband she is not free to remarry. As indicated above she is supposed to marry one of her brother-in-law. Even children born to the brother after the death of the husband are considered by the family as the deceased's children.

5.3.3.1.7 It discourages divorce

Report on customary marriages: project 90 states that 'if a wife seeks a divorce, her family is theoretically obliged to return *lumalo*…'

The return of *lumalo* upon divorce by the wife's family to the husband's family, of course subject to who between the husband and the wife is guilty, makes it hard for wives to exit from customary marriages.

Regarding *lumalo* repayment, Higgins, *et al,* (2006:24) state that 'the threat of her family having to repay *lumalo* may discourage an unhappy or abused wife from leaving a marriage'.

This means that a wife in customary marriage may be discouraged from leaving a marriage realising that her natal family would not be able to make *lumalo* repayments. If she attempts to

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leave the customary marriage, and her family is unable to repay the *lumalo*, the family may force her to go back to her husband without even taking into considerations what she is going through (Herbst and du Plessis, 2008).

5.4 CHILDREN AS AN ESSENTIAL FEATURE OF A CUSTOMARY MARRIAGE

Reproduction is needed for the survival of the human race (Mbiti, 1990:139). Marriage in terms of the customary law is meant mainly for procreation. According to Radcliffe-Brown and Forde (1975:51), 'the most important part of the value of a woman is her child-bearing capacity'.

This means that failure by a woman to bear children is, in terms of the customary law, regarded as having failed the marriage in its purpose. For that purpose customary law of marriage allows the husband to take additional wife who would fulfill the customary marriage expectations. In some societies they consider bringing in her sister as an additional wife specifically to come and bear children for her elder sister who is not capable to do so.Mamashela and Xaba (2003) cite an example of one husband who had to marry another wife because his first wife did not have children. They argue that the husband could have either divorced her or address his first wife's problem, but instead chose to find another wife. This shows the importance of children in customary marriages.

Regarding the number of children, Olivier, *et al,* (1995:35) states that 'the marriage is only complete if the woman has fulfilled the expectation of bearing a sufficient number of children …including one or more sons to provide for an heir and to continue her husband's lineage…'

This means that there is a number that the family considers sufficient that a wife should give birth to. It suggests that giving birth to one child may not be considered as having contributed sufficient number of children to the lineage of the husband. Amongst the children that she gives birth to, there should be at least a boy who would maintain the family name since girls are always bound to be married and shed the family name. From the above deliberations it is evident that customary marriages law considers women as the most important party in a marriage. If the marriage does not work out to the expectation of the customary law in terms of procreation, the blame is upon the wife rather than the husband.

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Though it might seem as if customary law is not taking into consideration any factors from the side of the husband which could be contributing to the wife not to be able to bear children, such as the husband's impotency and sterility, provisions are there to cover up for him. Among certain communities, including the Venḓa, the Pedi and the Tswana, it is customary, in those circumstances, to procure the services of another male to procreate children on behalf of the impotent husband (Olivier, *et al*, 1995:35).

As a way to ensure that marriage would fulfill its obligation of procreation, some traditional communities prepare their children through the initiation ceremonies. It is during those ceremonies that they detect at an early stage if their children are not able to procreate. For example, in terms of the customary marriages law, boys and girls are generally considered ready for marriage at puberty (Bennett, 2008:203).

According to De Wet, *et al*, (2010:147), puberty 'is the stage when it becomes possible for girls and boys to have children'.

Sex characteristics that appear during puberty in boys and girls are as follows:
Boys: testicles and penis (sex organs) get bigger.
Girls: vagina and uterus (sex organs) get bigger; breasts develop; menstruation starts and hips become wider.

5.5 DEVELOPMENTAL PHASES THAT CHILDREN UNDERGO IN INITIATION SCHOOLS TO ENSURE CHILD-BEARING CAPACITY

Customary law does not prescribe age as a requirement for a valid customary marriage. It simply requires that both prospective spouses must have at least attained or reached certain physical development stages or phases (Olivier, 1995:7). There are pre-marital initiations schools that boys and girls need to attend. There are initiation schools that are established for girls only, and those that are established for boys only, as well as 'combined' initiation schools that are established for both sexes. Girls are taught many things, including how to avoid teenage pregnancy where emphasis is on abstinence from sexual activity and maintaining their virginity until they are married. Virginity is held in high esteem in customary law (Tyrrell and Jurgens, 1983:134). Emphasising the importance of virginity, Mbiti (1990: 138) says that "virginity symbolises purity not only of the body but also of

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moral life; and a virgin bride is the greatest glory and crown to her parents, husband and relatives". Girls are also taught how to handle future husbands and ways of learning to cope with pressures of marriage (Mbiti, 1990:126). In the initiation schools, both boys and girls are warned of the pitfalls and dangers that they are likely to come across during the course of their marriage life (Spencer, 1985:64). In essence, boys and girls are taught to understand the 'true' significance of marriage from the cultural perspective. In addition to the pre-marital initiation schools that boys and girls need to attend, boys also have to undergo certain initiation ceremonies which include circumcision in some communities before they can be considered eligible for marriage (Olivier, 1995:5).

This means that customary law focuses on the basic functionality of the reproductive systems of the prospective spouses.

5.6 PROCEDURE FOR ENTERING INTO A MARRIAGE

5.6.1 Negotiations for marriage

A customary marriage is a process which is accomplished by a series of rites and negotiations which take place over a period of time. The negotiations are between the grooms' family and the family of the bride. These negotiations are an essential element of the validity of the customary law marriage. This means that any union between a male person and a female person which has not been entered into through negotiations between the two families, is in terms of the customary law, not a customary marriage. As cultures are diverse, there are many customary marriage formations. Since marriage formations differ in different ethnic groups, the following sections discuss marriage proposals cited by many scholars.

5.6.1.1 Regular procedure for marriage proposal

Different customs are observed in finding partners for marriage. It is believed in customary law that potential problems that men and women encounter in marriage can be avoided if proper care is taken in the selection of appropriate partner. This belief justifies the parents' involvement in the selection and making of all the customary law marriage arrangements. Around the initiation period which coincides with puberty, the parents of a boy identify a girl whom they want their son to marry (Mbiti, 1969:135). Once a prospective wife has been identified, the groom's parents appoint a team of negotiators, technically called marriage guardians that engage in the formal process of negotiations with the bride's family on their behalf. The team consists of, as is usually the case, the father's male relatives. The team is mandated to approach the parents of an identified girl and ask

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for their daughter's hand in marriage to the son (Bennett, 2008:210). In some South African communities, the choice of a girl may be made even before she is born. In such an instance, the parents of a boy make a request to the household where there is an expectant mother for the child to be born in the event that it is a girl (Gibbs, 1963:561). The team then embarks on a series of visits to the identified girl's family. One important feature of a customary marriage which is negotiated during the visits is the payment of *lumalo*. The omission of any step in the procedure for negotiating a marriage vitiates the marriage proposal and makes it irregular (Bennett, 2008: 212). Apart from the processes involved in negotiating regular marriage proposals, there is an irregular marriage proposal which may take different forms. This section now proceeds to discuss some irregular marriage proposals. Such irregular marriage proposals include the following: girl's family identifying a future husband for their daughter, kidnapping and eloping. Each irregular marriage proposal shall be discussed briefly.

5.6.1.2 Irregular procedure for marriage proposal

Irregular marriage proposal may take different forms. It may take the form of a girl's family identifying a future husband for their daughter and begins with the marriage negotiations. This procedure is followed, for example, in cases where a girl has some physical disabilities. In such a case, the arrangement is for the disabled girl to be married to her relative, preferably her cross-cousin who is the son of her father's sister (Radcliffe-Brown and Forde, 1975:54).

Another example involves a girl from a high ranking family, like a chief's daughter. Her family could identify a future husband for her and start with the marriage negotiations. Usually the identification is limited to boys from the royal families. This is done to strengthen the relationship as well as to ensure support in times of war (Bennett, 2008:212). We shall now proceed to discuss other common forms of irregular proposals in customary marriages which are kidnapping and eloping.

5.6.1.2.1 Kidnapping or abduction

Another form of irregular marriage proposal is kidnapping commonly referred to as abduction. This is a practice where the bridegroom and his party ambush and snatch a bride when she is out fetching fire wood or water. If the bridegroom's father approves the action, he sends a delegation to the bride's parents to let them know where their daughter is. As a ritual, the delegation carries with

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them some valuables that they give to the girl's father as admission of guilt. The valuables also serve as a token that the bridegroom is prepared to marry her. After advising her family of her whereabouts, the formal processes of marriage proposal would begin. If the bridegroom's father does not approve the action, he would command that she be sent back to her family. In such unlikely instance, he will have to pay a fine for damages (Mbiti, 1990:144). According to (Bennett, 2008: 212), some of the reasons behind abduction act are to:

(i) force her parents, particularly her father to give his consent,

(ii) avoid full observance of the formalities of a regular proposal,

(iii) avoid making an immediate payment of *lumalo,*

(iv) hasten the marriage process where the girl is already pregnant,

(v) show how serious the bridegroom is.

5.6.1.2.2 Eloping

Eloping is another form of irregular marriage proposal. This is a practice through which, for instance, a girl's marriage has been arranged by her parents to a man, while she has her own arrangement with another man. She could decide to run away from home with her private man to escape from the arranged marriage. In another instance, a married woman may leave her husband unceremoniously to go and stay with another man she loves. The two live together as a husband and wife. The 'new' husband gives back the *lumalo* to her family which will eventually be transferred to her former husband through the relevant channels (Bennett, 2008: 212). This is supported by Radcliffe-Brown and Forde (1975:325) who say that:

> *if she goes to stay with another man, her new mate becomes liable, not only for the payment of damages to the husband on account of adultery, but also for refunding to her matrilineal kinsman the amount of the marriage payment which the latter is required to restore to the husband.*

5.7 REGISTRATION OF CUSTOMARY MARRIAGES

Under customary law, marriages are not actually registered per se. They are instead made known to the traditional leader through the relevant channels of communicating. With regard to the purposes of registering a customary marriage, making a customary marriage known to the traditional leader can be equated to registration of customary marriages provided for by *the RCMA*. The traditional leader keeps a record of all married couples and their families within his jurisdiction. 'Registration'

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of a customary marriage brings with it a number of advantages. First, upon 'registering' a customary marriage, the husband as the head of the family is entitled to arable land as well as a residential site. The husband is expected to plough the land and produce food to feed and maintain his family. Second, by registration the couple is assured of legal protection in terms of the customary law. This means that in instances where a dispute relating to marriage arises and is brought before the customary court, the traditional leader is compelled to address it since the marriage is known to him by 'registration'. Third, when a dispute arises regarding the existence of the customary marriage, it is 'verified by referring to the evidence of go-betweens and family elders and the public rituals of negotiation and consummation' (Bennett, 2011). This suggests that proof of the existence of a customary marriage is not in the marriage certificate as it is with common law marriages, but in the people who witnessed it, who can be called to come and give evidence. Failure to 'register' a marriage with the traditional leader does not invalidate a customary marriage. It instead, makes the couple lose the benefits that accompany 'registration' of a customary marriage.

5.8 RIGHTS AND DUTIES OF SPOUSES

Under customary law, the husband is the head of the family and the wife is under his guardianship (Bennett, 2008: 231). As the family head, he owns all family property in his home and has control over the property attaching to the house of his wife (The KwaZulu Act on the Code of Zulu Law 16 of 1985). Since he is in charge of the family property, he has full capacity to use, loan, exchange, buy, donate and sell the property, to enter into contracts and to take a case to court. He is furthermore not obliged to require assistance or permission from his wife to acquire or dispose immovable property.

On the other hand, under customary law, the wife has no contractual capacity (Olivier 1995:5). This means that she cannot enter into a contract without her husband's permission. Regarding the status of women under customary law, 'Tshwaranang Legal Advocacy Centre' (TLAC) states that the position of a woman married under African customary law is similar to that of a minor child. She has no legal capacity before the customary law. This suggests that she does not have the capacity to use, loan, exchange, buy, donate and sell the property, and to take a case to customary court. For her to initiate a complaint, she needs the assistance of her husband. If a case involves her husband, she needs to be assisted by a senior male family member to bring it to court. She is only allowed to

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attend customary court proceedings when she is party to a case. In a nutshell, customary marriage does not provide for the equal status and capacity of the spouses. When there is a major decision to be taken by the husband, be it about property or the family, he would rather consult senior male family members than his wife.

5.9 PROPRIETARY CONSEQUENCES OF CUSTOMARY MARRIAGES

In terms of the customary law, men in South African communities have control over family property as they hold positions of authority. It follows therefore that under customary law, a husband has absolute control over matrimonial property. The control and ownership of such property vests in him as the family head. Upon dissolution of the marriage by divorce, the husband takes the matrimonial property while the wife gets virtually nothing. TLAC states that upon divorce, the woman 'would not own any property resulting from the marriage.'

If the dissolution of the marriage is as the result of the husband's death, TLAC states that the wife is not allowed to inherit property from her husband. The patrilineal system principle dictates that the matrimonial property control should be inherited by his eldest son. The justification of this principle is that male children maintain the family name while female children are always bound to be married and abandon the family name (Radcliffe-Brown and Forde, 1975:181). In a nutshell, a married woman does not have independent individual property rights in customary law. She has familial rights that are at her husband's discretion. She does not even have a say in the administration of the property. She was traditionally regarded as a property herself. A wife's inferior or unequal status in marriage continues to manifest itself in cases such as when a husband wishes to marry another wife. He has no obligation to seek permission from her (Bennett, 2008:247). If at all he ever consults her, it is just for her information, not for her to have a different view. The wife on receiving the information about her husband's intentions may be forced to consent out of culturally instilled respect. She could also consent to avoid divorce or community censure. This means that the consent is not freely given.

5.10 DISSOLUTION OF CUSTOMARY MARRIAGES

In terms of the customary law, dissolution of customary marriages by divorce is almost unknown in that marriages are very rarely dissolved (Mbiti, 1990: 141). According to Radcliffe-Brown and Forde (1975:65), '*divorce is objected to because it is destructive...*'

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This means that in customary law, divorce is unwarranted. Marriages are rarely dissolved because of the following three reasons cited by some scholars:

(i) it is socially unacceptable for a woman to return to her natal home from a marriage, women are taught to persevere and marital problems are resolved through family discussion.

(ii) As a mechanism to discourage couples from divorcing, the Pedi Customary Marriage law prescribes a fine on anyone who wishes to divorce (Bennett, 2008: 266).

(iii) Other mechanisms by customary law to discourage couples from divorcing include imposing stringent grounds for divorce with very strict conditions that must be satisfied.

Although divorce is not common, grounds for divorce exist under customary law. These include witchcraft, sexual misconduct and long period of separation. We shall now proceed to briefly discuss them.

5.10.1 Witchcraft

According to the *New Dictionary of the History of Ideas (2004)* the concept, witchcraft, is defined by many social science scholars of Africa, as "an act of magic that results in harming a person or aspects of the material world on which he or she depends". In terms of the Mpumalanga Suppression of Witchcraft Draft Bill 2007, the concept witchcraft means '…the secret use of muti, zombies, spells, spirits, magic powders, water, mixtures, etc., by any person with the purpose of causing harm, damage, sickness to others or their property'.

This means that witchcraft practice is an act viewed as serious and no one would like to be its victim. Hence, great care is taken by the bridegroom's family in their selection of appropriate bride for their son. They would not want their family to be associated with a woman that practices witchcraft (Mbiti, 1990:142). Though the practice of witchcraft is serious, accusations of witchcraft against the wife by the husband can only be considered a sufficient reason for divorce if it is persistent and proven by a traditional doctor through the process of 'smelling out' (Bennett,2008:268).

5.10.2 Sexual misconduct

In terms of the customary law, it is generally accepted for a husband to have extra-marital affairs, while the wife is expected to remain faithful to her husband. This means that the husband's

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involvements in extra- marital affairs are not reason enough for the wife to complain and claim divorce. Customary law condones his behaviour (Bennett, 2008:268). Even the wife's occasional involvement in extra-marital affairs is not a sufficient reason for the husband to claim divorce. The husband can instead claim damages from his wife's lover through the customary court. This is supported by Radcliffe-Brown and Forde (1975:50) who say that *"...he may claim to be indemnified for the injury to his rights"*. The wife's sexual misconduct can only become sufficient reason for divorce if she stops her husband from charging her lover for damages, or if her behaviour persists (Bennett, 2008:268).

Writing about the Yako tribe of Nigeria, Radcliffe-Brown and Forde (1975:326) say, 'a wife can place no legal restriction on the sexual activities of her husband, but he is entitled to claim monetary compensation from a man with whom she has committed adultery, to divorce her, and receive back the marriage money.'

This means that the Yako community condones the husband's sexual misconduct while it condemns that of the wife. It gives the husband the absolute right not only to claim for 'damages' from the man that had sex with his wife, but also the right to divorce his wife as well as the right to reclaim the *lumalo* .

5.10.3 Desertion

Long period of separation as a reason for divorce differs from one culture to another. Among the Lozi tribe of Zambia, if a husband has been away for at least 3 years, his wife is entitled to a divorce (Radcliffe-Brown and Forde, 1975:182). This means that she can cite the long period of separation as a ground for divorce. Bennett (2008:269) has a different view regarding the long period of separation as a reason for divorce. He states that customary law recognises as a reason for divorce if spouses have been separated from each other for at least 10 years, irrespective of the reasons behind the separation. This means that whether the husband has been away on work-related commitment or the wife has been home for the purposes of discipline is of little importance. According to him, what matters is the length of the period of their separation.

In terms of the Zulu customary marriage, Radcliffe-Brown and Forde (1975:182) state that 'however long a labour migrant is away, his wife should not be divorced; she can bear children for him by his kinsmen or a lover'.

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This means that with the Zulus, a long period of separation cannot be considered as a ground for divorce by the customary court. The wife's infidelity in such a situation is not condemned but condoned. She can even go to an extent of bearing children with another man when her husband is away. If the husband comes back after a long period of separation and cites infidelity or illegitimacy of children as a ground for a divorce, the family as well as the customary court will not entertain him in that regard. This means that the wife is fully protected from divorce on the basis of desertion, even if it involved infidelity and illegitimacy (Mbiti, 1990:142). Regarding desertion of the wife by the husband, Mamashela and Xaba (2003) note state that 'in almost all the cases of desertion, the man had left the home and was cohabiting with either a girlfriend or a second 'wife'. This means that the loneliness that the wife at home feels is not felt by her husband since he is cohabiting with another 'wife'.

5.11 PROCEDURE FOR DIVORCE

It is much easier for a husband to initiate a divorce than it is for a wife. Customary law requires that the aggrieved spouse complains or registers his or her dissatisfaction and intentions to file for divorce with the senior family members, particularly the senior aunt (Olivier, *et al*, 1995:50). This customary procedure for obtaining divorce places the wife at a relative disadvantage in that she is not allowed to consult any member of her family before consulting her husband's family. Upon receiving the grievance, the aunt as a family consultant would first try to reconcile the spouses. If she fails to resolve the marital problem amicably, she takes the matter up with the senior members of the husband's family, who in turn would also try to reconcile the spouses. If they fail to resolve the spouse's marital problem amicably, the marriage guardians from both the husband's family and the family of the wife would be invited for intervention. If the marriage guardians from both families fail to reconcile the spouses, a further attempt to reconcile the spouses takes place before the customary court. If at this level, no amicable solution is reached, the customary court grants them permission to divorce. In such a situation, the husband's family would then organise a delegation to accompany the wife to her family (Radcliffe-Brown and Forde 1975:325). The customary court further facilitates the return of *lumalo* only if the wife is found to be the guilty party.

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5.12 UNIQUE ASPECTS OF VHAVENḒA CUSTOMARY MARRIAGES

The Vhavenḓa community of Vhembe, an African cultural group, has a peculiar cultural marriage practice. Parents have an obligation to ensure that their children are trained on how to become suitable marriage partners from a cultural perspective. This is done to ensure that their children meet all the societal expectations. For this reason parents send their children to cultural initiation schools. According to Blacking (1985), there is one initiation school for girls in Venḓa. It is comprised of three phases which are: *vhusha* (puberty rites for girls), *tshikanda* (secret initiation rites for girls), and *domba* (group rites as preliminary to marriage for girls). *Vhusha* is the first phase in the girls' initiation. Girls should attend vhusha immediately after their first menstruation. *Vhusha* could be held several times in a year at the headmen's kraal. At *vhusha* girls are introduced to marriage related laws which are meant to prepare them for their future roles as wives and mothers. *Tshikanda* is the second phase in the girls' initiation. At *tshikanda*, considerable time is spent practising the marriage related laws which were introduced during the vhusha phase. *Domba* is the third and final phase in the girls' initiation. It is the final qualification for Vhavenḓa customary law marriage. This phase is characterisesd by a special dance which symbolises the mystical act of sexual communion, conception, the growth of the foetus as well as the child-birth. According to Stayt (1931:112) *domba* 'stresses the value of institutionalised motherhood, with all the checks and balances necessary to maintain the stability of the social system. It is the dramatic final stage'.

Both *tshikanda* and *domba* are held at intervals of three to five years at the chief's kraal. In essence, girls progress from phase to phase; starting at an early age. There is also one initiation school for boys in Venḓa which comprises of two phases which are *murundu* and *thondo*. At *murundu* boys are circumcised while at thondo boys are trained in the self discipline, endurance, manners and tribal etiquitte. Each boy is expected to pass through thondo to attain manhood. Traditionally, only a girl that has been through the *domba (*group rites as preliminary to marriage for girls*)* ceremony is eligible for marriage. Similarly, only a boy who has been through the *thondo* (group rites as preliminary to marriage for boys) is eligible for marriage. If a girl has not attended *domba*, when suitors come to the family to propose for marriage, parents would reply on behalf of the girl that she should first attend the *domba.* In essence, a girl who has not attended this school is not fit to be married because she is considered to be still 'young'. The main aim for the establishment of

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customary initiation schools discussed above is to ensure marital stability and prevention of divorce.

Under Vhavenḓa customary law, marriage is not just an affair between two individuals, but also an alliance between two families. It is regarded as a sacred institution precisely because it involves the welcoming of a new member into the clan. For that reason, it cannot be left in the hands of an individual to decide, that is an individual may not choose his or her own partner for marriage. It is the responsibility of the head of the family to arrange and organise marriages for their children. The aunt (father's sister) in the family serves as both customary marriage overseer and a consultant. The two families, that of the prospective groom and that of the prospective bride, engage in the formal processes of negotiating on behalf of their children. If a male has reached a marriageable stage, he would report to the parents through acceptable ways of communication. If he comes with a suggested name, the parents would not just accept it. They will first send people to investigate the suggested name's parents that they would be looking at, whether she is from a good family or a family of parents who do not bewitch people. Another aspect is whether she behaves appropriately. If she is found lacking in these aspects, the parents will not allow the son to marry the girl. However, if they are satisfied with the family, they would send an intermediary to the girl's family to propose the girl for marriage. If he does not suggest a name, the parents will take some time to search among the local girls. If none of the local girls are suitable, the family will find out from relatives who are far away if they can make any recommendations.

In all their deliberations, they take the needs and desires of the two families into consideration, from a cultural perspective. They believe that the needs and desires of the family are the ideal basis on which to establish a lasting marriage. Romantic love is never considered important in marriage, as it is considered to be a Western culture. During the formal process of negotiations the families need to come to a mutual agreement regarding the *lumalo,* usually in the form of cattle, that the groom has to give (pay) the bride's parents. *Lumalo* is an age-old Tshivenḓa custom that brings the families together. It is a gesture of gratitude on the part of the groom's family for looking after and bringing up the young bride. Once *lumalo* is paid, the deal is sealed, the groom and the bride cannot object; they have to abide by their parents' arrangement. As indicated in chapter 5 of this study, that in customary law there are practices which do not have room for consent, more particularly of a

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woman, it follows that Vhavenḓa cultural marriage practice is one of those practitioners. This means that the bride's consent for a customary marriage is irrelevant.

An arranged marriage is, traditionally the only way to marry in the Tshivenḓa culture, and it is believed to ensure stronger and happier marriages than any other way. Since by marriage a new member is brought into the inner circle of the family, it means that relatives, more especially the parents have a stake in the person who is to become the spouse (Vander Zanden, 1990: 265). It is primarily the responsibility of parents to arrange marriages for their children. Marriages are arranged by parents for various reasons which include friendship, political, financial and cultural.

5.13 CONCLUDING OBSERVATIONS

Marriage is one of the most developed aspects of customary law. As customary law practices differ from one tribe to the other, so do customary marriages. However there are customary law marriage practices that are common to almost all the South African tribes. These practices include the payment of *lumalo* and patriarchal system of governance. Customary law marriages have to a significant extent being modified by amongst others, the change in political orientation of the country and religion, particularly Christianity.

Customary law marriage practices that have been hugely affected by the above cited phenomena are:

(i) The requirements for entry into a valid customary marriage which includes capacity, consent and payment of *lumalo*.
(ii) Children as the main purpose for customary law marriages is procreation.
(iii) Procedure of entering into and exiting a customary marriage.
(iv) Rights and duties of spouses.
(v) Proprietary consequences of customary marriages.

Dissolution of customary marriages by divorce is based on the assumption that one of the parties is proved to be at fault. It is actually a fault-based system of divorce. With the strict conditions attached to the grounds for obtaining divorce, it is relatively hard to obtain divorce under customary law.

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CHAPTER SIX

RECOGNITION OF CUSTOMARY MARRIAGES ACT (ACT 120 OF 1998)

6.1 INTRODUCTION

This chapter examines the need for codification of customary law. It considers *the RCMA* and examines amongst others, the extent to which *the RCMA* sets out requirements for a valid customary marriage, provides for the registration of customary marriages, gives legal recognition to both monogamous and polygamous customary marriages, provides for the status and capacity of spouses married in terms of customary law and regulates the manner in which a customary marriage may be dissolved.

6.2 CODIFICATION OF CUSTOMARY LAW

South African common law is based on Roman Dutch law and English law. This law is codified, meaning that the law is on paper. On the other hand there is South African private law, which includes customary law. Customary law is the living law and it is not generally codified.The majority of South Africans identifies and conducts their lives in accordance with customary law (Herbst and du Plessis, 2008).

Before the 1996 Constitution, customary law marriages were recognized subject to rules of natural justice and public policy. After the 1996 constitution, those rules were incorporated into the Constitution. The South African Law Reform Commission had to investigate the possible recognition of customary law marriages in the same manner as common law marriages. It succeeded in that *the RCMA* was enacted.

Sections 9, 15(3), 22, 25, and 31of the Constitution provide that the recognition of customary law marriages should be in the same manner as common law marriages. Herbst and du Plessis (2008) state that in the *Alexkor Ltd v Richtersveld Community* case, 'the Constitutional Court confirmed that customary law is part and parcel of South African law and that it should be regarded as such'.

This means that customary law should be considered like any other law in South Africa. But common law which governs common law marriages is codified, while customary law governing

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customary marriages is generally not codified. This suggests that the South African Law Reform Commission has a huge task, that of bringing customary law in equal footing with the common law, first by ensuring that customary law is also codified. Whoever wants to codify South African customary law should first consider reconciling the varied customary law practices of each South African tribe. To reconcile the varied customary law practices of all the South African tribes and come up with one customary law may not be simple in the following senses: First, each South African tribe has its own customary practice peculiar to it. Second, South African customary law is not static but evolves as the people who live by its norms change their life patterns. It means that customary law develops continuously and is continuously adapting to changing circumstances unique to Africa and, especially, South Africa (Herbst and du Plessis, 2008).

What it is today is not what it was 10 years ago. For instance, *lumalo* payment used to take the form of livestock, more particularly cattle, currently it is in the form of cash (Olivier, 1995:24). Third, customary law is based on the idea of community and communal rights. Taking into account the right to equality, dignity and freedom as enshrined in the Constitution, the South African Law Reform Commission at one point attempted to codify customary law, but failed (Herbst and du Plessis, 2008).

According to Herbst and du Plessis (2008), '… *customary law cannot be forced into a specific format that will fit into an individualistic human rights dispensation…*' In essence, this suggests that customary law cannot be codified. Thus, *the RCMA* definition of customary law is open-ended in that it does not explicitly state which customs and usages it is referring to as is evident in the following definition: 'customary law refers to 'the customs and usages which are traditionally observed and form part of the culture of the particular tribe' (Government Gazette No 120 of 1998). Though the enactment of *the RCMA* seems to have attempted to address the issue of codifying customary law marriages, it only succeeded marginally.

6.3 THE RECOGNITION OF CUSTOMARY MARRIAGES ACT (ACT 120 OF 1998)

In chapter 5 it was evident that a woman married under the African customary law is grossly discriminated against. Such discrimination is in violation of the 1996 constitution. For the purposes of improving the status of women married under customary law, customary marriages had to be given legal recognition. In chapter 3 of this study it was indicated that *the RCMA* was enacted in

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terms of section 15(3) of the Constitution of the Republic of South Africa Act (Act 108 of 1996) with the primary purpose of recognising customary marriages.

Customs differ between different ethnic groups, each with its own customary law. Traditionally marriages are conducted in terms of the customary law. This suggests that each ethnic group has its own customary law marriage practices. In order to accommodate all the varying customary laws relating to marriage practices, *the RCMA* was passed to:

> …make provision for the recognition of customary marriages; to specify the requirements for a valid customary marriage; to regulate the registration of customary marriages; to provide for the equal status and capacity of spouses in customary marriages; to regulate the proprietary consequences of customary marriages and the capacity of spouses of such marriages; to regulate the dissolution of customary marriages…

Section 1(ii) of *the RCMA* defines customary law 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…*'

Customary marriage, in turn, is defined in terms of section 1(iii) of *the RCMA* as '*a marriage concluded in accordance with customary law*'.

This chapter discusses the position of customary marriage in terms of the Recognition of Customary Marriages Act (Act 120 of 1998). Sections of the legislation are discussed individually, especially those which present challenges to the customary marriage and seem to have an impact on divorce.

6.3.1 Requirements for validity of customary marriages under *the RCMA*

Section 3 of *the RCMA* provides for the requirements for a valid customary marriage. These requirements set out by *the RCMA* must be complied with for a customary marriage entered into after *the RCMA* came into operation, to be valid. Section 3(1)(a)(i) of *the RCMA* requires that for a customary marriage to be valid the prospective spouses must both be above the age of 18 years. The minimum age requirement of 18 years for prospective spouses to customary marriage is based on the requirement stipulated in the African Charter on Human and Peoples' Rights of 1981(Herbst and du Plessis, 2008).

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In terms of section 3(3)(a), and section 3(4)(a), a child under the age of 18 years, who wishes to enter into a customary marriage must have parental consent and must obtain written permission from the Minister of Home Affairs to get married. This means that minors have to make an application to the Minister of Home Affairs to get permission to enter into a customary marriage. The Minister of Home Affairs, having considered the interests of the parties, may grant permission to a child under the age of 18 years to enter into a customary marriage. This means that a child under the age of 18 years who enters into a customary marriage without written permission from the Minister of Home Affairs circumvents *the RCMA*, and as such his or her customary marriage is invalid in terms of *the RCMA*. *The RCMA* is silent on the sanctions that should be meted out on minors who enter into customary marriages without the necessary written permission. Instead, section 3(4)(c) states that the Minister of Home Affairs, having assessed the interests of the parties as well as compliance with every other requirement of *the RCMA*, may declare the customary marriage of minors to be valid in terms of *the RCMA*. This means that failure by prospective spouses to observe section 3(1)(a)(i) does not attract any legal sanctions and the marriage may still be considered valid in terms of *the RCMA*. Failure by *the RCMA* to punish the offenders gives prospective spouses who are minors an opportunity to get married outside *the RCMA*.

In terms of section 3(1) (a)(ii) of *the RCMA*, the free and full consent of both prospective spouses to the customary marriage is required for the validity of a marriage. It means that both individuals to the marriage (at the time of the union) should agree to the marriage. This suggests that *the RCMA* explicitly requires permission of both individuals to the marriage.
This ensures that both prospective spouses enter into marriage out of their own free will, without coercion from anyone (Herbst and du Plessis, 2008). However, *the RCMA* is silent on how prospective spouses should give free and full consent. It does not state whether the free and full consent should be given in a verbal or written form.

Section 3(1)(b) requires that for a customary marriage to be valid, it '*must be negotiated and entered into or celebrated in accordance with customary law*'.

Section 3 gives two conditions for a customary marriage to be valid. Firstly, it provides that a negotiation in line with the customary law is a prerequisite for a valid customary marriage. Does this mean that *the RCMA* is aware of each ethnic group's customary marriage law? If not, there

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might be challenges when an issue arises from a particular ethnic group's customary marriage law which has to be dealt with from the provisions of *the RCMA*. For instance, the ruling of the Constitutional Court (in the matter between *Mayelane v Ngwenyama*, Case CCT 57/12, [2013] ZACC 14), illustrates that the judges were not fully aware of the customary laws that govern marriages in all ethnic groups of South Africa when they said that 'another problem is that we are not able to determine what the position in customary law systems other than the Xitsonga system is'.

Although South African marriage customs differ between different ethnic groups, almost all customary marriages are characterised by negotiations around issues which include *lumalo*. This section is unclear on whether the payment of a bride price is a prerequisite for the validity of a customary marriage. By implication this section suggests *lumalo* as a necessary prerequisite for a valid customary marriage. It should be stressed that currently, there is no ethnic group in South Africa which enters into customary marriages where *lumalo* is not a prerequisite to its validity.

Secondly, the section provides that besides negotiations, a customary marriage must be entered into in accordance with the customary law. In terms of the customary law, marriage is characterised by the payment of *lumalo* (Wanjohi: 1999). It is suggested later in this thesis that this section needs to be amended to categorically state that *a lumalo* negotiation *is* a prerequisite for a valid customary marriage.

6.3.2 Registration of customary marriages

Section 4 of *the RCMA* provides for the registration of customary marriages. Bennett (2011) notes that 'in modern society, married couples are more mobile and families and communities are less involved in their relationship. In these circumstances it is more difficult to establish the existence of a customary marriage'. Thus, there is a need for both existing as well as new customary marriages to be registered in order to facilitate proof of the existence of the customary marriage.

Section 4(1) of *the RCMA* requires that spouses to a customary marriage should register their marriage at the Department of Home Affairs. The marriage officer registers a customary marriage on condition that he or she is satisfied that a valid customary marriage exists or existed between the spouses (section 4(5) (b)).Upon registration, a certificate of registration of a customary marriage is issued by the registering officer (section 4(8)). In modern society, married couples are more mobile

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and families and communities are less involved in their relationship. In these circumstances it is more difficult to establish the existence of a customary marriage and, as the main purpose of registering the marriage is to provide proof that a customary marriage indeed exists. Registering their marriage benefits the spouses in case of any dispute that could arise about the validity of their customary marriage.

By registering their customary marriages spouses get legal recognition that allows them to get legal protection when they end the marriage by divorce or when the marriage ends by death. This means that without a marriage certificate, a spouse cannot apply for a divorce or claim against an estate in case of death. Failure to comply with the provisions of section 4(1) may merely deprive parties to the marriage of the legal benefits of a valid customary marriage.

Section (4)(9) states that failure to register a customary marriage does not render the marriage invalid. What does this provision actually mean? Does it mean that there is no link between registration of a customary marriage and its validity? Section 2(1) of *the RCMA* provides that 'a marriage which is a valid marriage at customary law and existing at the commencement of this Act is for all purposes recognised as a marriage.'

An unregistered customary marriage is not invalid, but the spouses may not benefit from the protection that *the RCMA* provides for. The wife in a customary marriage which is not registered has much to lose in the sense that she would not be able to administer her husband's estate, she may have no claim for maintenance against her husband's estate and she could lose her home to her husband's family. This provision of *the RCMA* gives legal recognition to all valid customary marriages, (be they polygamous and monogamous) that existed up until the commencement of *the RCMA*. This means that customary marriages which had been existing in terms of the customary law are recognised as such.

Section 2(2) of *the RCMA* provides that 'a customary marriage entered into after the commencement of this Act, which complies with the requirements of this Act, is for all purposes recognised as a marriage'. This provision gives legal recognition and protection in terms of *the RCMA* to customary marriages entered into after the commencement of *the RCMA*, provided they comply with the requirements of *the RCMA*. Maybe the question that arises is what happens if spouses to customary marriages

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entered into after the commencement of *the RCMA* fail to comply with the provision of section 4(1) of *the RCMA*? In terms of section 4(9), those marriages are valid, but the spouses may not benefit from the protection that *the RCMA* provides. Such marriages are regulated by section 7(2) of the RCMA which states that:

> *a customary marriage entered into after the commencement of this Act in which a spouse is not a partner in any other existing customary marriage, is a marriage in community of property and of profit and loss between the spouses, unless such consequences are specifically excluded by the spouses in an antenuptial contract which regulates the matrimonial property system of their marriage.*

This means that where the spouses fail to register a customary marriage after the commencement of *the RCMA*, they are in effect denying themselves an opportunity to choose the system that would govern their matrimonial property. In that instance, the default matrimonial property system 'in community of property' will apply to govern their marriage. In a nutshell, monogamous customary marriages are automatically 'in community of property unless the spouses enter into a contract stating otherwise.

Section 4(2) of *the RCMA* states that registration can be done by the wife or the husband. This section requires the registration officer to register a customary marriage even if one spouse is not physically present before him or her, provided all the information required is supplied. This could lead to problems in cases where a spouse decides to go and register a customary marriage without consulting the other. It may not be easy for the registering officer to detect the authenticity of the information given by one spouse. If the registration officer ends up issuing a certificate in the absence of the other spouse, in case of divorce, the other spouse usually a husband might refuse to acknowledge that there was ever a marriage. Recommendations in respect of this sensitive issue will follow at the end of this research.

6.3.3 Recognition of customary marriages: Effect of non-registration

The spouse who is most seriously affected by non-registration of a customary marriage is the wife. In the case of divorce, the husband may contend that there was never a marriage. In such an instance the wife would lose that which divorce was supposed to provide her. In the event of the

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death of the husband, the wife stands to lose the estate to her husband's family which might have an interest and deny the existence of the marriage for the purposes of their inheritance. In such an instance, the widow remains legally unprotected.

6.3.4 Customary marriage registration: Possible factors for non-registration

Failure to register a customary marriage may be attributed to many reasons. Some scholars cite the following possible reasons for the non-registration of customary marriages: distance and cost: spouses engaged in customary marriages who reside in remote rural areas might find it too expensive to get to the Department of Home Affairs for the registration of their marriages, some spouses might not have known that customary marriages are now recognised in terms of *the RCMA* and that registration is required, by the time the spouses become aware of *the RCMA* and that they need to register their customary marriage, the level of relationship might have already deteriorated to the point where one party or both have lost interest in marriage, the woman may not have the power in a relationship to persuade her husband to consider registering their marriage.

6.3.5 Status and capacity of spouses

Section 6 of *the RCMA* provides for the equal status and capacity of spouses married in terms of customary law. In terms of section 6, both the husband and wife have full status and capacity on the basis of equality subject to the matrimonial property system entered into which governs the customary marriage. This means that the full status and capacity on the basis of equality is enjoyed by those who choose 'In Community of Property' in profit and loss as their matrimonial property system to govern their customary marriage. Such spouses have equal capacity to buy, donate and sell property, to enter into contracts and to take a case to court. They both have full capacity to act and neither spouse is obliged to require assistance or permission to acquire or dispose of immovable property.

In the Constitutional Court of South Africa case *CCT 50/08, [2008] ZACC 23* in the matter between *Gumede v President of the Republic of South Africa &6 others,* Judge Moseneke with regard to the provisions of section 6 of *the RCMA* noted that 'the Recognition Act abolishes the marital power of the husband over the wife and pronounces them to have equal dignity and capacity in the marriage enterprise'.

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With this matrimonial property system, all the assets and liabilities which the spouses have will fall into the joint or communal estate of the two spouses. They own all property and other assets equally. They are also jointly and severally liable for all liabilities. *The RCMA* does not state registration of a customary marriage as a condition for the spouses to have equal status and capacity. This means that if spouses fail to register a customary marriage, the court will apply the default matrimonial property system which is 'in community of property' and of profit and loss.

6.3.6 Proprietary consequences of customary marriages and contractual capacity of spouses

Section 7 of *the RCMA* provides for the proprietary consequences of customary marriages and contractual capacity of spouses. The need for property division may arise in the event of death or divorce. The proprietary consequences of a customary marriage differ according to whether the marriage was entered into before or after the commencement of *the RCMA*. In terms of section 7(1) of *the RCMA*, the proprietary consequences of customary marriages in existence before the commencement of *the RCMA* continue to be governed by customary law. Currently there are three matrimonial property regimes in South Africa, which are 'in community of property', 'out of community of property' without accrual and 'out of community of property' with accrual. None of the above matrimonial property systems exists in customary marriage law. *The RCMA* is silent regarding what a customary law matrimonial property system consists of. Does section 7(1) mean that the customary marriages entered into before *the RCMA* should continue to be governed by the customary law regarding matrimonial property? It should be emphasised that customary law is in direct conflict with the Bill of Rights in that it strongly discriminates against women. In case of death or divorce, will it be proper to apply In Community of Property as the default matrimonial Property system?

Section 7(6) of *the RCMA* requires that a husband who wishes to enter into an additional customary marriage with another woman after the commencement of *the RCMA* must apply to court to approve a written contract which will regulate the future matrimonial property system of his marriages (i.e. the existing marriage and the prospective one). This section does not provide guideline regarding what the content of the contract should be. In the process of developing the contract, section 7(8) of *the RCMA* specifies that all interested parties have to be afforded an opportunity to participate. This means that the existing wife or wives and the prospective wife must be part of the whole process and should freely consent to the property settlement. Section 7(8) is

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silent on who the other parties (besides the existing and the prospective wife) to the written contract should be. Clarity is necessary regarding the wife in a customary marriage which is 'Out of Community of Property', whether she should be party to the written contract or not. Should the court in its consideration of the application find that the written contract does not adequately safeguard the interests of any of the parties involved, it has the right to turn down the application (section 7(7)(b)(iii)). The court seeks to ensure that the rights of all parties are protected in the course of the administration of the estate in case of death or division of the matrimonial property in case of divorce. In that light it may grant the request with a condition attached (section 7(7) (b) (ii)).

6.3.7 Dissolution of customary marriages

Section 8 of *the RCMA* provides for the dissolution of customary marriages. This section regulates the manner in which a customary marriage may be dissolved by a court of law.

In terms of section 8(1) of *the RCMA*, courts are given exclusive jurisdiction over the dissolution of customary marriages. This means that the dissolution of customary marriages falls under the jurisdiction of the Department of Justice and Constitutional Development. A customary marriage may only be dissolved by a court on the ground of the irretrievable breakdown of the marriage as contemplated in the Divorce Act 70 of 1979. In terms of the Divorce Act 70 of 1979, there are only two grounds for divorce, namely,

> 'the irretrievable breakdown of the marriage and the mental illness or continuous unconsciousness of one partner'.

It is interesting to note that one of the factors that is considered `irretrievable breakdown of the marriage` is lack of love between the partners. Divorce in terms of *the RCMA* can be considered as' no fault-based.' A 'no fault' system of divorce is relatively easier to obtain.

6.3.8 Concluding observations

The RCMA was enacted to regulate and harmonise customary marriage principles and guidelines with the requirements of the Constitution which is the supreme law of the country. The RCMA achieves all the above by specifying requirements for a valid customary marriage, regulating the registration of customary marriages, providing for the equal status and capacity of spouses, giving

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legal recognition to both monogamous and polygamous customary marriages and determining the manner in which a customary marriage may be ended.

One of the provisions of the RCMA which regulates the manner in which customary marriages may be ended stipulates that the marriage may only be dissolved by a decree of divorce issued by the court which applies the provisions of the Divorce Act 70 of 1979. The Divorce Act provides for two grounds of divorce which are the irretrievable breakdown of the marriage and the mental illness or continuous unconsciousness of one partner. The two grounds for divorce mentioned above make it relatively easier for a spouse to divorce as it can be considered a no-fault system of divorce.

Unlike the customary marriage law which is generally not codified, *the RCMA* is codified and this makes it relatively easier to keep it handy and always refer to when necessary.

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CHAPTER SEVEN

COLLECTION OF DATA, PRESENTATION AND ANALYSIS OF DATA

7.1 INTRODUCTION

The questionnaire used to collect quantitative data was developed by the researcher. The researcher and his assistant visited 30 villages including the townships from where they got 60 accurately completed questionnaires. 90 questionnaire forms were initially distributed to the potential respondents to complete with the promise of coming back on a certain agreed date and venue to recollect. After collecting the questionnaire forms from the respondents they checked each questionnaire for completeness and accuracy. They then codified the forms to be in line with the interviews to be conducted. Out of 90 questionnaire forms they had issued to the potential participants, only 60 were duly completed and accurate which gives 66,7% of respondents whose data was collected, analysed and interpreted. 11 questionnaire forms were incomplete and inaccurate, and were thus spoiled. In total 71 questionnaire forms were retuned which gives 78, 9% response rate. Of the total questionnaire forms distributed, 19 were not returned at all for reasons unknown to the researchers which gives 21,1% non-response rate. Thus the total number of questionnaire forms returned and the number of respondents interviewed is 60. This brings the response rate to 66, 7%.

7.2 QUANTITATIVE DATA PRESENTATION AND ANALYSIS

Data analysis was recorded under the following two categories: Biographical information and issues related to Recognition of Customary Marriages Act and divorce.

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GRAPH 1: AGE GROUP:



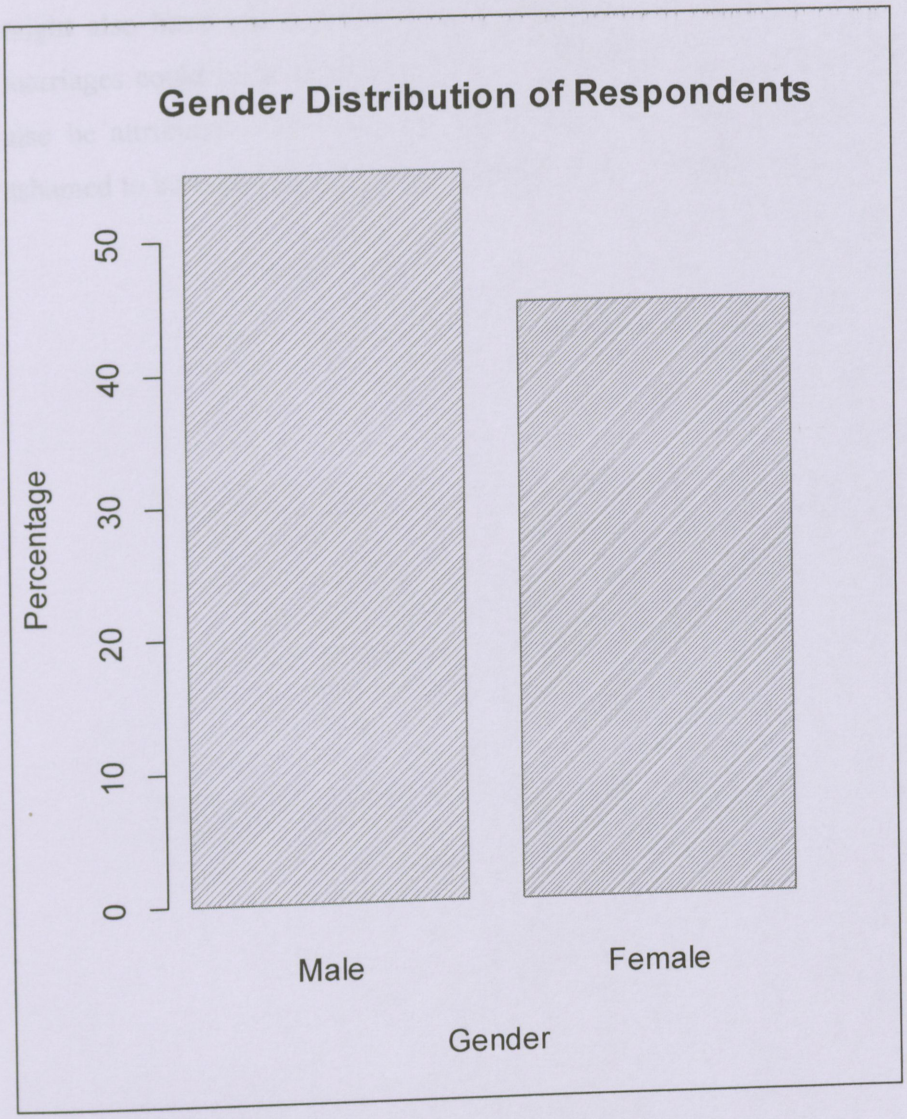
The graph shows that 93% of the total respondents are over 40 years of age. Only 7% of the total respondents are between 36 and 40 years of age.

The result shows that a very high percentage of respondents (93%) are over the age of 40 years, and this indicates the wealth of marriage life experiences that the respondents brought to the research.

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GRAPH 2: GENDER



The graph above shows that 55% of respondents were males. Fewer than 45% of respondents were females.

The above statistics indicate a direct opposite of what the woman population is which is 54,31% compared to 45,69% men in the Vhembe district (Census 2011 Municipal report, Limpopo, Report 03-01-57). The results could suggest that more males agreed to participate in this research than females. The low female participation ratio could be attributed to many factors, both intrinsic and extrinsic. They might have felt that they are less important compared to men as the Vhavenda tradition

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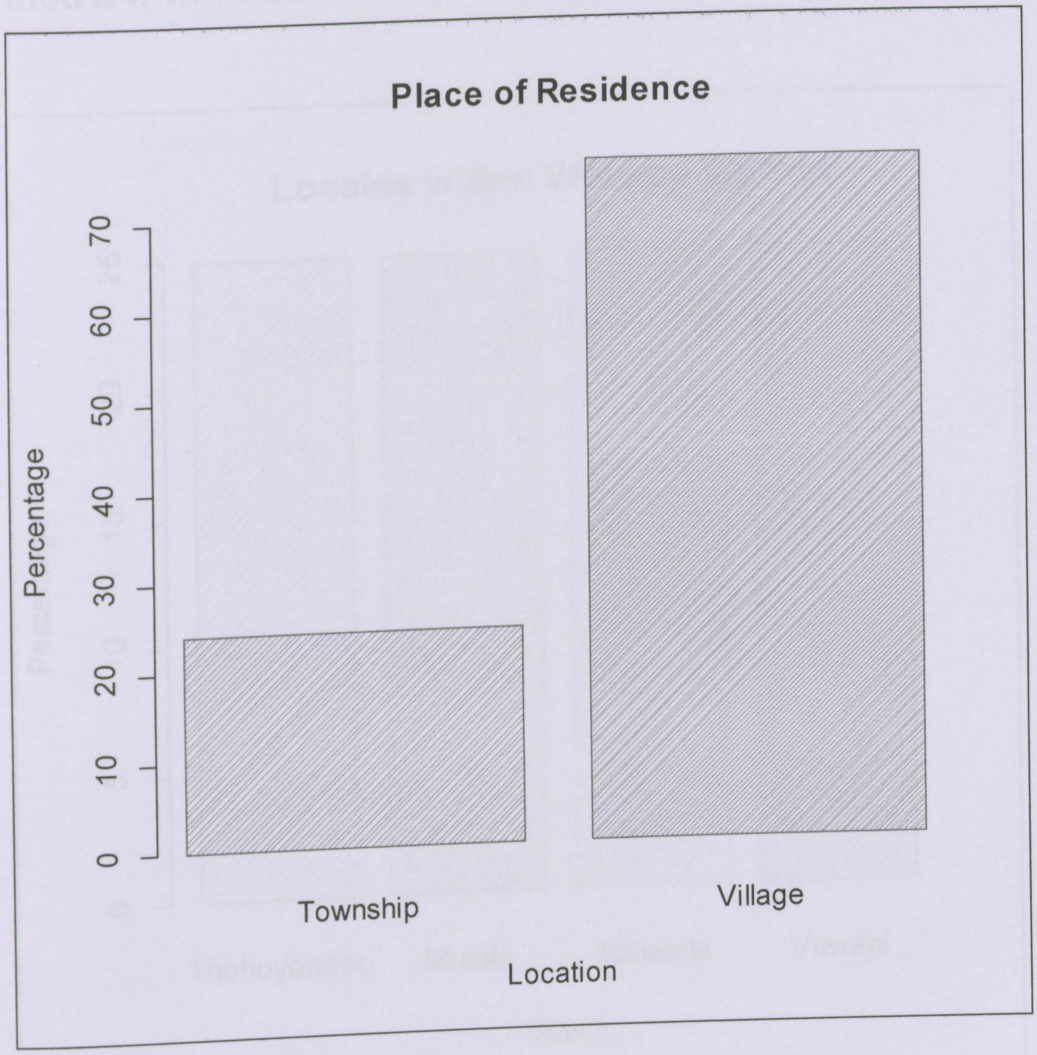
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dictates. It may also mean that they felt they should first seek permission from their husbands who they felt might not grant them permission to participate. Even though anonymity was promised they might also have had a fear that should their husbands find out what their responses are, their marriages could be jeopardized. The low percentage of female participation in the research could also be attributed to the fact that women are in terms of the Vhavenḓa tradition, nervous and ashamed to be asked about matters related to their marital status.

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GRAPH 3: PLACE OF RESIDENCE



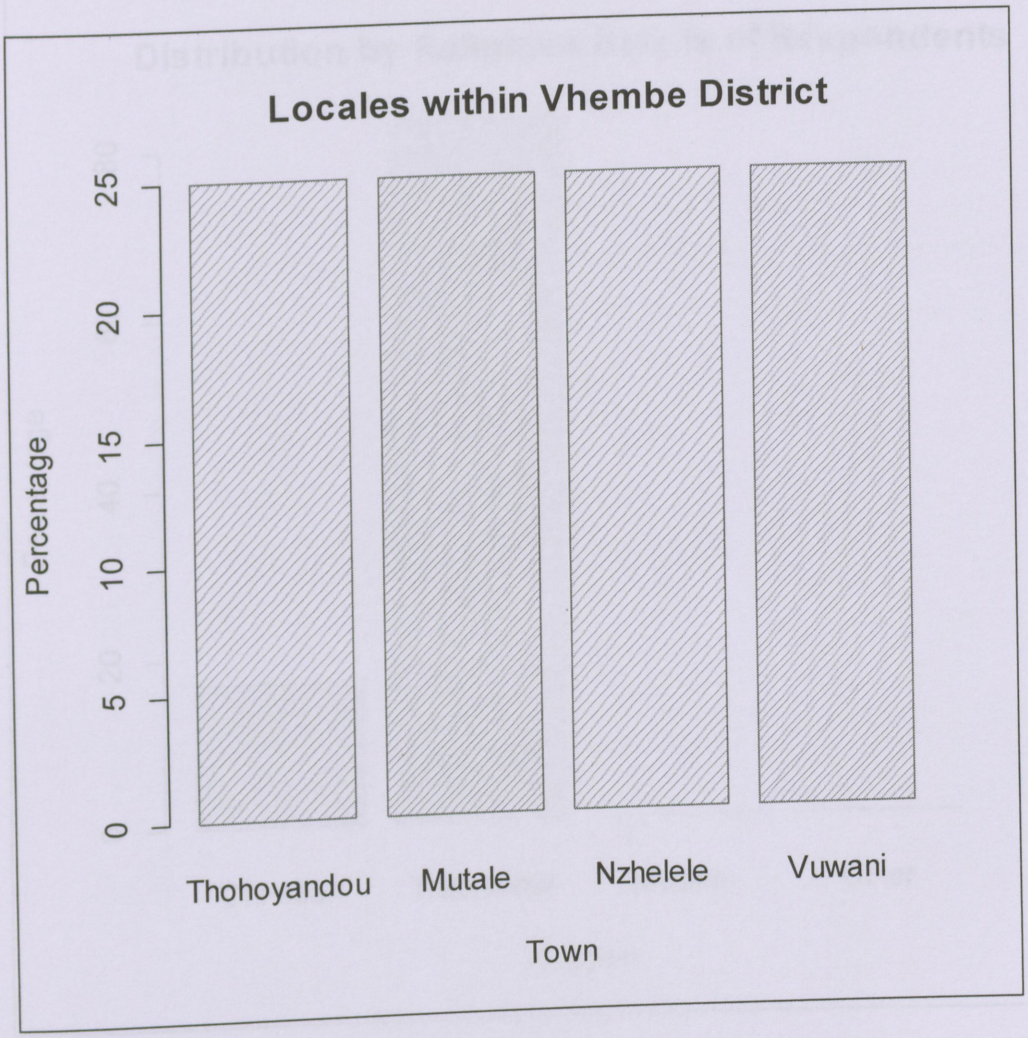
The graph above shows that 74% of respondents were from the villages of the Vhembe District. The rest 24% came from the townships of the Vhembe District.

In the villages residents are largely under traditional leadership. Traditional leaders play an important role in the lives of the people who stay in traditional communities. According to Mbalula (2010), traditional leadership plays an important role as custodians of the South African customs, which includes, amongst others, the transmission of cultural practices. It means the respondents' life is regulated to a large extent by the traditional leader and traditional structures. In the township, residents are not under the leadership of a traditional leader, but are under the leadership of modern civic organisations like the South African National Civic Organisation (SANCO).

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GRAPH 4: IN WHICH AREA OF THE VHEMBE DISTRICT DO YOU RESIDE?



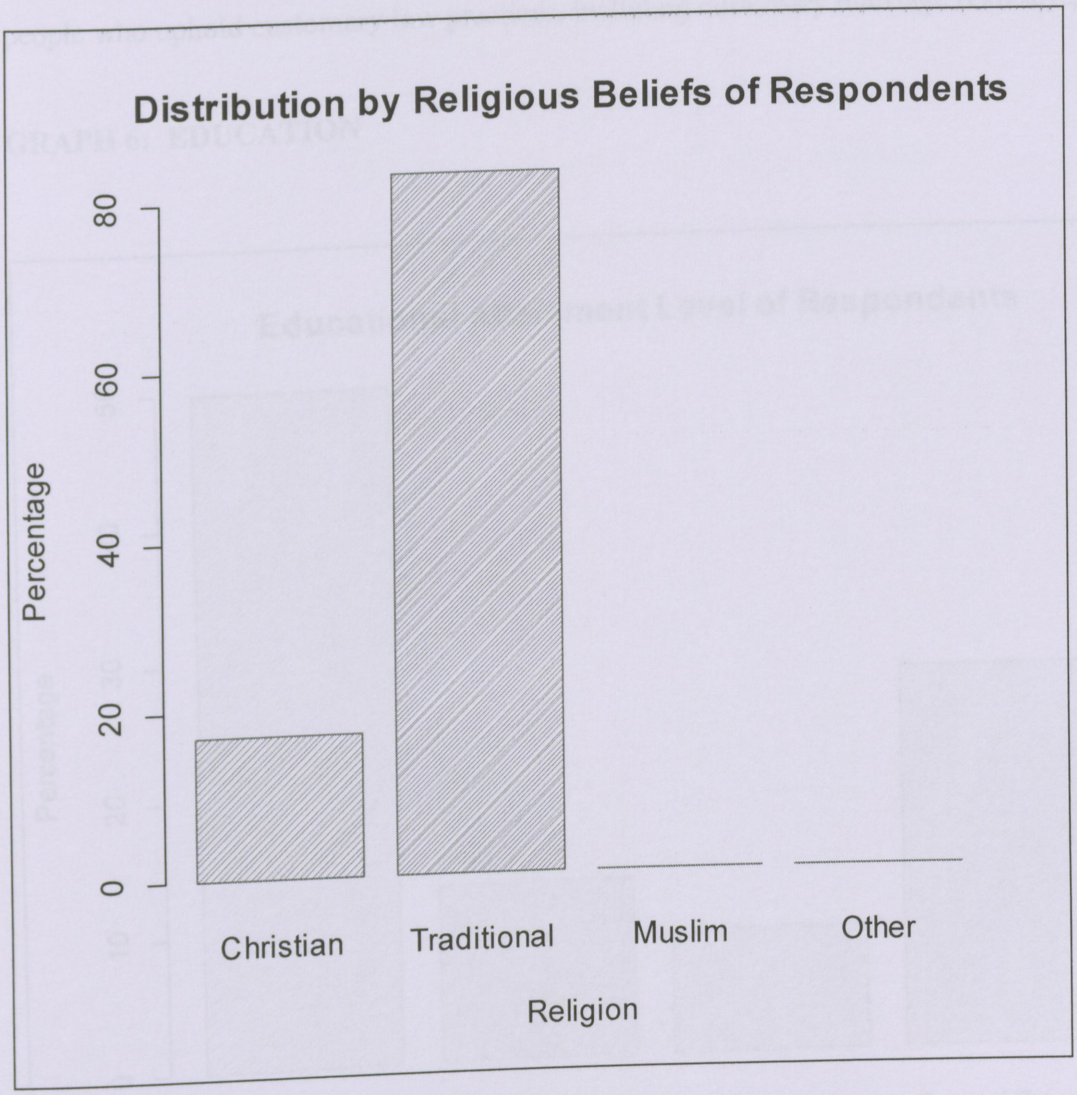
Vhembe district covers a geographical area that is predominantly rural. It is divided into four geographical areas which are Ṱhohoyandou, Mutale, Nzhelele, and Vuwani. The graph above shows that from each of the four geographical areas of the Vhembe District, 15 respondents were sampled.

The results show that each of the geographical areas of the Vhembe District was equally represented in the sampling.

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GRAPH 5: RELIGION



The graph above shows that 83% of the total respondents belong to the Traditional African religion. Only 17% belong to the Christian religion.

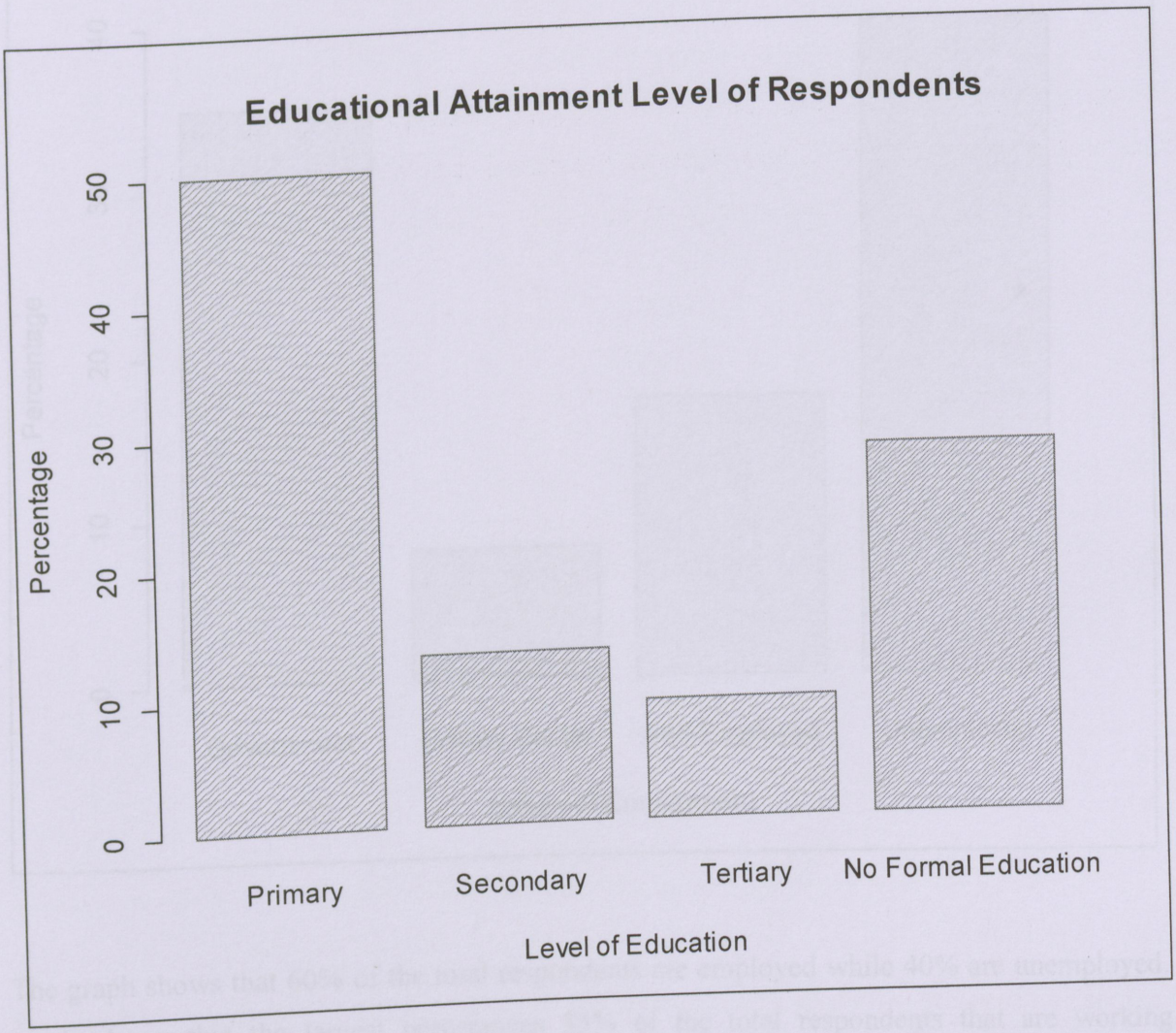
The results show the high percentage of the respondents who belong to the Traditional African religion which could have been influenced by the fact that it is the indigenous religion of the Africans. It is a religion that has been handed down from generation to generation by the forebears of the present generation of Africans. According to Mufungizi (2012), Traditional African religion "…is inculcated in the children at a tender age". He further indicates that for an African, Traditional African Religion is life.

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It means that it is an African culture's religion. Since Traditional African religion permeates all aspects of a traditional African culture it suggests therefore that the majority of the respondents are people who uphold customary law practices, including customary marriage (Omotoye, 2011).

GRAPH 6: EDUCATION



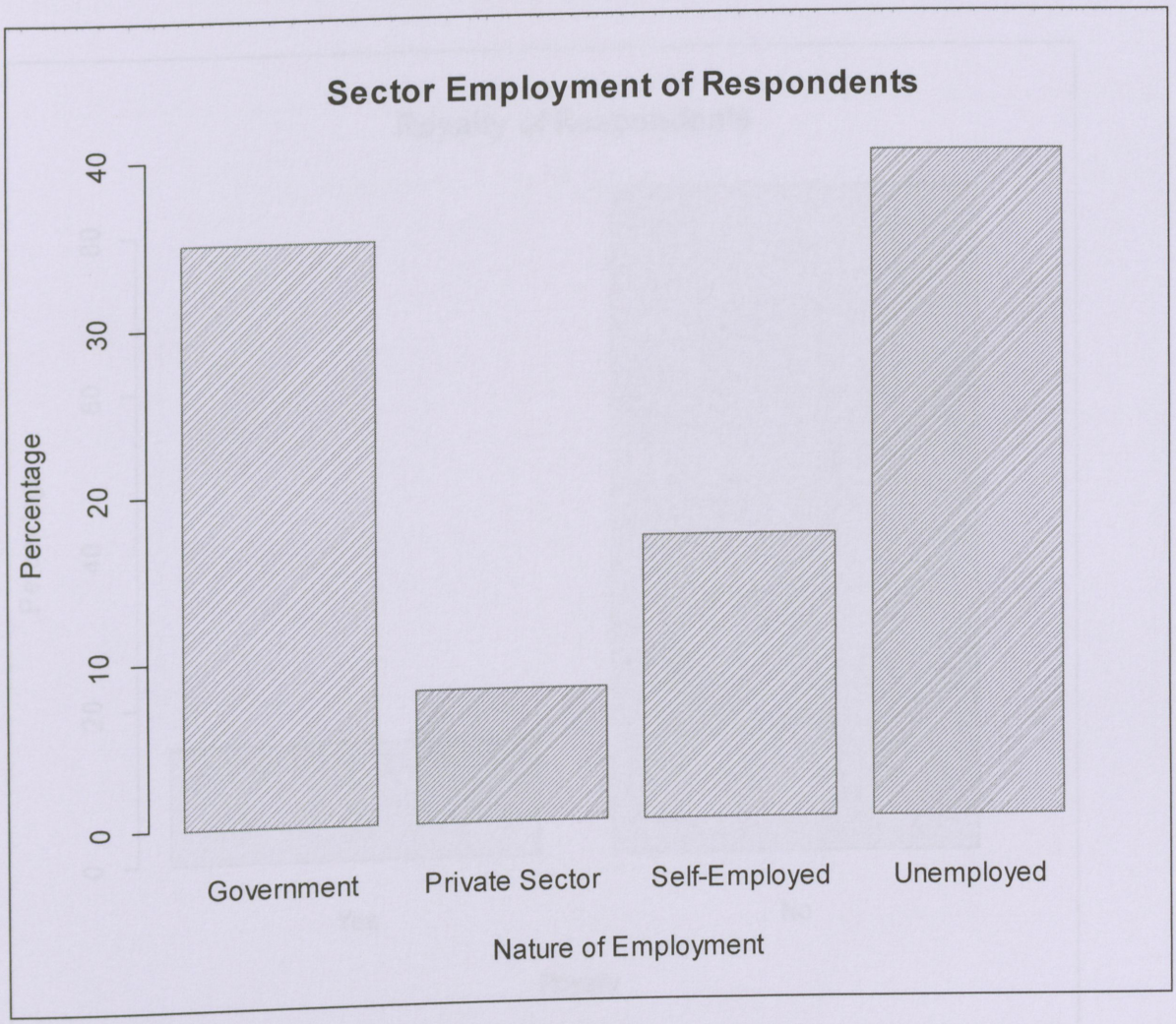
The graph shows that 72% of the total respondents have had a formal education whilst 28% never had any formal education.

The results show that most of the respondents are literate and would probably have a good understanding of the research aims and objectives.

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GRAPH 7: OCCUPATION

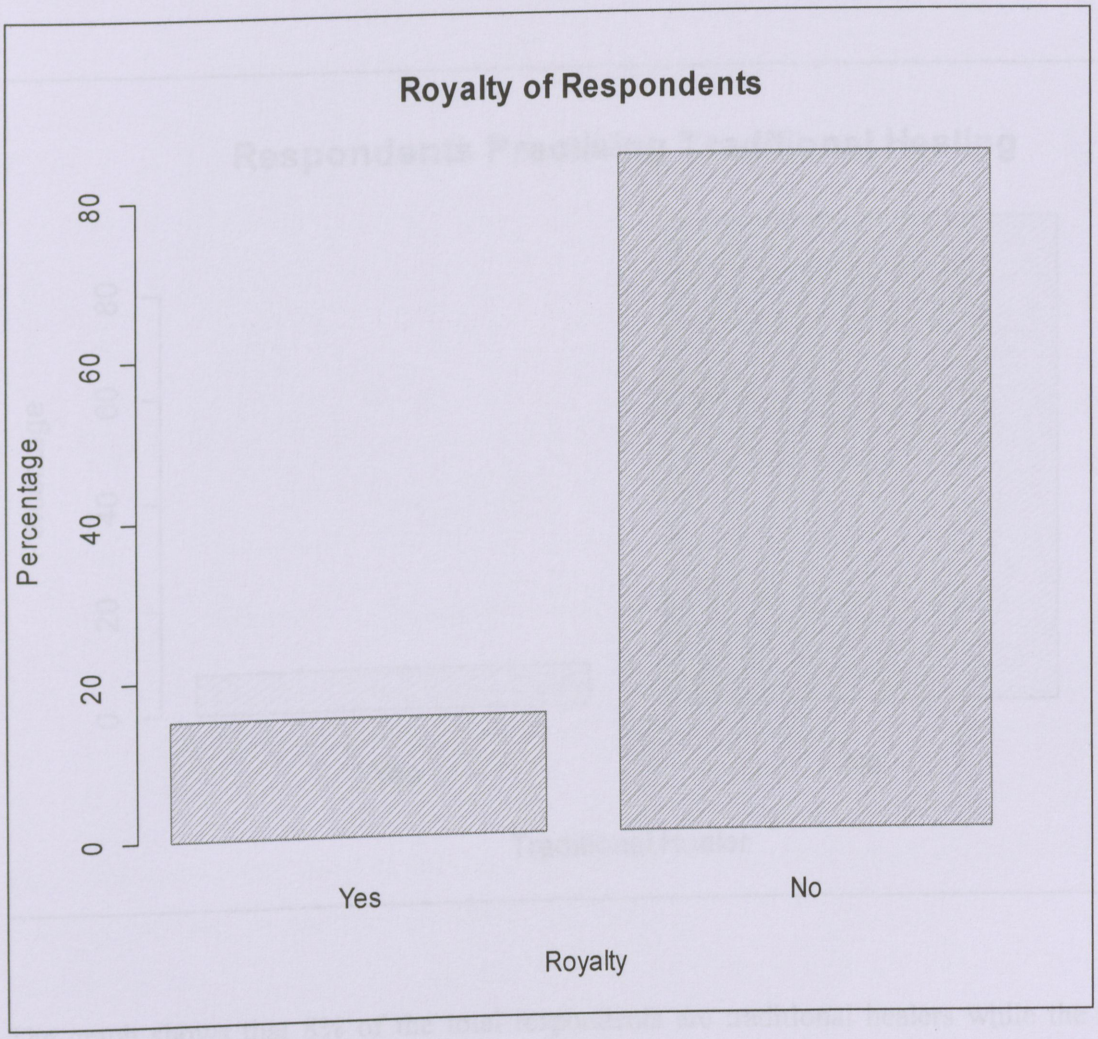


The graph shows that 60% of the total respondents are employed while 40% are unemployed. The result shows that the largest percentages 35% of the total respondents that are working are employed by the state. Those that are employed in the private sector and those that are self-employed might be engaged in different types of industries which include business, transport, farming, building, mining and travelling. Those that are unemployed could be depending on social grants from the Ministry of Social Development paid through the South African Social Security Agency (SASSA).

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GRAPH 8: ARE YOU OF ROYAL BLOOD?



The graph shows that only 15% of the total respondents are from the royal families. The rest 85% of are ordinary members of the society.

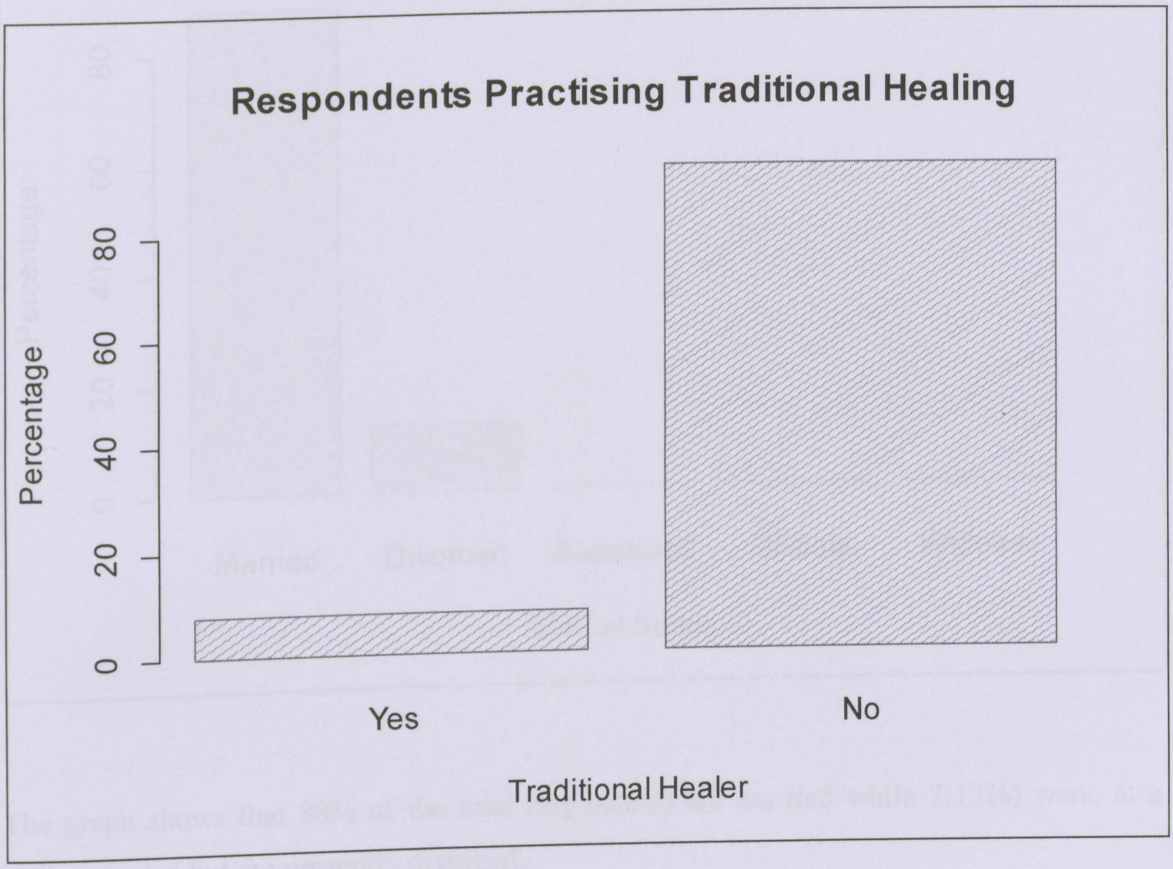
The results show that some of the respondents were from royal families. They could be traditional leaders themselves or had the potential of becoming traditional leaders in their community. They belong to the institution of African traditional leadership, an institution which is as old as humanity itself. Amongst other roles, traditional leaders are the custodians of the custom, including marriage

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customs. This means that the sample had covered both the royal and the non-royal members of the community.

GRAPH 9: ARE YOU A TRADITIONAL HEALER?



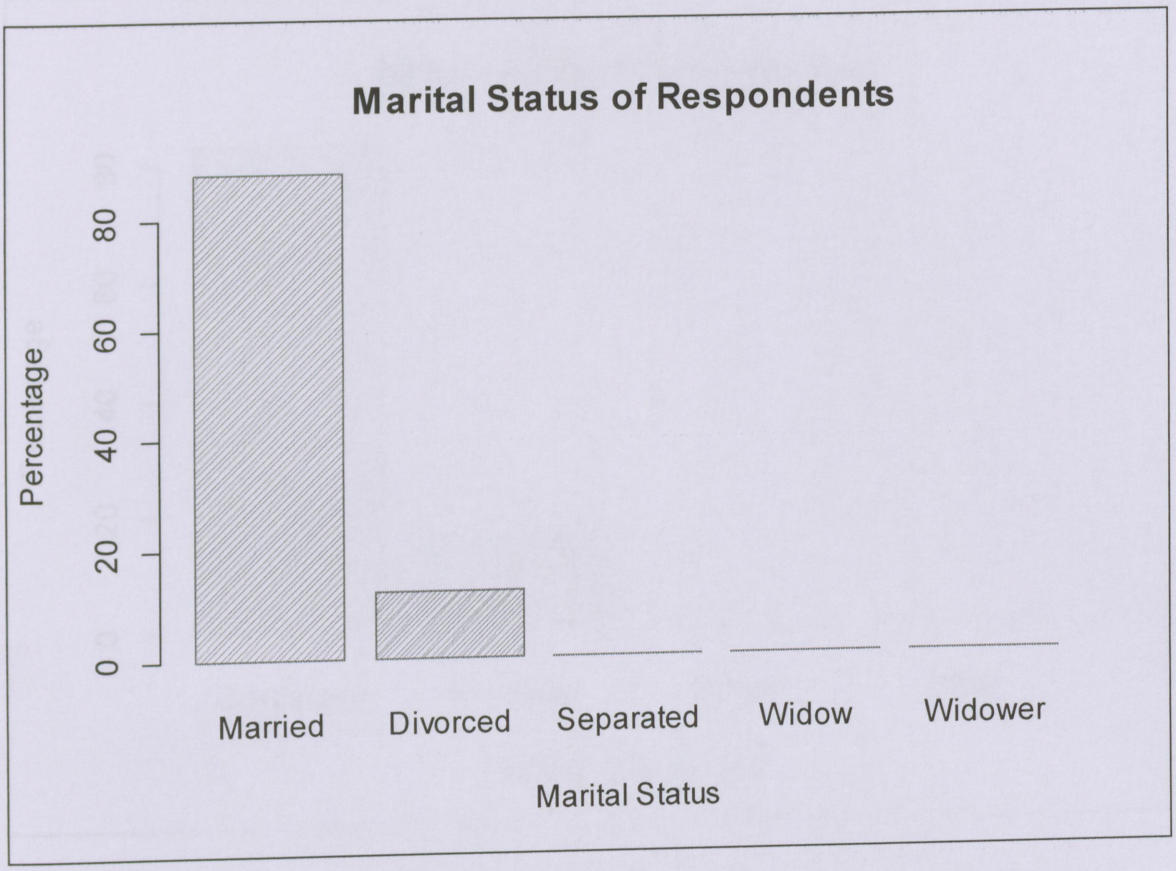
The graph shows that 8% of the total respondents are traditional healers while the rest 92% are ordinary or non-traditional healers.

The results show that a substantial number of the respondents are traditional healers. in many black communities traditional healers are considered to be the effective agents of ancestors as they command authority. Amongst other roles, traditional healers serve the community as psychologists, marriage and family counselor. They are also considered as the legitimate interpreters of customary rules of conduct, morality and values.

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GRAPH 10: MARITAL STATUS:



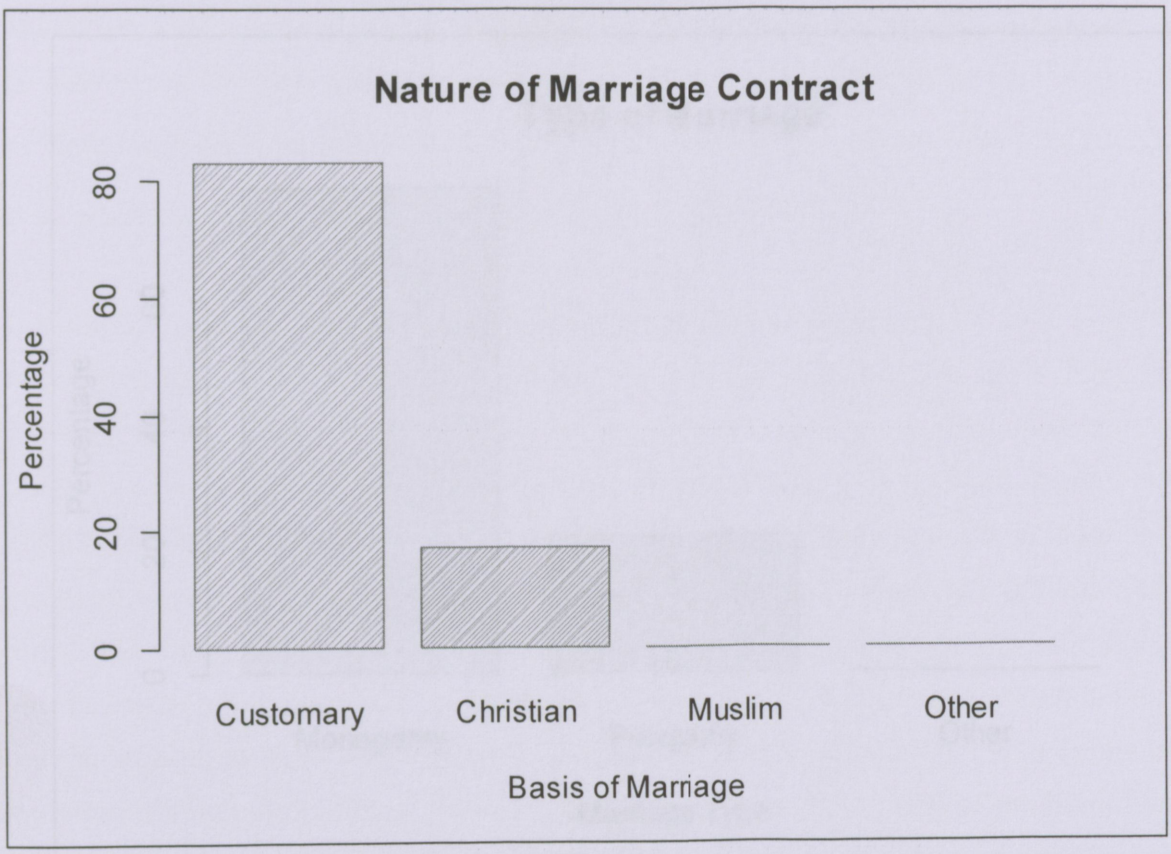
The graph shows that 88% of the total respondents are married while 7(12%) were, at a certain stage, married but are presently divorced.

The results show that the research had sampled the relevant respondents that are in marriage or have at least been in marriage. It is worth noting that no one amongst the respondents was a widow or a widower. The reason could be that couples who lose their partners through death end up engaging in further marriages.

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GRAPH 11: HOW DID YOU GET MARRIED?



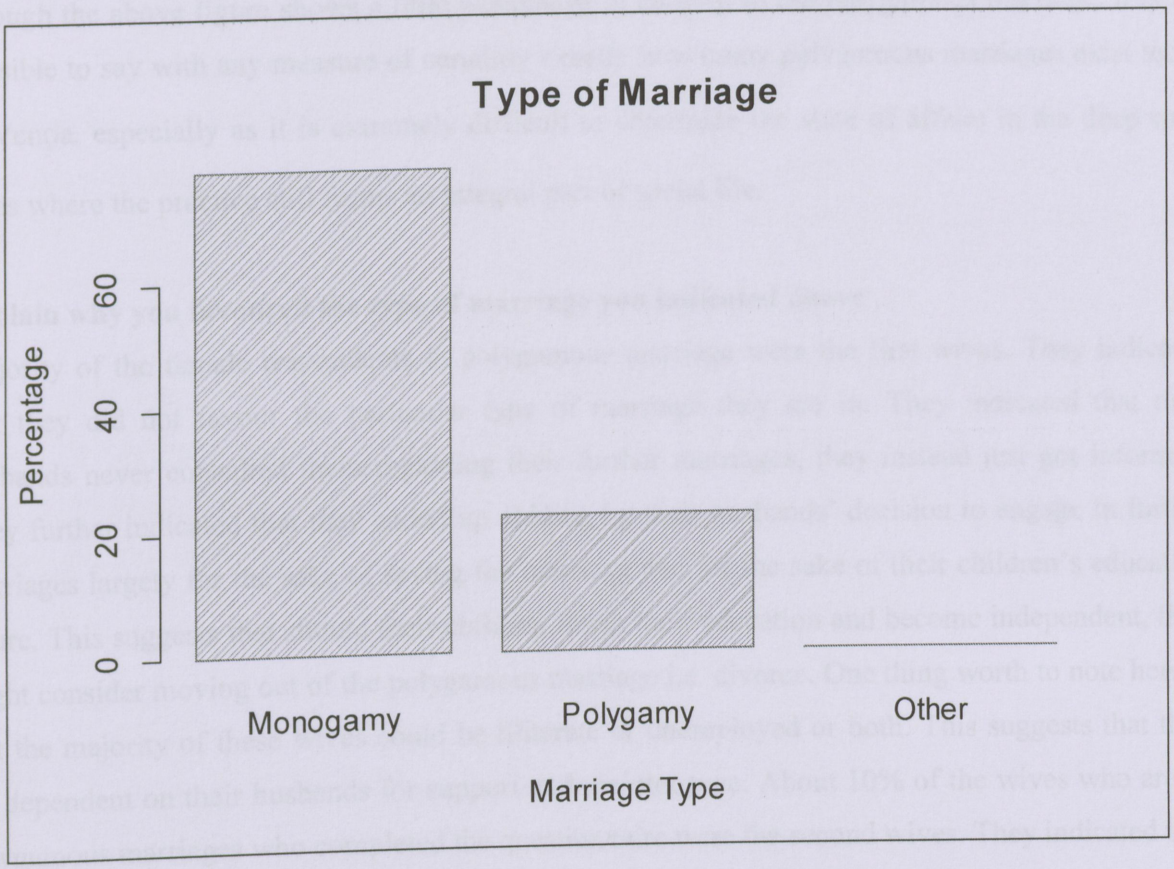
The graph shows that 83% of the total respondents had been married solely in accordance with customary law, while 17% had been married in accordance with the Christian law.

The results show that majority of the respondents went through a process which is accomplished by a series of rites and negotiations which took place over time as the customary marriages law prescribes. The 17% of the respondents that got married the Christian way might have married in terms of the civil marriages law which is solemnised by a single formality. Christians normally conduct their marriages in churches.

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GRAPH 12: WHAT FORM OF MARRIAGE ARE/WERE YOU IN?



The graph indicates that 78% of the total respondents had been married to one spouse (monogamy) whereas only 22% had been married to more than one spouse (polygamy).

Although customary marriages are said to be potentially polygamous, when individuals marry, the union starts as a monogamous one and later on more and more spouses are acquired making it polygamous depending on various factors which include affordability, family status and migration. Affordability refers to the husband's material ability to pay *lumalo* for and support an additional wife. Family status is with reference to the male members of the royal family who are or will become traditional leaders that it is obvious that their marriages will eventually become polygamous irrespective of affordability but by virtue of their traditional rank. Migration system of the country contributed to many males in engaging in further marriages in that when the mining of diamonds and gold began, a policy of separating male workers from their wives was established.

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The policy discouraged male labourers from bringing their wives along to the mines. The policy was aimed at paying low salaries that could only meet his individual needs (Bennett, 2008:183). Though the above figure shows a little percentage of couples in the polygamous marriage, it is not possible to say with any measure of certainty exactly how many polygamous marriages exist today in Venda, especially as it is extremely difficult to determine the state of affairs in the deep rural areas where the practice still forms an integral part of social life.

Explain why you favoured the type of marriage you indicated above

Majority of the female respondents in polygamous marriage were the first wives. They indicated that they did not favour the particular type of marriage they are in. They indicated that their husbands never consulted them regarding their further marriages, they instead just got informed. They further indicated that they ended up abiding by their husbands' decision to engage in further marriages largely for the sake of saving the marriage and for the sake of their children's education future. This suggests that should their children finish their education and become independent, they might consider moving out of the polygamous marriage i.e. divorce. One thing worth to note here is that the majority of these wives could be illiterate or unemployed or both. This suggests that they are dependent on their husbands for support and maintenance. About 10% of the wives who are in polygamous marriages who completed the questionnaire were the second wives. They indicated that they did not like to be married in a polygamous marriage as such. They would have loved to be married in a monogamous marriage if a single man had proposed them. Of the 10%, only 2% of the respondents indicated that they were not aware that they were getting into a polygamous marriage, until at a very advanced stage of their relationship they discovered that their husbands had wives at their homes. They indicated they had met them at their working places where they were staying in camps.

About 96% of the respondents who are husbands in polygamous marriages indicated that they did not actually plan to engage in polygamous marriages. They claim that it came as a result of migratory working system of the country which began with the mining of diamonds and gold, where employers would discourage male labourers from bringing their wives with them. According to Bennett (2008:183), the policy of separating male workers from their wives and children was aimed at paying low salaries to the workers that could only meet his individual needs. They indicated that as they were working far away from home such as in the mines, they needed a

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wife to stay with. They would not take their first wives along since they were not allowed and had to look after the children at home. The fact that she would not be at the two places at the same time, the husbands claim that they were compelled to go for additional wives. They further indicated that they like polygamous marriage because it helps them avoid engaging in adultery. This is supported by Mamashela and Xaba (2003) who state that 'in almost all the cases of desertion, the man had left the home and was cohabiting with either a girlfriend or a second 'wife''. Ironically, these husbands seem to be selfish in that they claim inability to stay alone without a wife when they are working far away from home. Maybe the questions are:

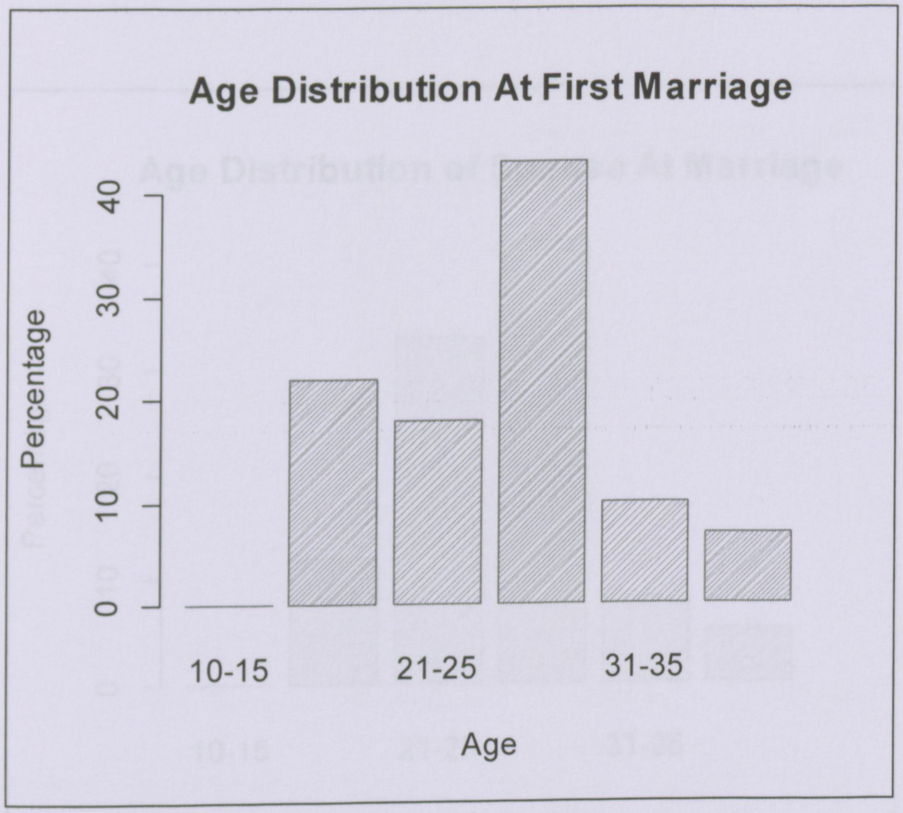
- How about their wives, who remain at home, don't they need a husband to stay with?
- Would they condone or condemn their wives for engaging in adultery over prolonged absence of husbands in the mines?

They would definitely condemn it.

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GRAPH 13: HOW OLD WERE YOU WHEN YOU FIRST GOT MARRIED?



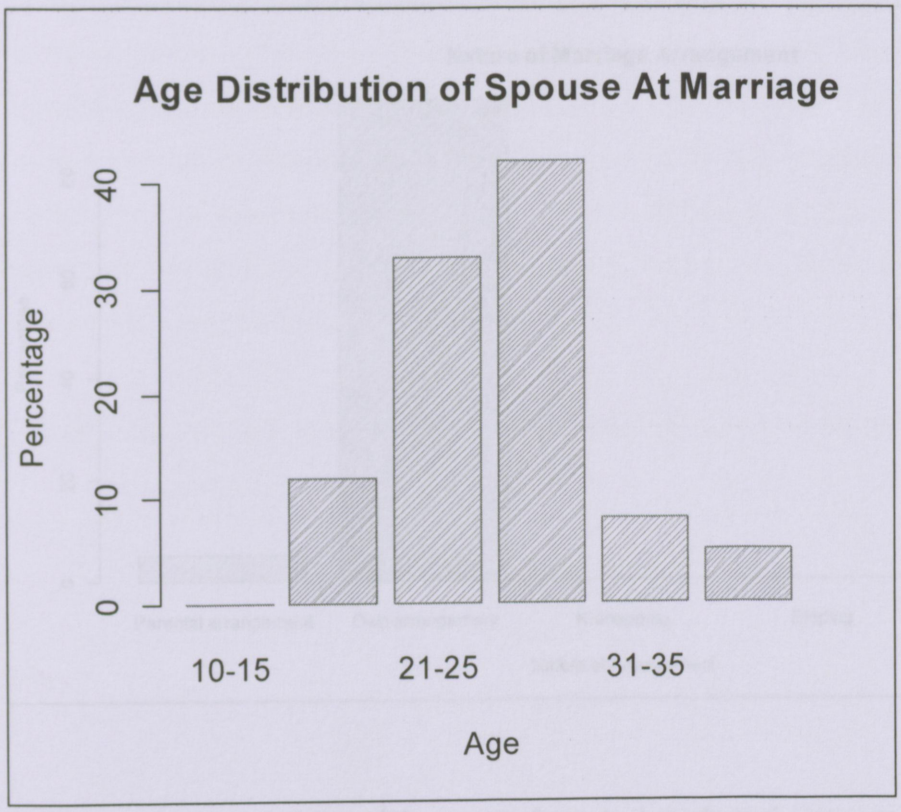
The graph shows that 43% of the respondents got married at the age between 26 and 30, followed by 22% who got married for the first time at the age between 16 and 20. Those who got married for the first time at the age between 21 and 25 are 18%, followed by 10% who got married for the first time at the age between 31 and 35, the rest 7% got married for the first time at the age between 36 and 40.

The results show that almost 22% of respondents are spouses in marriage who got married as young as 16 years of age. This could be those that got married in terms of the customary law since customary marriage law does not set a minimum age for marriage. Nevertheless, marriage generally does not take place before attainment of puberty (Bennett, 2008:203).

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GRAPH 14: HOW OLD WAS YOUR SPOUSE WHEN HE/SHE GOT MARRIED TO YOU?



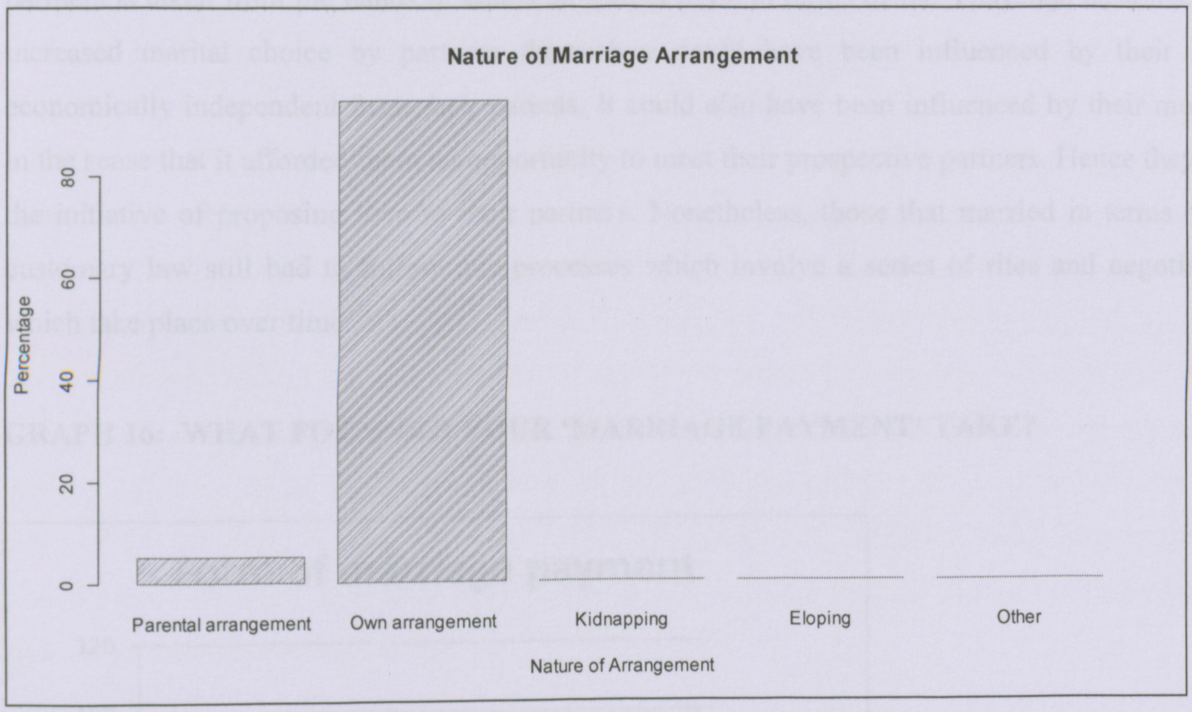
The graph shows that 42% of the respondents got married at the age between26 and 30, followed by 33% who got married for the first time at the age between 21 and 25. Those who got married for the first time at the age between16 and 20 are 12% followed by 8% who got married for the first time at the age between 31 and 35. Those who got married for the first time at the age between 36 and 40 form 5% of the total respondents.

The results show that 12% of the respondents got married to their spouses that were at the ages between 16 and 20. Following from the graph above, one could say that 6 of the 13 respondents got married to the spouses whose age was above their age group of 16 to 20. If that is the case, the 6 respondents are probably males in that in terms of the customary law, it is recommended that a wife should be younger than the husband. Based on the above statistics, it means that the age of females at first marriage is increasing considerably.

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GRAPH 15: HOW DID YOU GET YOUR SPOUSE?



The graph shows that 95% of the respondents had made their own arrangement with their partners to get married. Only 5% had their marriage arranged and organised by their parents.

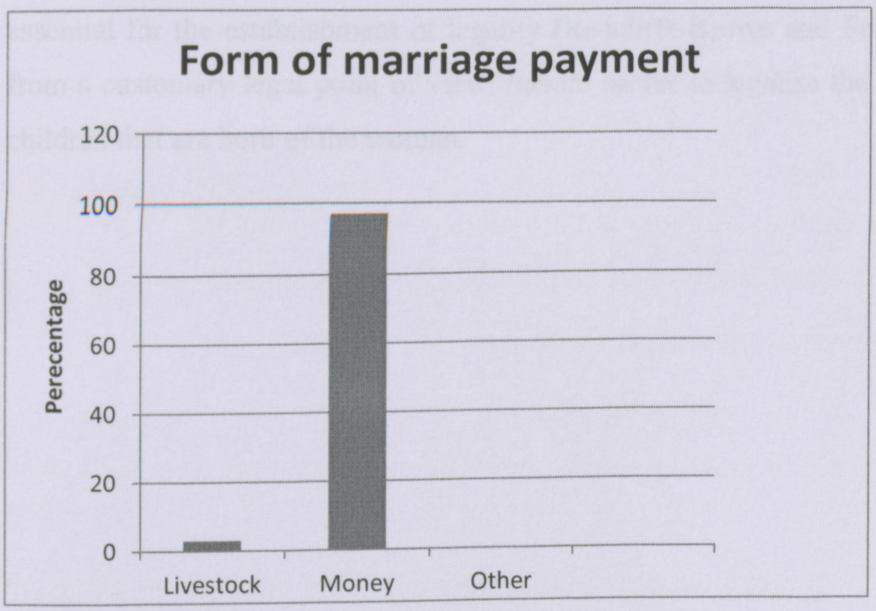
The result shows that no respondents indicated eloping and kidnapping as ways used to get their spouses. This does not necessarily mean that there is no kidnapping and eloping within the Vhavenḓa community. It might mean that since kidnapping and eloping are not the best ways recommended by customary marriage law to get a marriage partner, disclosing it could be embarrassing. The three respondents whose marriages were arranged and organised by their parents are probably those from the royal families who happened to be traditional leaders. Royal families are very strict with regard to the choice of marriage partner more especially for the son who is going to give birth to the heir. Their choice of a suitable wife is restricted to the royal families. Since the mother to the traditional leader is required to be from the royal family, this practice ensures that children have royal blood. As such royal families would not leave such a huge task like marriage to be decided and executed by the individual; instead they arrange their children's marriage (Vander Zanden, 1990:258).

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The 95% of the total respondents indicated that they had made their own marriage arrangements. This shows an increased freedom of marital choice by individuals where selection of marriage partners is taken from the hands of elders as it used to be in terms of the Vhavenda customs. The increased marital choice by partners themselves could have been influenced by their being economically independent from their parents. It could also have been influenced by their mobility in the sense that it afforded them an opportunity to meet their prospective partners. Hence they took the initiative of proposing love to their partners. Nonetheless, those that married in terms of the customary law still had to follow due processes which involve a series of rites and negotiations which take place over time.

GRAPH 16: WHAT FORM DID YOUR 'MARRIAGE PAYMENT' TAKE?



The graph shows that 97% of the total respondents had their marriage payment in the form of cash. Only 3% of the respondents had their marriage payment in the form of livestock. Livestock includes domestic animals such as sheep, goats, horses and cattle. In some other cultures, the bridegroom has to serve for the bride by working for her parents for a certain period. This is reflected in the biblical story where Jacob had to serve his mother's brother called Laban for seven years for each of the two sisters, Leah and Rachel. He ended up marrying both of them after serving his uncle for 14 years (Genesis 29:16-26).

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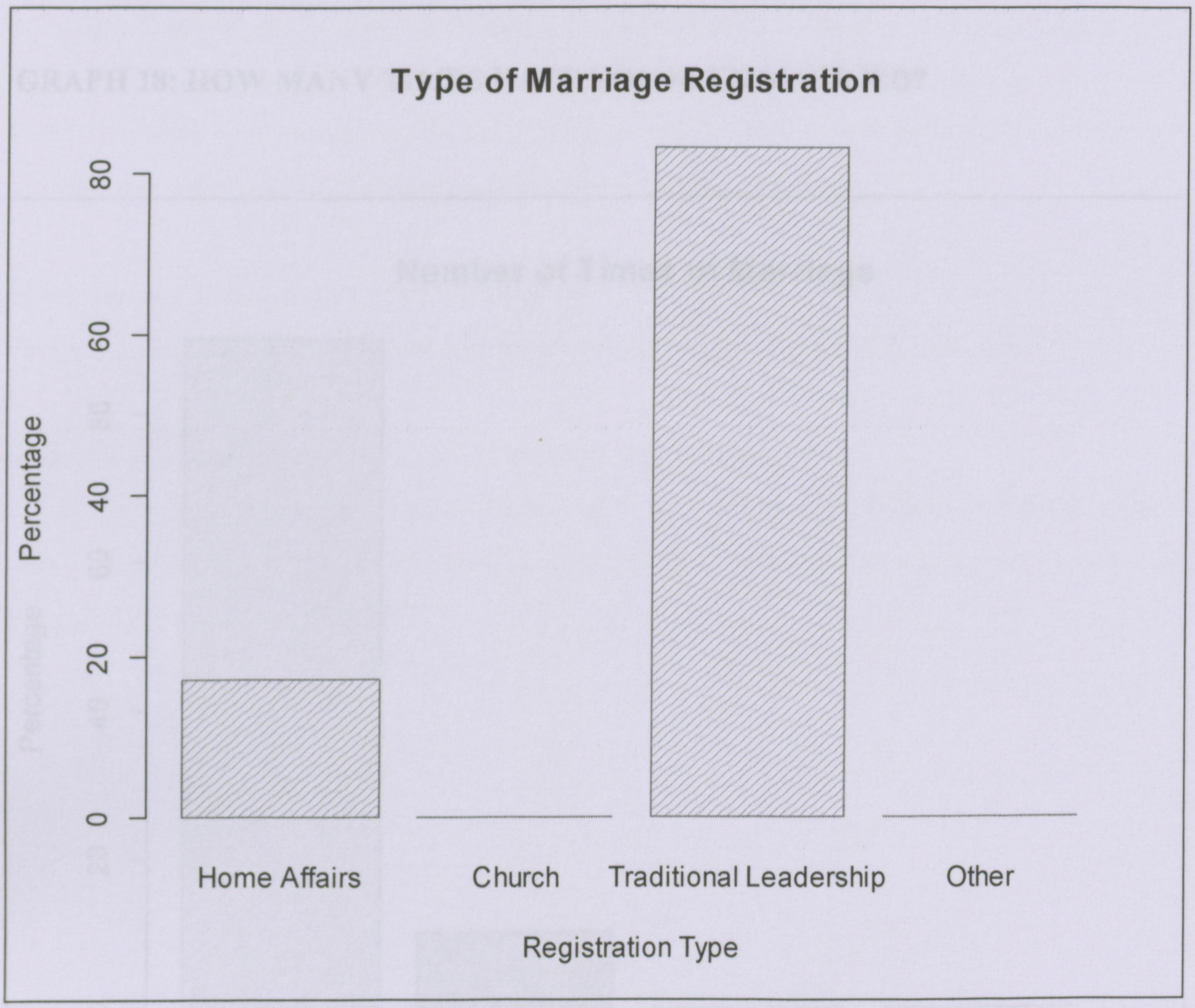
The results show that the majority of respondents made use of money in their marriage payment. This is a great change from the form that marriage payment used to take traditionally in African society. It used to take the form of livestock, which included goats, sheep, horses and cattle (Olivier, 1995:24). According to Radcliffe-Brown and Forde (1975:82) the patrilineal cattle-keeping peoples of East and South Africa used to transfer cattle in their system of marriage and kinship. The 3% of the respondents who indicated that their marriage payment took the form of livestock probably are those that come from the royal families, and most probably traditional leaders. When a chief marries the wife who will give birth to the heir, marriage cattle are contributed by his subordinate social groups. The son born of the marriage belongs to the group who gave the cattle and this qualifies him to rightly succeed to the heirship (Radcliffe-Brown and Forde 1975:184). It is worth noting that the payment of marriage (*lumalo*), irrespective of the form that it takes, be it in the form of money or livestock, by the bridegroom to the bride's family is essential for the establishment of legality (Radcliffe-Brown and Forde 1975:46). This means that from a customary legal point of view, *lumalo* serves to legalise the marriage and to legitimate the children that are born of the woman.

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GRAPH 17: WITH WHAT BODY/INSTITUTION DID YOU REGISTER YOUR MARRIAGE?



The graph shows that 87% of the respondents indicated that they have registered their marriage with the Traditional African Leadership. Only 13% have their marriages registered with the Department of Home Affairs.

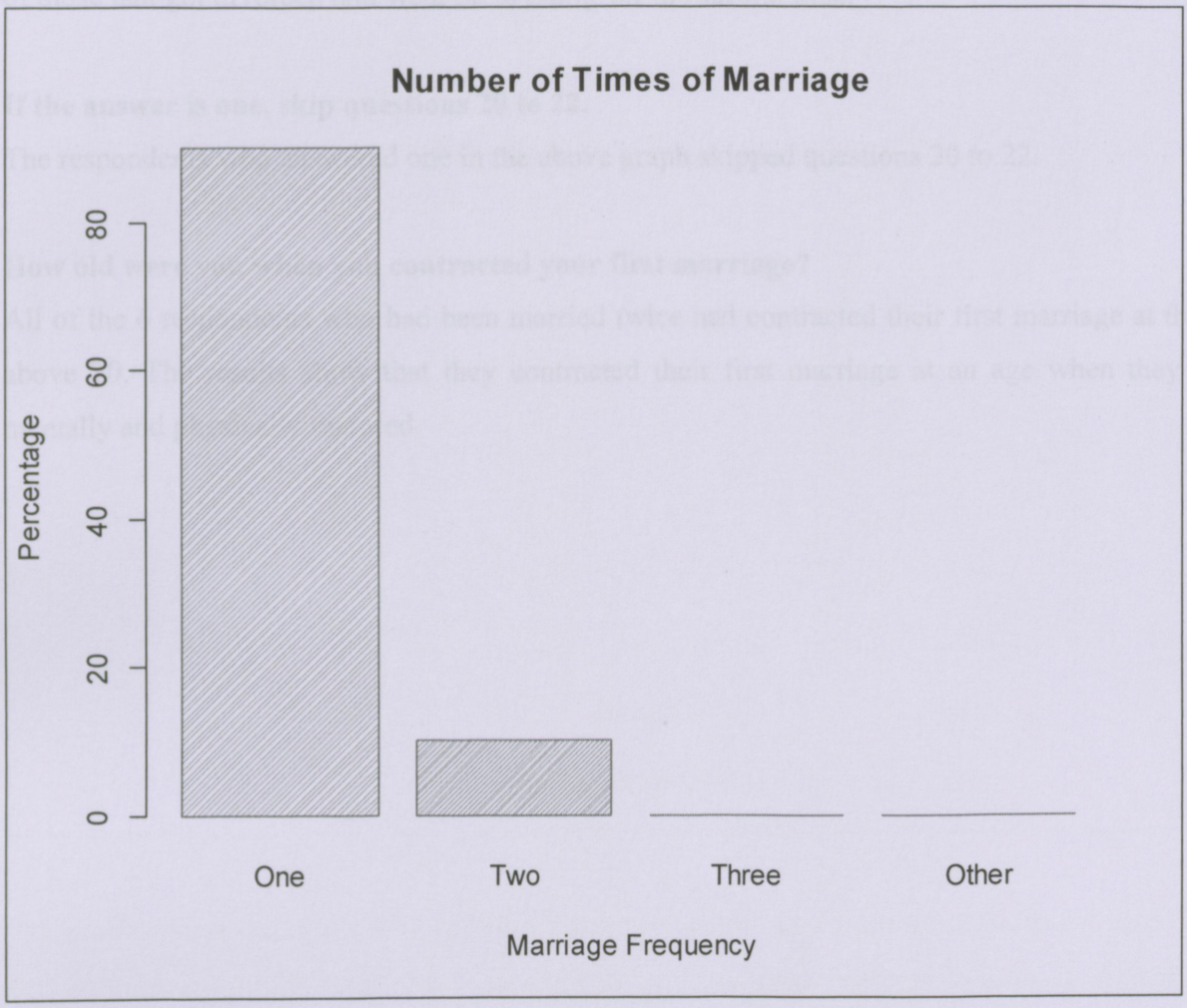
The results show that there are many couples out there who have not registered their marriages in terms of the marriage laws of South Africa. Registering a marriage with the traditional African leadership is in terms of the Recognition of Customary Marriages Act (Act 120 of 1998), not legal since traditional leadership and its structures are not recognised as agents of registration. Even those that claim to have registered their marriages with the traditional African leadership, some did not actually even register, and they are just staying together as cohabitants. Since they did not

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register their marriages in terms of the RCM or Civil Marriages Act, it is in inconsequential that they are registered with the traditional leadership.

GRAPH 18: HOW MANY TIMES HAVE YOU BEEN MARRIED?



The graph shows that 90% of the respondents indicated that they have been married only once, while 10% of the respondents indicated that they have been married twice.

The results show that majority of people are in their first marriages. This number could be so huge because even those wives that are in polygamous marriages, if they were not married before they came into their present form of marriage, they recorded theirs as first marriage. Part of the 10% of

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the respondents that indicated that they have been married twice are probably husbands in polygamous marriages who got married to their first wives and later on engaged in a further marriage. It might not be the wives who got married twice since in a polygamous parental family there can only be two or more mothers but only one father (Radcliffe-Brown and Forde 1975:82). Part of the 10% of respondents that indicated that they have been married twice could also comprise of those that got divorced and went on to marry for the second time.

If the answer is one, skip questions 20 to 22.

The respondents who answered one in the above graph skipped questions 20 to 22.

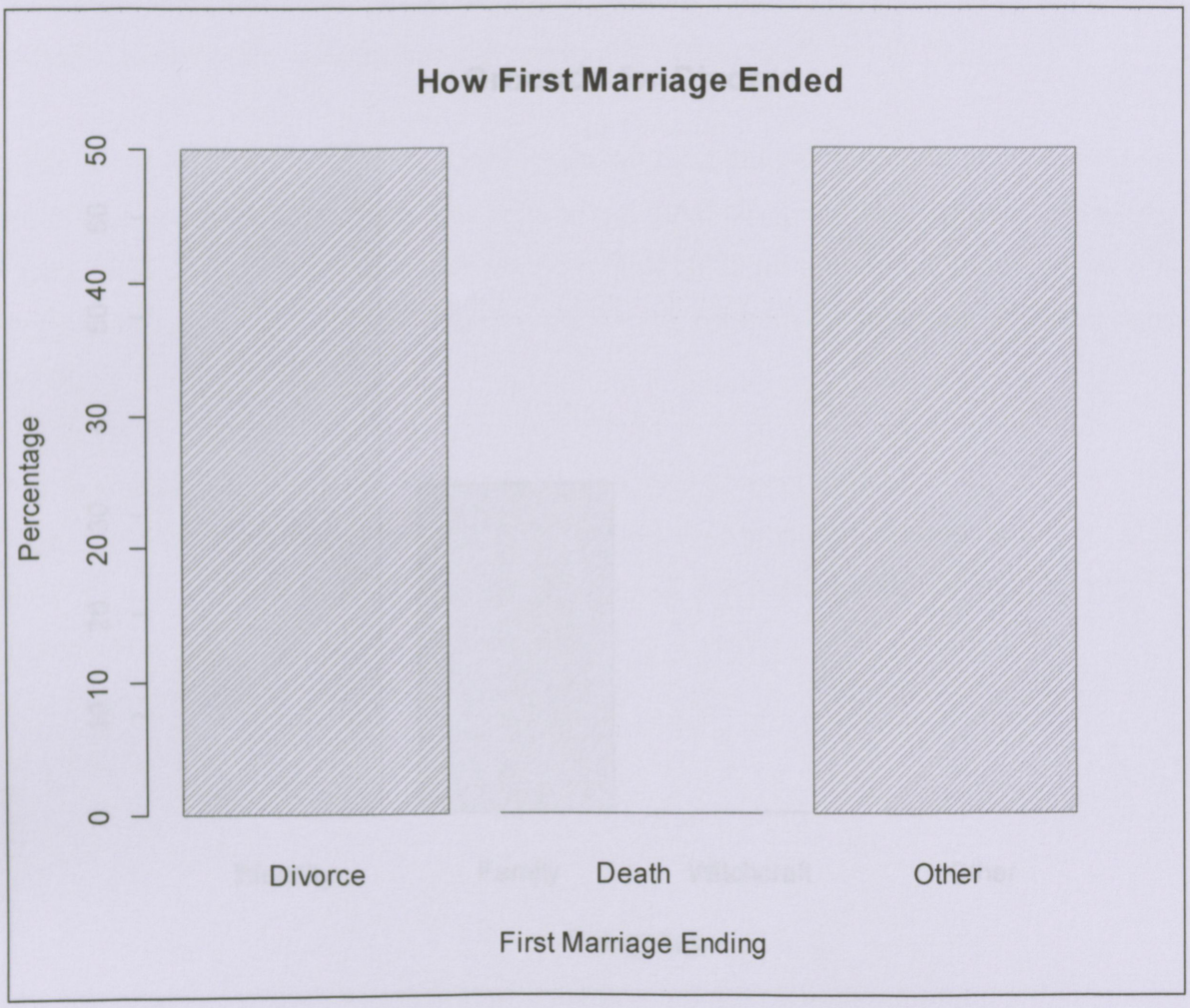
How old were you when you contracted your first marriage?

All of the 6 respondents who had been married twice had contracted their first marriage at the age above 20. The results show that they contracted their first marriage at an age when they were mentally and physically matured.

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GRAPH 19: WHY DID YOUR FIRST MARRIAGE END?

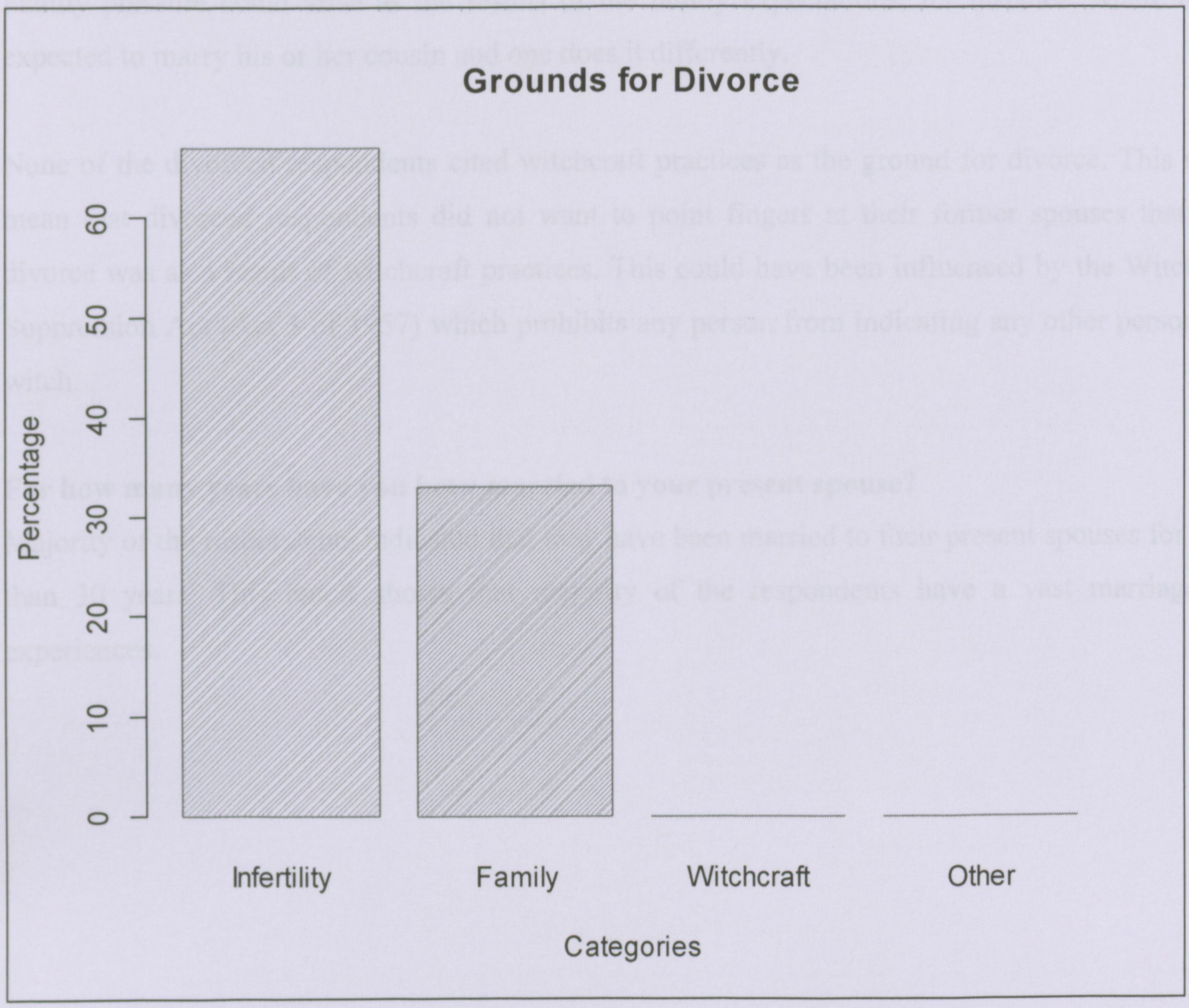


The graph shows that only 50% of the 6 respondents that were married twice had divorced their first spouses. No one indicated his or her engagement in second marriage as a result of death. This means that the remaining 50% of the respondents that were married twice were probably husbands in polygamous marriage since traditionally it is the husband who can have more than one wife unlike the wife marrying more than one husband at a time (Radcliffe-Brown and Forde 1975:82).

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GRAPH 20: IF DIVORCED, WHAT WERE THE GROUNDS?



The graph shows that 67% of the divorced respondents cited infertility as the ground for their divorce. Only 33% of the divorced respondents cited family pressure as the ground for their divorce.

The results show that 67 % of the divorced respondents that got divorced were probably male respondents that blamed their wives for not conceiving. According to Radcliff Brown and Forde, (1975: 51) "the most important part of the value of a woman is her child-bearing capacity". This means that if a woman cannot give birth, she is considered in terms of the customary law, as having failed the marriage. Although customary marriage law does not recommend divorce on the ground

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of infertility. At least 67% respondents were divorced due to their infertility as shown in the graph above. The 33% of divorced respondents indicated that their divorce was due to family pressure. Family pressure could arise as the results of the family expectations, for instance, where one is expected to marry his or her cousin and one does it differently.

None of the divorced respondents cited witchcraft practices as the ground for divorce. This might mean that divorced respondents did not want to point fingers at their former spouses that their divorce was as a result of witchcraft practices. This could have been influenced by the Witchcraft Suppression Act (Act 3 of 1957) which prohibits any person from indicating any other person as a witch.

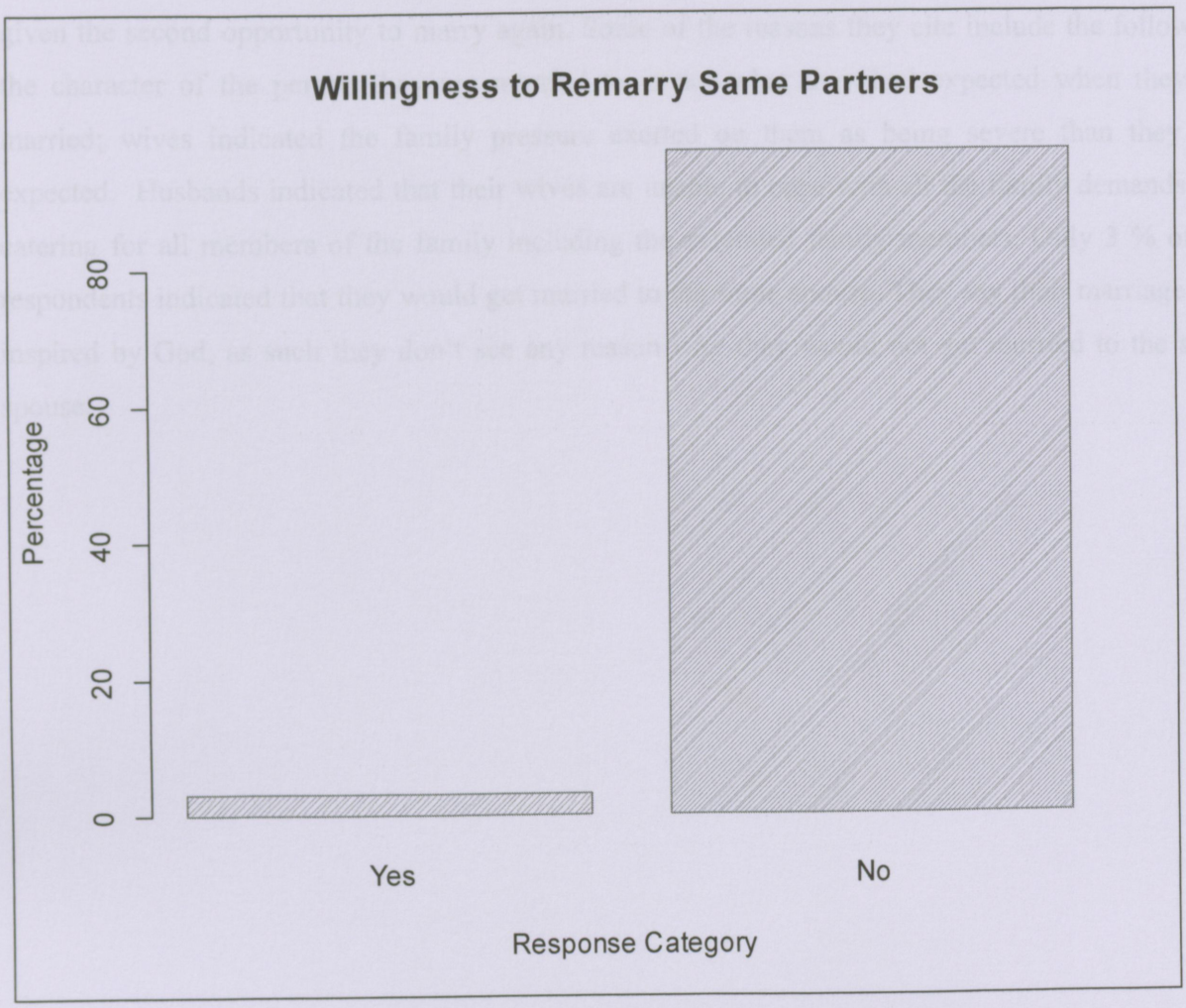
For how many years have you been married to your present spouse?

Majority of the respondents indicated that they have been married to their present spouses for more than 30 years. This result shows that majority of the respondents have a vast marriage life experiences.

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GRAPH 21: IF YOU WERE GIVEN A SECOND CHANCE IN LIFE, WOULD YOU GET MARRIED TO THE SAME SPOUSE? AND WHY?



The graph shows that 97% of the respondents would not get married to the same spouse. Only 2(3%) of the respondents agree that they would get married to the same spouse should they be given another chance of choosing their life partner.

The results show that majority of the respondents are not entirely happy in their marriage.

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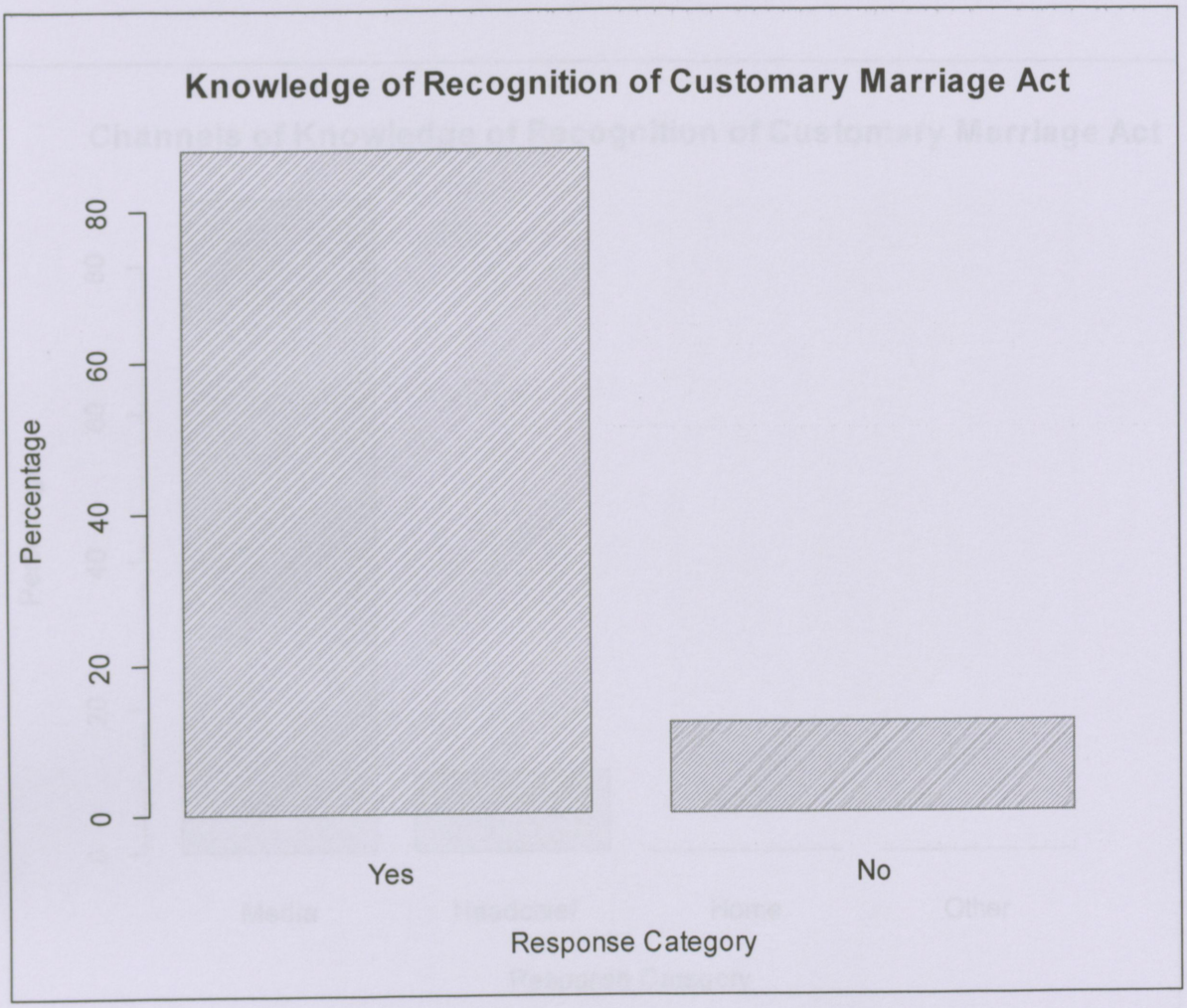
Motivate the choice you made in 24 above

Majority 97% of the respondents indicated that they would not be married to the same person if given the second opportunity to marry again. Some of the reasons they cite include the following: the character of the person they are married to is not what they had expected when they got married; wives indicated the family pressure exerted on them as being severe than they had expected. Husbands indicated that their wives are unable to cope with all the family demands like catering for all members of the family including the extended family members. Only 3 % of the respondents indicated that they would get married to the same spouse. They say their marriage was inspired by God, as such they don't see any reason why they would not get married to the same spouse.

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GRAPH 22: DO YOU KNOW ABOUT THE RECOGNITION OF CUSTOMARY MARRIAGES ACT (ACT 120 OF 1998))?



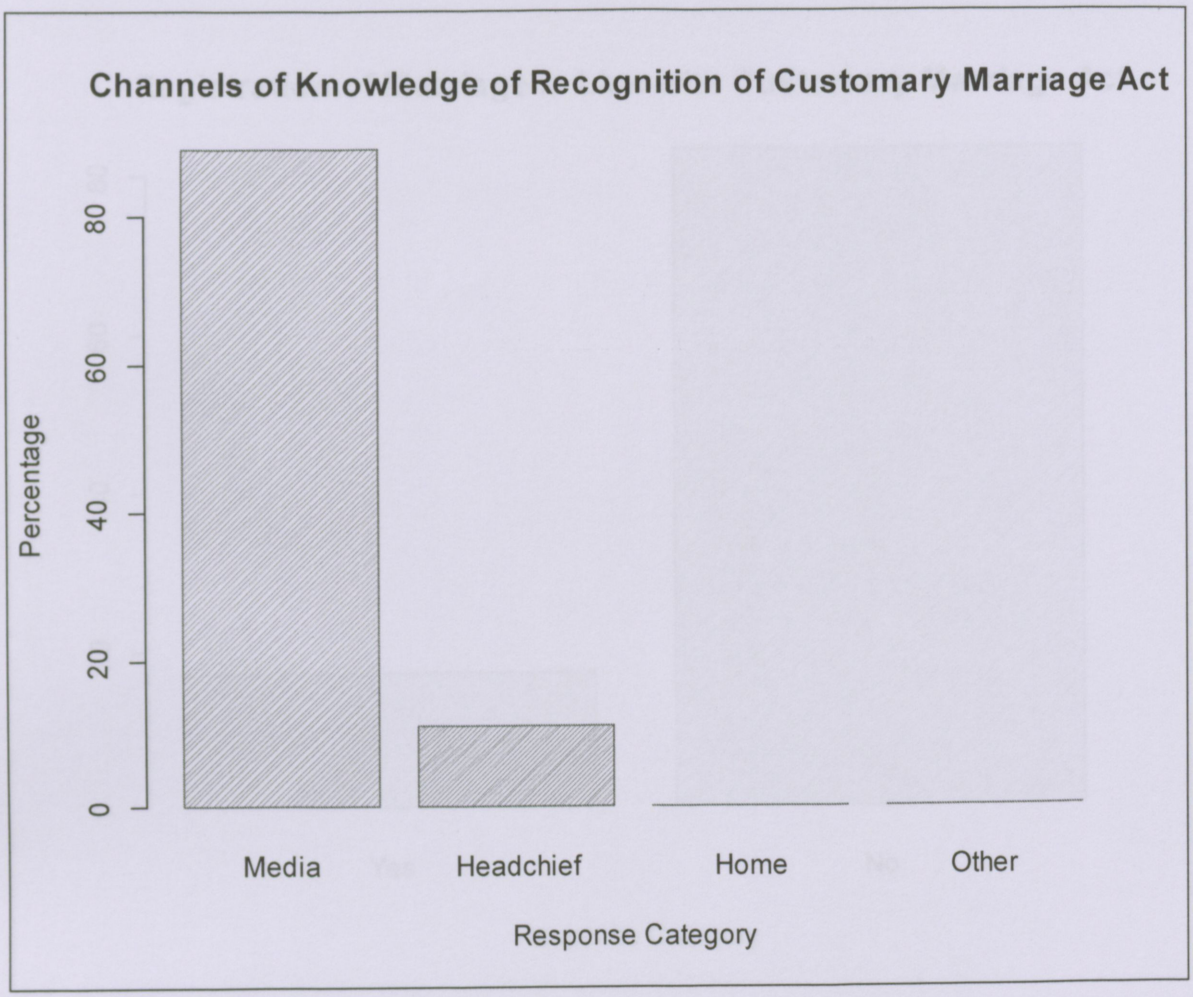
The graph shows that 88% of the respondents know about the Recognition of Customary Marriages Act (Act 120 of 1998). Only 12% indicated that they do not know about the Recognition of Customary Marriages Act (Act 120 of 1998).

The results show that many 88% of the respondents know about *the RCMA*. Fewer 12% who do not know about *the RCMA* are probably respondents who have not had any schooling and reside in deep rural areas of the Vhembe district.

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GRAPH 23: IF YES, HOW DID YOU KNOW ABOUT THE RECOGNITION OF CUSTOMARY MARRIAGES ACT (ACT 120 OF 1998)?



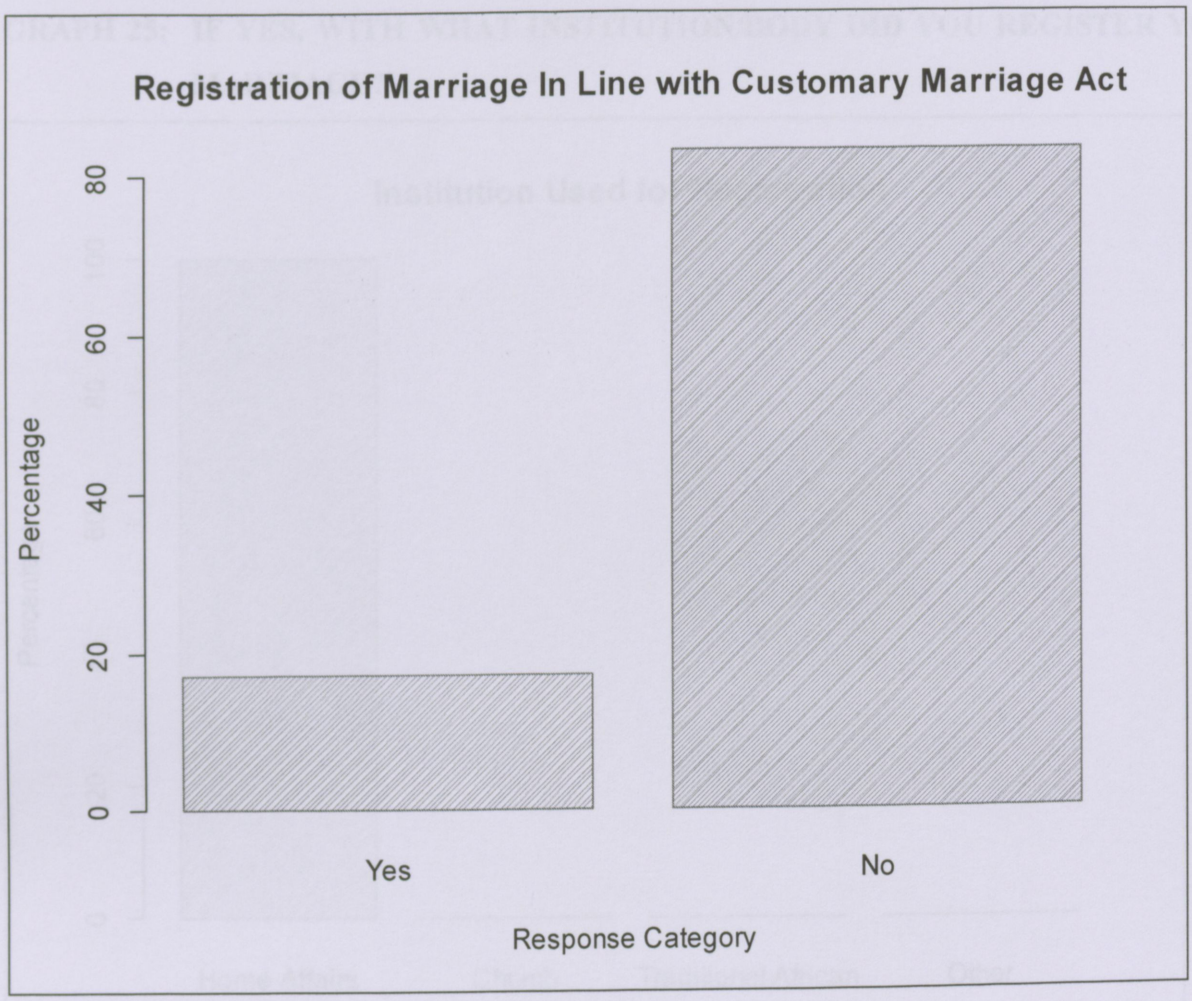
The graph shows that 89% of the respondents knew about *the RCMA* through the media while the remaining 6(11%) knew about *the RCMA* through the traditional leadership and its structures.

The results show that the majority of the respondents knew about *the RCMA* through the media, which could be the radio, newspapers, television or internet. Fewer 11% of the respondents who knew about *the RCMA* might have heard it from the traditional leaders in the traditional structures' meetings held in their communities.

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GRAPH 24: HAVE YOU REGISTERED YOUR MARRIAGE IN TERMS OF THE RECOGNITION OF CUSTOMARY MARRIAGES ACT (ACT 120 0F 1998)?



The graph shows that 83% of the respondents did not register their marriages in terms of the Recognition of Customary Marriages Act (Act 120 of 1998). Only 17% of the respondents had registered their marriages in terms of the Recognition of Customary Marriages Act (Act 120 of 1998).

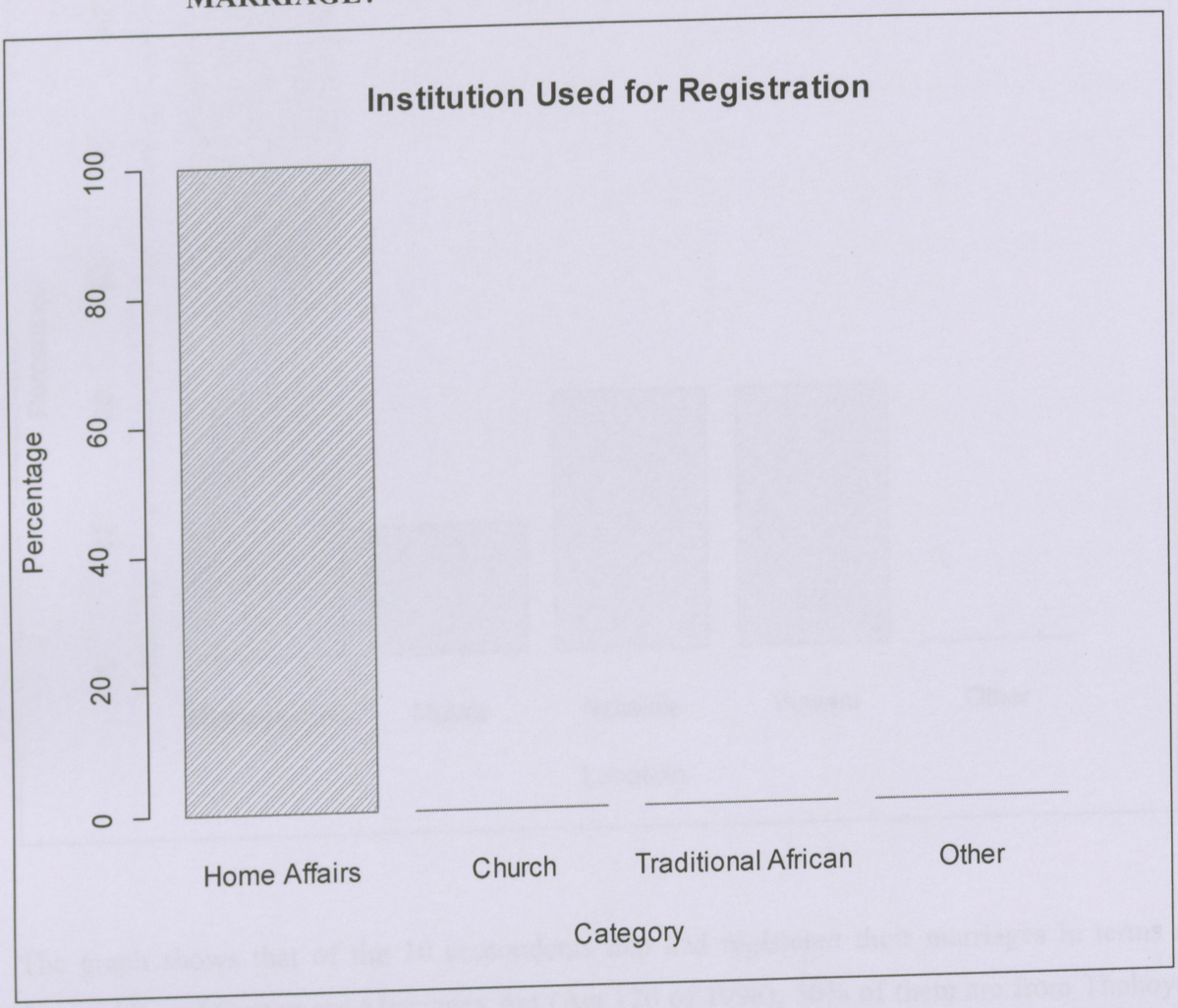
The results show that although majority 83% of the respondents knew about *the RCMA* through different agencies as indicated in graphs 26 and 27 above, they did not register their marriage in terms of the Recognition of Customary Marriages Act (Act 120 of 1998). Their non-registration

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could be due to factors such as lack of knowledge, the cost involved in travelling to the registration offices of the Department of Home Affairs or ignorance.

GRAPH 25: IF YES, WITH WHAT INSTITUTION/BODY DID YOU REGISTER YOUR MARRIAGE?



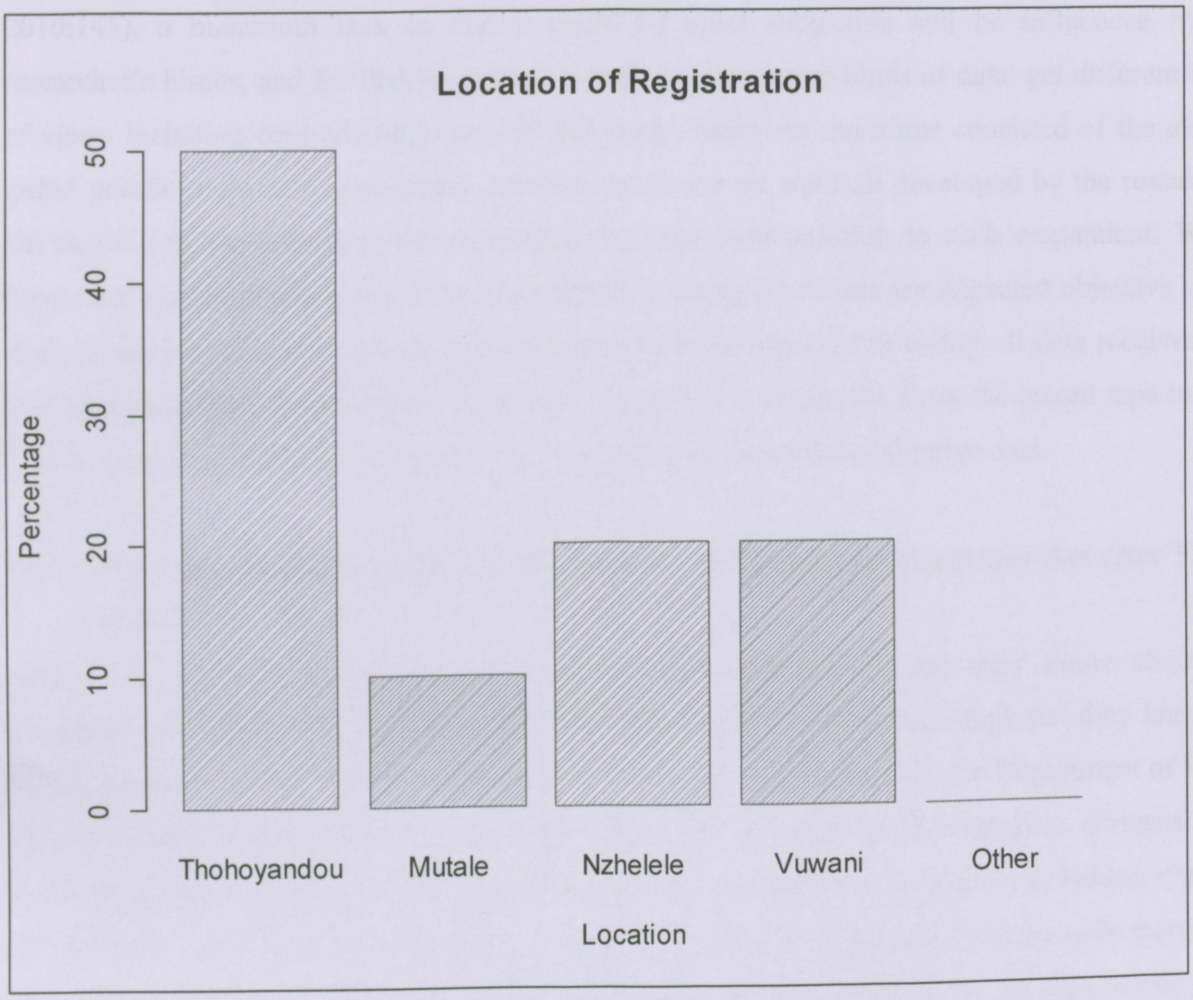
The graph shows that all 10 respondents who indicated in graph 28 above that they have registered their marriages in terms of *the RCMA* did so with the Department of Home Affairs.

The results show that it is a registration officer at the Department of Home Affairs only who in terms of *the RCMA,* customary marriages should be registered with.

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GRAPH 26: IF YOU REGISTERED WITH HOME AFFAIRS, WHERE DID YOU REGISTER?



The graph shows that of the 10 respondents that had registered their marriages in terms of the Recognition of Customary Marriages Act (Act 120 of 1998), 50% of them are from Thohoyandou area of the Vhembe district, 20% from Nzhelele area of the Vhembe district, 20% from Vuwani area of the Vhembe district and 10% from Mutale area of the Vhembe district.

The results show that the least percentage 10% of respondents had registered their marriages at Mutale area of the Vhembe district. This is the area which entirely consists of rural communities. This could mean that it is poverty-stricken. The low turn up could have a link with the community's socio-economic background.

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7.3 QUALITATIVE DATA PRESENTATION AND ANALYSIS

Data presentation, Analyzing and Interpreting Qualitative Data is according to (Leedy and Ormrod, 2010:145), a mammoth task in that it could be more subjective and be influenced by the researcher's biases, and for that reason one needs to collect more kinds of data, get different kinds of views including contradicting ones. In this study, interview questions consisted of the closed-ended questions and the open-ended questions and were all were all developed by the researcher. On the day of the interview the researcher read out each question to each respondent. Where necessary, the researcher probed the respondents to respond towards the expected objective of the study. Later on the researcher sat down together with the assistant to codify all data received and link them with the questionnaires. Thereafter we started to transcribe from the record tape to text. This process was followed by the analysis and interpretation of the qualitative data.

7.3.1 What do you know about the Recognition of Customary Marriages Act (Act 120 of 1998)?

About 93% of the respondents that were interviewed indicated that they know about the Recognition of Customary Marriages Act (Act 120 of 1998)). Some indicated that they knew *the RCMA* as a law that enforces the registration of customary marriages with the Department of Home Affairs. Others indicated that *the RCMA* is a law that is aimed at discouraging Africans from practicing their own culture. Since African customary marriages are polygamous in nature, it means therefore that *the RCMA* is aimed at stopping the Africans from practicing polygamous marriages. The other group indicated that *the RCMA* is a law that is aimed at forcing the couples to marry the "white way". This means that they understand *the RCMA* as a law that forces individuals to marry in terms of the Western Culture. While others indicated that it is a law that regulates customary marriages. Majority of husbands interviewed indicated that it is a law that has been enacted to address the needs of women while making it hard for men in marriage. Some indicated that much of what they know about *the RCMA* is what they learnt through a Venḓa language prime time soap opera called Muvhango which broadcasts on SABC 2 from Mondays to Fridays at 21h00.

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7.3.2 How do you compare the stability of customary law marriages before and after the commencement of the Recognition of Customary Marriages Act (Act 120 0f 1998) in 1998?

The majority of the respondents indicated that they see more partners getting divorced beyond 1998 than before the introduction of *the RCMA* in 1998.

7.3.3 What is your opinion about the divorce rate before and after the commencement of the Recognition of Customary Marriages Act (Act 120 0f 1998) in 1998?

The majority of the interviewees indicated that before 1998 customary law marriages were not legally in existence. Hence they can talk very little about the divorces thereof. However divorces were there, only that it was a private matter between the families themselves and the traditional leadership. Nevertheless, the rate was very low compared to the rate of divorce after the commencement of *the RCMA* in 1998. Some argue that the rate of divorce before and after the commencement of *the RCMA* in 1998 is the same. They went on to say that it is just that before 1998 there was no formal record keeping by the traditional leadership to show the rate of divorce then. They further indicated that after 1998, since every divorce has to be granted by the court, the rate of divorce seems to be high.

7.3.4 Which factors do you attribute the divorce rate you mentioned above to?

The majority of the interviewees indicated that before 1998 partners would address marital disputes through family councils and the traditional courts. With the introduction of *the RCMA,* partners who have marital disputes no longer consider family councils and traditional courts as agents that could help address their disputes. They either go their separate ways without formally divorcing. Some consider divorcing right away without seeking some reconciliatory measures from elderly persons within their family. Other interviewees attribute the high rate of divorce to people going into marriage without proper knowledge and skills. They indicated that the resurrection of the traditional initiation schools could help address the shortage of knowledge and skill necessary for marriage.

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7.3.5 How does each of the following elements affect the rate of divorce?

7.3.5.1 Marriageable age

The majority of the interviewees do not see marriageable age as having anything to do with the divorce rate. They claim that although puberty is regarded as the minimum marriageable age in terms of the customary law marriages, one can marry at any age, it does not have any direct bearing on the rate of divorce.

7.3.5.2 Marriage payment

The majority of the interviewees indicated that cattle are no longer used as a form of marriage payment, but cash is used instead. They further indicated that the form of marriage payment is immaterial with regard to the divorce rate.

7.3.5.3 Registration of marriages

The majority of the interviewees indicated that, traditionally, people don't consider registration of their marriages to be a high priority. They claim that usually marriages that are registered with the traditional leaders do not actually end in divorce. They maintained that it is because with the traditional leader, before a divorce can be granted, there is too many grounds for divorce that need to be satisfied. They indicated that when one thinks of divorce, what comes to mind is all the embarrassment the whole process would bring to him or her and the family at large. They argued that marriages not registered with the traditional leaders usually are not addressed by the traditional courts when there are marital disputes. Instead they are taken to other agencies that would not consider reconciling the partners in disputes. They suggest that the state should consider appointing traditional leaders and various other people within traditional structures to formally register customary law marriages. Some interviewees indicated that many spouses married in terms of the customary law are afraid to register their marriages in terms of *the RCMA* because they realised that it may have some negative financial consequences. For instance, if registered, by the time one spouse reaches an age in which he/she qualifies for old age social grant, one may not get if his/her spouse is found to be working or has been working for the state. They believe that through technology it will be detected and these may result in them not getting the necessary grant that they desire so much.

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7.3.5.4 Equal status and capacity of spouses

The majority of the interviewees indicated that in terms of the customary law marriage, the husband as the head of the family has the sole right to decide what happens to the marital property and has the capacity to enter into a contract without involving his wife. When an uninformed husband married in terms of *the RCMA* realises later what the law provides for, that his wife has equal right and status to decide what happens to the property and has capacity to enter into a contract without his assistance, he might feel threatened and insecure. The only option available for him is to go for divorce.

7.3.5.5 Proprietary consequences of customary marriages:

The majority of the interviewees indicated that in terms of the customary law marriage, the husband owns and controls the marital property. The wife has no control over the marital property. Joint marital property is not a common concept in customary law marriage. As a result she loses out on property right at divorce. *The RCMA* brought into being property arrangement that met with a great deal of approval particularly from women's groups because it protects their rights and interests. They further indicated that now that the proprietary consequences of customary marriages are regulated by *the RCMA*, it is hard for many husbands to adapt to the requirement. Those that are already in such a dilemma, end up divorcing their wives for fear of the uncertainty.

7.3.6 Elaborate on how the manner in which a marital problem is addressed could have an impact on the decision by the spouses to seek a divorce

The majority of the interviewees indicated that they agree that the way a dispute is addressed could influence the spouses to consider seeking divorce. They believe that if the matter is handled by the people that do not have the interest of the marriage at heart, they could have a negative influence that could lead to the spouses going for divorce. They further alluded that, in customary law marriages, usually, if the one to be blamed in the whole marriage dispute is the wife, chances are that she could end up being divorced, while if the problem is found to be with the husband, tolerance could be overemphasised to save the marriage. Some gave a scenario of a wife who has committed adultery, depending on the people that are handling the dispute; some may condemn the behaviour and recommend her full expulsion from marriage, i.e. divorce, while some could try to find an alternative solution which is not disastrous. With the husband the same behavior could be condoned. Some interviewees linked the manner in which a marital problem is addressed to the way

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a customary marriage is concluded. The conclusion of a customary law marriage involves the families and the clans of both the prospective couples. It is never a matter for the two individual prospective couples alone as is with other marriage laws. This means that immediately *lumalo* which legalises customary law marriage is paid by the groom's family to the bride's family, the members of the two families as well as their clans have an obligation to ensure that the marriage is successful. This means that the extended families of the two spouses play a large role in mediation and attempting to resolve marital disputes. Normally their intervention focuses on reconciling the couples. Resolutions taken by the elders to reconcile the couple may not always please them both, especially the wife, in that, for instance, it is generally considered acceptable in terms of the customary law for a husband to have extramarital affairs, whilst the wife is expected to remain faithful to her husband. Due to the respect and honour the couple has for elders as taught in the traditional initiation schools, they end up abiding by the resolutions taken. In this way, break down of a customary law marriage or divorce is prevented.

Others linked the manner in which a marital problem is addressed to the customary law justice system. The first level of addressing marital disputes in a customary law marriage is the extended family. If there are issues which cannot be resolved between the couple and the extended family, their next customary court of appeal is that of the clan where the presiding officer is the senior member of the clan. If at the level of the clan the issues remain unresolved, or the couple disregard resolutions taken by the clan, their next customary court of appeal is that of the headman where the presiding officer is the headmen himself. The headman's council consists of the heads of the various traditional structures within the particular community. Should there be issues that remain unresolved at the level of the headman, or the couple disregard resolutions taken by the headman and his council, the couple could take their issues up with the next customary court of appeal which is the chief. At the chief's kraal, the chief himself is the judge. The chief's council consists of the headmen within his area of jurisdiction. If the marital disputes are not resolved at the chief's kraal or there are issues that remain unresolved, the couple could be granted their wish, which probably is divorce. Interviewees also indicated that the customary law justice system does not provide for legal representatives, only witnesses who include family and friends are allowed to make statements on behalf of the parties involved in marital disputes. However, in terms of section 8(1) of *the RCMA,* customary law marriages can only be dissolved by a court on the irretrievable breakdown of the marriage as contemplated in the Divorce Act (Act 70 of 1979).

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The couple's appearance in all the above mentioned customary courts beyond the family is a shame and a disgrace to one's own image and family. In essence, it is an indication that the families, where the husband was raised up and the wife was raised up had failed in their cultural obligation of bringing them up according to the cultural requirements. Cultural requirements include attending all the traditional initiation schools such as *vhusha (*puberty rites for girls*),tshikanda (*secret initiation rites for girls*), domba (*group rites as preliminary to marriage for girls, *murundu (*circumcision rites for men*)* and *vhutuka* (group rites as preliminary to marriage for boys) (van Warmelo, 1989:31).

Taking into consideration all the embarrassment which comes with appearing in different customary courts level, couples married in terms of the customary law who intend to divorce may rather stay in a marriage being unhappy and living separate lives but still customarily married. This means that the justice system processes of the customary law which could be too cumbersome serve as a deterrent to couples intending to divorce.

7.3.7 What best do you think could be done by the traditional leaders as well as the parliamentarians who represent the vast majority of customary law-orientated people of this country with regard to the prevalence of divorce?

Majority of the interviewees indicated that since traditional leaders are the custodians of the custom, they should be trained and tasked by the state to handle marriage disputes of their subjects who are married in terms of *the RCMA*. With the respect and honour the subjects have in their traditional leaders, their intervention in times of marital crisis could be of assistance.

7.3.8 Which regime of marriage in your opinion is more likely to lead to divorce- customary marriages or civil marriage?

The majority of the interviewees indicated that civil marriages are more likely to lead to divorce in that marriage is for the two partners, who at any time if they feel they no longer need each other may divorce. They claim that there is very little consideration of others in their decision making, and as such this gives them much opportunity to opt for divorce whenever differences crop up in the marriage. They maintain that a traditional African marriage is a matter that is public from the time one starts to do the arrangements in the sense that nobody ever goes to ask for a woman's hand in marriage alone, it is always a large group that is involved. Even divorce, it is a matter between the families as is the entering into the marriage. As such whenever spouses face marital disputes,

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they are compelled to consult the elders who would then intervene thereby reducing the chances of spouses ending the marriage by divorce.

7.3.9 If you had the option to contract the civil law marriage or customary law marriage, which regime would you have opted for?

The majority of the male interviewees indicated that if they had the option to choose between the civil law marriage and the customary law marriage at the time they got married, they would have loved to be married in terms of the customary law marriage. Some of the reasons they cited are that customary law marriage is more compatible with the African people than the civil marriage which they believe is meant for the whites or the rich people. They also cited that with the civil marriage law, there is lack of tolerance between the spouses. The majority of the female interviewees indicated that they would have loved to be married in terms of the civil law. Some of the reasons they cited are that with the civil law marriage, they are assured of one to one partnership in that there is no provision for one engaging in further marriages like it is with the customary law marriages. They also cited that since customary law marriages are potentially polygamous, it means such marriages are associated with emotional problems which include jealousy and frequent arguments.

7.4 PRESENTATION AND ANALYSIS OF DATA COLLECTED FROM THE DEPARTMENT OF HOME AFFAIRS AND THE DEPARTMENT OF JUSTICE

According to the Provincial Manager of the Department of Home Affairs, the Department has registered 32 customary marriages of Vhavenḓa in the Vhembe district over a period of 12 month, i.e. from 01 April 2012 to 31 March 2013.

Over the same period a Senior Officer in the Department of Justice in Sibasa Regional Court indicated that they had registered 316 divorce cases within the Vhembe district of which 8 were of the Vhavenḓa couples that had been married in terms of the customary law. Of the 8 couples who had brought their divorce cases to the Department of Justice, only 2 had marriage certificates indicating that they had been married in terms of the customary law and had registered their marriages with the Department of Home Affairs. The remaining couples (6) had no marriage certificate to prove their marriage in terms of the customary law.

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Based on the information given above, over the period of 12 months very few marriages (32) have been contracted and registered in terms of the Recognition of Customary Marriages Act (Act 120 of 1998). It amounts to approximately 3 customary marriages registered per month. This does not necessarily mean that people are not getting married in terms of the customary law. It could mean that those engaging in customary law marriages are not registering their marriages with the Department of Home Affairs as provided for by *the RCMA*. Their non-registration could be due to lack of knowledge, i.e. they might not have registered their customary marriages because they never had information or been informed about *the RCMA*. If ever they had information, then their non-registration could be due to ignorance.

The result also shows that over the period of 12 months there had been 8 cases of divorced couples that had been married in terms of the customary law within the Vhembe district. Of the 8 divorced couples, 6 (75%) of them did not have marriage certificate. This means that they had not actually registered their marriages with the Department of Home Affairs. According to the Department of Justice Senior Officer, most of the divorce cases of the 6 couples mentioned above had been referred to their offices by either their traditional leaders or traditional structures that had tried them in their traditional courts and failed. Traditionally, marital disputes and divorce issues are addressed by the couple and their families. If they (marital disputes and divorce) are above their capacity they are referred to the traditional leader for intervention.

In this instance it means that, the 6 couples who had approached the Department of Justice through their traditional leaders had issues that could not be resolved between themselves, their families and the traditional leaders. In essence, this means that there are marriage dissolutions that are handled by the traditional leaders in their traditional courts in terms of the customary law. This is in contrast to the requirement of t*he RCMA* which provides that only the high court has the power to dissolve a customary marriage in terms of the Divorce Act 70 of 1979. *The RCMA* further provides that a traditional leader may only act as mediator in marital disputes and dissolution. This means that the traditional leader has no power to dissolve marriages. Although Section 4(1) of *the RCMA* places an obligation on parties to register their marriages, section 4(9) provides that omission to do so does not have an effect on the validity of the marriage. Hence, the 6 couples who had not registered their marriages in terms of *the RCMA* had their divorce cases heard by the Department of Justice.

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Only 2(25%) of the divorce cases had their marriages registered with the Department of Home Affairs in terms of *the RCMA*.

The reduced number of divorces among the people that are married in terms of the customary law could be linked to the reduced number of people that have registered their marriages with the Department of Home Affairs. Maybe if they had registered in large numbers there could have been a higher rate of divorce, since they would consider lodging their divorce with the Department of Justice after having exhausted all the available avenues, such as involving their family members, and traditional leadership in their marital disputes as provided for by *the RCMA*. The low registration of marriages does not necessarily mean that people are not contracting customary marriages; it only means that they are contracting them but in an illegal way since the only legal way is in terms of *the RCMA*. It means therefore that there is a need for an outreach campaign to inform the majority of the Vhavenda in the Vhembe district with regard to *the RCMA*.

7.5 CONCLUDING OBSERVATION

It was evident from the respondents interviewed that, very few people are aware of the existence of *the RCMA*. This shows that those majorities of the interviewees that claim to know about *the RCMA* actually do not know or understand what it is about.

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CHAPTER EIGHT

IMPACT OF THE RECOGNITION OF CUSTOMARY MARRIAGES ACT (ACT 120 OF 1998) ON DISSOLUTION OF CUSTOMARY MARRIAGES

8.1 INTRODUCTION

According to the South African Constitution, everyone has the right to live in terms of their cultural and customary practices provided those traditions and practices are in line with the values of the Constitution (Section (15) (3) (ii)). Similarly, *the RCMA* provides for the recognition of customary marriages that existed before its commencement, including polygynous marriages. It also on the other hand, sets out the requirements for the validity of future customary marriages. The requirements of *the RCMA* appear to be at odds with the established customary practices as discussed in the previous chapter.

Customary practices provide for a comprehensive support to the families through different structures which include family members, marriage guardians and traditional leadership. With such supportive systems, possibilities of divorce are minimised.

This chapter examines the provisions of *the RCMA* and compares these provisions with the customary law principles and practices on divorce and assesses the extent to which the provision of *the RCMA* could impact on divorce rates among the Vhavenda. Only sections of the legislation which present challenges to the customary marriage and seem to have an impact on divorce shall be discussed.

8.2 REQUIREMENTS OF A MARRIAGE

Section 3 of *the RCMA* lists the requirements for a valid customary marriage which include age requirement, consensus and *lumalo*. Each of these requirements and its impact on divorce shall be discussed separately.

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8.2.1 Age requirement

In chapters 3and 5 of this study it was shown that under customary law practices, there is no specified age requirement for individuals to enter into a customary marriage. Instead the customary law regards puberty and initiation ceremonies as the minimum requirement for marriage as the ultimate goal of a marriage is procreation.

In chapter 6 of the study it was shown that under *the RCMA*, there is a minimum age requirement which is 18 years for individuals to enter into a customary marriage. Individuals under the age of 18 who wish to conclude a customary marriage need to seek permission from the Minister of Home Affairs as well as their parents. The ultimate goal of *the RCMA* is to allow the individuals to the marriage to make an informed decision with regard to the consequences of the marriage. In essence, *the RCMA* seems to endorse puberty and initiation ceremonies of the customary law as essentials for a customary law marriage. Under *the RCMA*, the essential age requirement is that the parties must have attained a minimum age of 18 years. This development could make customary marriages vulnerable to divorce.

8.2.2 Consensus

In chapter 2 it was shown that the consent of the individual parties to the marriage is not a requirement of a valid customary marriage. This follows from the provisions of customary law definition of marriage that it is a union between two families. In chapter five it was shown that family consent is generally required for a customary marriage to be valid. Thus the individual parties, particularly women could be dragged into a marriage without their consent or permission. Under common law, consent of both individual parties to the marriage is a requirement for a valid marriage. Individual parties' consent ensures that spouses enter into marriage without coercion from anyone.

In chapter 6 it was shown that section 3(1)(a)(ii) of *the RCMA* provides that free and full consent of both prospective spouses to the customary marriage is a requirement for a valid customary marriage. *The RCMA* explicitly requires consent of both individuals to the marriage. *The RCMA* in this regard perpetuates the common law position. Thus, *the RCMA* is, in a way imposing common law marriage requirement of consent into customary law marriage practices. On a more positive note, *the RCMA* aims at prohibiting forced marriages that used to occur under customary law.

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Established customary practices such as abduction or kidnapping have now been abolished by virtue of the legislation. On the other hand the implicit abolition of the family's role as provided for by the customary law in marriage, could negatively impact the stability of marriage in that the involvement of family members in the marriage negotiation process, would be eroded.

8.2.3 *Lumalo*

In chapter 2 of this study it was shown that *lumalo* is an essential requirement for a valid customary law marriage. *Lumalo* obligates the parents and the family at large to have an interest in the welfare of the customary marriage.

Under common law, *lumalo* is not a requirement for a valid marriage. A marriage can be concluded without any reference to the payment of lumalo.

In chapter 6 it was shown that although *the RCMA* provides a definition of *lumalo*, it does not state that it is a requirement for a valid customary marriage. This seems to leave this important customary law marriage institution *(lumalo)* at the discretion of the prospective spouses and their families. The families could decide to leave out negotiating and agreeing on the payment of *lumalo* in their process of negotiations. This omission could lead to the destruction or abolishment of the institution of *lumalo* which is an essential element in customary marriages. Regarding the payment of *lumalo* currently, Herbst and du Plessis (2008) state that '*lumalo* is not a requirement for any other recognised marriage in South Africa.

If the lumalo is abolished, it could lessen the parent's obligation to intervene in times of marital disputes between spouses to a customary marriage. Withdrawal of parents from engaging in marriage issues could have a negative impact on the marriage's stability, resulting in divorce which could have been avoided.

8.3 REGISTRATION OF CUSTOMARY MARRIAGES

In chapter 5 of the study it was shown that under customary law, marriages are not registered; instead they are made known to the traditional leader through various channels. Making the customary marriage known to the traditional leader benefits the couple in many ways. They get arable land, residential site as well as legal protection under customary law. There is no marriage

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certificate issued by the traditional leader as a proof of the existence of a customary marriage. Whenever a dispute arises concerning the existence of a customary marriage, family members, go-betweens, traditional leaders and community members are readily available to give evidence to that effect.

In chapters 5 and 6 of the study it was shown that common law makes registration of marriages compulsory. Common law marriages need to be registered with the relevant state officer. Upon registration, a certificate of marriage is issued as a proof of the existence of a marriage.

In chapter 6, it was shown that section 4 of *the RCMA* provides for the mandatory registration of customary marriages with the relevant department of Home Affairs officials. Upon registration, a certificate of marriage is issued as a proof of the existence of a customary marriage. This provision of *the RCMA* resembles the provision of common law marriages with regard to registration of marriages.

In chapter 7 it was established through data imperically that only 13% of the respondents had registered their customary marriages with the department of Home affairs in compliance with the requirement of *the RCMA*. Spouses, particularly husbands, were found to be reluctant with regards to registering their marriages in line with the provisions of section 4 of *the RCMA*.

From the foregoing, it is evident that *the RCMA* imposes some of the common law marriages provisions into customary law marriages. Registration of customary law marriages makes customary marriages as binding as their common marriages counterparts. The registration of customary marriages is generally to the advantage of women who for long have been denied legal protection under customary law. Spouses, husbands in particular, could in some instance register their marriages to fulfill the requirement of the marriage law, and still continue conducting themselves differently from the provisions of the same law. Such a conduct could cause problems in marriages that might lead to divorce.

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8.4 STATUS AND CAPACITY

In chapter 2 it was shown that under customary law, the husband heads the family. He holds decision-making power and authority in the family. The wife is considered inferior and her husband is regarded as her legal guardian. Thus, under customary law, women do not enjoy equal status with men.

In chapter 6 it was shown that under section 6 of *the RCMA* both the husband and wife have full status and capacity on the basis of equality subject to the matrimonial property system entered into which governs the customary marriage. This means that full status and capacity on the basis of equality is enjoyed by those who choose 'in community of property' in profit and loss as their matrimonial property system to govern their customary marriage. Under *the RCMA*, customary marriages are marriages concluded in community of property and of profit and loss between the spouses, except if a pre-nuptial contract is concluded to regulate otherwise. If the husband wishes to marry another wife, the property regime must be revised and a court application made.

The above provision of *the RCMA* abolishes the marital power of the husband over the wife under customary law, as it pronounces them to have equal dignity and capacity in the marriage enterprise. It also affects the customary law's matrimonial property system. This abolition of the customary law marriage practice by *the RCMA* could affect some conservative traditionalist husbands to an extent that they may decide to either ignore the provisions of *the RCMA* which they may see as withdrawing their traditional rights or simply divorce to move on freely to the next marriage.

8.5 POLYGAMOUS MARRIAGES

In chapter 2 it was shown that under customary law, a husband can marry as many wives as he can afford. What counts in his limitation of wives he could marry is nothing more than affordability. The husband as the head of the family has no obligation to seek permission from his wife. The wife is informed of his intention to take another wife

From the data collected, it was shown that majority of the female respondents in polygamous marriages were the first wives, who did not favour the particular type of marriage they were in. Their husbands never consulted them before taking other wives, they were simply informed about the new developments, and there was nothing they could do as it was the norm under customary

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marriage. It was evident that many women in polygamous marriages are not happy with their marriages. It was also shown that majority of the male respondents in polygamous did not actually plan to engage in polygamy, but they were compelled to do so by the circumstances beyond their control such as the migratory system of the country. Furthermore, many husbands in polygamous marriages did not show any pride in their polygamous marriage.

In chapter 6 it has been shown that Section 7(6) of *the RCMA* requires that a husband who wishes to enter into an additional customary marriage after the commencement of *the RCMA* should first make an application to the court to approve a written contract which will regulate the future matrimonial property system of his marriages. This means that a marriage contract should be drawn up and sent to the court for approval. This provision of *the RCMA* requires both the existing wife and the prospective wife to be part of the whole process of acquiring approval from the court. If and only if his application is approved by the court can he enter into additional customary marriages. If he enters into an additional customary marriage without a court-approved written contract, the second or subsequent marriage is null and void.

Implementation of the above provisions of *the RCMA* may have the following impact on divorce: First, a marriage contract is a legal document which is not easy to come up with. It needs to be drawn by people who have knowledge of legal matters or who have been trained to draw it, such as the lawyers. Taking into consideration the socio-economic status of people that reside in rural areas, husbands who wish to enter into additional customary marriages may not be able to afford a lawyer who would draw the marriage contracts. Being rural and/ or illiterate, they (husbands) may not even be aware of the free legal services offered by the Department of Justice through its legal board.

In the High Court of South Africa, Gauteng North Division, case number 29241/09 between *MM v MN*, the judge noted that 'most customary marriages are concluded by persons whose access to worldly goods is limited and whose financial security may be severely prejudiced by an earlier or the conclusion of another marriage…'

This suggests that a husband who is poor to the extent where he cannot afford a lawyer or resides in the deep rural area and is not aware of the free legal services of the Department of Justice may end

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up deciding to divorce his existing wife so that he may legally move on to the next customary marriage.

Second, for husbands to comply with the requirement of the law, it means they would need to sit around the table with their wives, have frank discussions with them regarding their intention to engage in a n additional marriage and to draw a matrimonial property system that would regulate the future matrimonial property system for their marriages. They would be required to also consider in their deliberations, other interested parties including the children in this regard. Some tradition conservative husbands having their minds already set on the next marriage might find it hard to comply with the provisions of *the RCMA*, where they would need to consult their existing wives and draw a new matrimonial property contract that would regulate their new marriage. Instead of complying with the provisions of *the RCMA*, they may consider divorcing their existing wives and move on freely to the next marriage. However, divorcing their existing wives does not do them any good since their marriage would still have to be dissolved in terms of the Divorce Act, and would be 'in community of property' by default, unless a valid antenuptial contract had been entered into before the marriage.

The above requirement of *the RCMA* completely abolishes the superiorr position husbands used to enjoy and use at will under customary law, where they would not be limited by their wives or anybody else in their acquisition of additional wives. However, *the RCMA*'s abolition of the said provision of the customary law is to ensure that the particular customary practice is in line with the values of the 1996 Constitution.

8.6 DISSOLUTION OF MARRIAGES

In chapters 2 and 3 it was shown that dissolution of marriages by divorce is devastating and affects almost every area of the life of the spouses. Divorce is ranked by many scholars as the number two life crisis after the death of a spouse. It was also shown that divorce under customary law is generally non-existence. Under customary law there are mechanisms in place to ensure marriage stability and prevention of divorce. One mechanism is the conduction of initiation schools where boys and girls are taught skills they would need as they get into and when they are in marriage. In the case of irreconcilable differences between spouses, dissolution of customary marriages would be handled by the families rather than the individual parties to the marriage. While it may be easy

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for the man to divorce his wife, it is relatively hard for a wife to divorce her husband under customary law. The timely intervention of the family would normally prevent a situation where irreconcilable differences would arise between the spouses.

Under common law, the dissolution of marriage by divorce is a matter that is in the hands of the two individual parties. They both have equal access to divorce. Cases involving marriages are handled and heard by the High Court and a marriage can only be dissolved by a court by a decree of divorce.

In chapter 6 of this study it was shown that *the RCMA* now governs the dissolution of customary marriages by divorce. This means that divorce should now occur under judicial supervision. Thus under *the RCMA*, a customary marriage may only be dissolved by a court on the ground of the irretrievable breakdown of the marriage as contemplated in the Divorce Act 70 of 1979. Both spouses now have equal access to divorce and only the High Court has the power to dissolve customary marriages. This provision of *the RCMA* is similar to the provision of divorce under common law. It means *the RCMA* is in this regard imposing common law divorce principles on the customary law marriages.

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8.7 GENDER ROLES

In chapter 2 it was shown that under customary law there is a clear division of labour between the sexes. Husbands are generally responsible for roles outside the home while the wives are responsible for roles in and around the home. These responsibilities are generally based on the idea of the inferiority and the superiority of the wives and husbands respectively. For instance, cooking food is, under customary law the duty for the wife, and if the husband is found doing that, it is considered ill-treatment by the wife. Should the wife be unable to cook for a considerable period of time due to ill-heath for instance, it is considered proper for her husband to marry another wife.

In chapter 2 it was also shown that under *the RCMA* division of work and responsibilities within customary marriage is not based on gender. In essence, there is no specific task meant for the husband or for the wife. For instance there is nothing wrong with the husband cooking, cleaning and taking care of the children which in terms of customary law would be defined as feminine tasks. Thus *the RCMA* sought to neutralise gender roles.

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The above provision of *the RCMA* completely abolishes the stereotyped roles for a husband and wife under customary law. This abolition of the custom could negatively impact on divorce in that some tradition conservative husbands could find it unacceptable if their wives have not cooked food when they come back from work, or to be told to do the washing while she is busy nursing a child. She could be divorced for failing to carry out her duty under customary law.

8.8 CONCLUDING OBSERVATIONS

From the foregoing discussion, it is clear that the attempt by *the RCMA* to make traditional customary marriage practices to be in line with the values of the Constitution (Section (15)(3)(ii)) has instead of recognizing those practices, made them operate more like civil marriages. Almost all the customs that used to be observed under customary law marriages have been ignored. The few that seem to have been left have been regulated in such a way that it is difficult to practice them. For instance,

(i) Polygamy as an age-old characteristic of customary law marriages where the husband would marry as many wives as he could afford has been dealt a severe blow by *the RCMA*.

(ii) *Lumalo* payment as an age-old requirement for a valid customary marriage has, under *the RCMA*, also been ignored. *The RCMA* only defines it but does not prescribe it as an essential requirement for a valid customary marriage. By not prescribing *lumalo* as a requirement under *the RCMA* could mean that it is not considered as an important requirement for a customary marriage, although it has been there since time immemorial.

Some conservative traditionalist spouses, particularly husbands may find the abolition of some of their traditional practices under customary law eroding their rights, and may defy or ignore them. The wives, as the most disadvantaged under customary law, would find *the RCMA* lifting them up to be on equal footing with their husbands. With the wife observing the provisions of *the RCMA* and the husband ignoring the same, this could lead to their marriage falling apart, thereby ending in divorce.

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CHAPTER NINE

GENERAL CONCLUSION

9.1 SUMMARY

The study comprised nine chapters which dealt with the ways in which the topic was approached as a way of examining the research problem.

Chapter one outlined the background, problem statement, aim and objectives, research question, hypothesis, rationale, significance, definitions of operational concepts and theory base. All these were aimed at exposing what necessitates couples to go for divorce.

Chapter two dealt with the theoretical framework. The following sub-themes were explored: understanding a custom, transmission of customs, modification of customs, impact of religion on customs, abolition of a custom, arranged marriages in Vhavenda community, a theoretical introduction, understanding customary law in South Africa, consent, status and capacity, gender roles, polygamy, dissolution of customary marriages, proprietary implications, and the impact of the Recognition of Customary Marriages Act on customary practice.

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Chapter three presented literature reviews of different researchers who studied different forms of marriage and divorce laws and practices. This chapter depicted previous researchers' views on the following practices and laws: Marriage practice in the Western culture, African customary marriage, rationale for arranging marriages, forms of marriage proposals, current South African marriage laws, Recognition of Customary Marriages Act (Act 120 of 1998), divorce and South African divorce laws.

Chapter four dealt with the research design and methodology. The following were explored: definition of research design, method for collecting data, sampling and sampling methods, data analysis, and methods of data analysis and levels of measurement of the variables.

Chapter five contained an exposition of customary law marriages. The following sub-themes were explored: understanding customary marriage in South Africa, requirements for entering into a valid

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customary marriage, capacity, consent, bride price, developmental phases that children undergo in initiation schools to ensure child-bearing capacity, procedure for entering into a marriage, registration of customary marriages, rights and duties of spouses, property consequences of customary marriages, dissolution of customary marriages, and procedure for divorce and peculiar aspects of Vhavenḓa customary marriages

Chapter six dealt with the Recognition of Customary Marriages Act (Act 120 of 1998). The following were explored: Recognition of Customary Marriages Act (Act 120 of 1998), requirements for validity of customary marriages under *the RCMA*, registration of customary marriages, recognition of customary marriages, effect of non-registration, customary marriage registration, possible factors for non-registration, status and capacity of spouses, proprietary consequences of customary marriages and contractual capacity of spouses and dissolution of customary marriages.

Chapter seven presented the quantitative and qualitative findings of the study.

Chapter eight presented the impact of *the RCMA* on dissolution of customary marriages. The following sub-themes were explored: requirements of a marriage, registration of customary marriages, status and capacity, polygamous marriages, dissolution of marriages and gender roles.

Chapter nine presented the general conclusion, summary, findings, dissemination of information and recommendations of the study.

9.2 FINDINGS FROM THE STUDY

The study found that the settlement pattern of the Vhembe District is largely rural and consists of 576 villages with the majority of the Vhavenḓa residing in the villages while few reside in the townships. Most of the Vhavenḓa couples are married in terms of the customary law. Customary law marriage is an indigenous marriage that Africans including the Vhavenḓa of Vhembe district have practiced since time immemorial.

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The researcher found that in the area of customary law marriages, there is a substantial increase in the prospective couple's own arranged marriages compared to parental arranged marriages among the Vhavenḓa of the Vhembe district. This means that many individuals choose their partners and arrange their own marriages rather than living it in the hands of the family elders to choose and arrange a marriage for them. A significant rise was also observed in monogamous marriages. The shift from polygamy to monogamy is attributable to the increase in the non-arranged marriages. The available evidence suggests that polygamy and arranged marriages appear to be on the decline in the Vhembe District.

The study also established that a majority of couples in polygamy, specifically wives, are not happy in their marriage. Their unhappiness is the result of inadequate financial support by the husband, emotional problems such as jealousy and frequent arguments between the spouses. The evidence also suggest that engaging in additional marriages is not something that they actually plan for. The first wives in most cases never get consulted, instead, they just get informed of their husband's additional customary law marriage with another wife. Nevertheless, there are first wives who approach their husbands to marry another wife due to various factors that include ill-health. Some additional wives are not aware that they are getting into a polygamous marriage and only discover it at a stage when it is too late to pull out. Nevertheless, there are women who knowingly and willingly get married as additional wives to husbands for various reasons. For instance, when a woman marries a husband from the royal family, she is aware that she is getting into a customary law marriage which is potentially polygamous. A majority of husbands in polygamous marriage engage in additional marriages as a result of circumstances beyond their control, such as the migratory system of the country where one's employment is far from home. This suggests that to the husband, engaging in additional customary law marriages is a way of avoiding engaging in adultery when one is working far from home. Some husbands engage in polygamous marriage as partial fulfillment of their family group requirement, for example, traditional leaders.

It was also found that the tradition whereby bridegroom pays a *lumalo* to the bride's family has been retained even in marriages where individuals choose and arrange with their partners to get married. This means that women have retained their value in the customary law marriage institution. There is a shift from the use of livestock as a form of marriage payment to money among the Vhavenḓa of Vhembe district. This is related to the present economic reality where

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majority of Vhavenḓa community no longer keep livestock or cattle as they used to do in the past. Hence they have adopted a style of using money as a form of marriage payment. The form of marriage payment used has been found to have no effect on the stability of customary law marriages.

It was also established in this study that while registration of marriages with the Department of Home Affairs works to the parties' benefit, very few Vhavenḓa couples have made use of this process. Majority of the Vhavenḓa couples were found to have 'registered' their marriages with the Traditional African Leadership in that their marriage is known to the traditional leader. Registration of marriage with the traditional leader could be related to the Vhembe district settlements patterns which are largely rural with the larger part of the land under the tribal authorities. This could suggest that majority of Vhavenḓa couples do not see the need to register a customary law marriage with the Department of Home Affairs as provided for by *the RCMA.* It is like once the groom's family has paid *lumalo* to the bride's family, and the marriage is appreciated by the two families, all that is left is for the marriage to be made known to the traditional leader. Making one's marriage known to the traditional leader is to most Vhavenḓa couples equivalent to registration. Some of the challenges that hinder registration of customary law marriages with the Department of Home Affairs have been found to be related to the cost involved in travelling to the registration offices of the Department of Home Affairs. Evidence from this research indicates that it is mostly township residents having relatively better knowledge and easy access to the registration offices of the Department of Home Affairs, who end up registering their customary law marriages. There are Vhavenḓa couples who undergo "double registration". They start by registering their marriages with the Department of Home Affairs and thereafter go and make their marriage known to the traditional leadership or the other way round, although the latter is not recognised as the agent of registration of marriages. This is usually practised by couples who reside in the villages where they are under traditional leadership.

The study also established that even though a customary law marriage is not registered with the Department of Home Affairs, the Department of Justice considers the couple married, provided there is sufficient evidence and information to that effect. This shows that the Department of Justice

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would handle divorce cases of customary law marriages irrespective of their registration with the Department of Home Affairs.

Furthermore, the study established that although many of Vhavenḓa couples are aware that *RCMA* exists, their knowledge about its provisions is very shallow. Most of them when interviewed showed lack of knowledge of the provisions of *the RCMA* which include marriageable age, registration of customary marriages, equal status and capacity of spouses, consent requirement as well as proprietary consequences of customary marriages. It is for these reasons that some married couples fail to comply with the requirements of *the RCMA*. Some couples are made aware of *the RCMA* and its provisions through the media, particularly the radio, which seems accessible to many. Others get to know about *the RCMA* through watching television soaps such as Muvhango, which is a Venḓa language prime time soap opera which broadcasts on SABC 2 from Mondays to Fridays at 21h00. In this soap, couples become aware of the challenges that customary law marriages face in this era of *the RCMA*. The respondents that know about *the RCMA* through listening to radio programmes as well as those that watch the Muvhango soap, were found to have very sketchy knowledge of the provisions of *the RCMA*.

It was found that there are people, including traditional leaders from the royal families, who while fully aware that customary marriages are potentially polygamous, would first marry in terms of the Marriage Act (Act 25 of 1961), and later when the need to fulfill their cultural requirement arises, would engage in additional marriages in violation of section 10(4) of *the RCMA*. What Mandla Mandela (an academic and chief of the Mvezo Traditional Council) did by engaging in additional marriages while still civilly married to Mabunu was in violation of section 10(4) of *the RCMA*? If a man of Mandla Mandela's caliber proves not to be aware of the provisions of the marriage laws of the country, ordinary rural folk can hardly be blamed for the same thing. The same is happening within the Vhavenḓa community of Vhembe district.

The study also established that the Vhavenḓa used to arrange marriages for their children with the rationale that young people are immature and impulsive to make good choices which is good for the family and the clans. In their choice of a suitable partner for their children, the Vhavenḓa would consider a traditional initiation school graduate. They would arrange a customary law marriage for

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reasons that include the following: strengthening friendship, financial or material benefit, maintaining a social class, payment of debt, cultural purpose, maintaining family relationships, acquiring cattle for agricultural purposes, arranging a wife for a person who is away from home and medical attention.

In arranging marriages for their children, the Vhavenḓa would engage in one of the different forms of marriage proposals which can either be regular or irregular. Irregular marriage proposals include arranging a marriage for unborn child, kidnapping and eloping. Though irregular, these marriage proposals are culturally accepted. In arranging a marriage for an unborn child, a family would pay *lumalo* whilst the mother is still pregnant even before the parents know whether the baby will be male or female. If it is a male, the groom's family would wait until she gives birth to a female child. It does not matter how long one waits. When the woman gives birth to a girl, the girl grows up knowing that she would become the wife of the person with whom marriage has been arranged.

Kidnapping is one of the irregular marriage proposals where a boy with the help of others, would wait for the girl he wants to marry to be alone and take her by force. This irregular marriage proposal is mostly used where the boy is impatient and cannot wait for the formal processes of a regular marriage proposal. Another accepted form of marriage proposals which is irregular but accepted is eloping. The arrangement is between a man and a woman to run away secretly with the intention of getting married, usually without parental approval.

The study also found that the average age of women at first marriage has risen quite significantly over the years. At the same time pre-arranged marriages of the unborn girl child as well as kidnapping as forms of irregular marriage proposal are fast disappearing. The end to these irregular marriage proposals might have been influenced by the provisions of the Children's Act, 2005 (Act 38 of 2005) which deals with topics that include the age of majority, child abduction, and trafficking of children.

It was also found that prior the enactment of *the RCMA* in 1998 the customary law divorce rate was lower compared to the customary law divorce rate after 1998. This suggests that the Vhavenḓa had their own customary law marriage mechanisms for dealing with the marital disputes. These mechanisms include the recognition of the extended family which comprises of parents,

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grandparents, aunts, and uncles. After the introduction of *the RCMA* in 1998, their customary way of dealing with the marital disputes was regulated by the provisions of the new Act. The current rate of customary law divorce, although low in comparison to other systems of marriage, is attributed to the parents' reduced influence and role in the marriage of their children. The reduced role in marriage by parents comes as the result of their non-involvement in the choice, arrangement and organisation of their children's marriages. Nowadays children choose and arrange and organise their own marriages with little or no involvement of their parents or families. Other factors that have been found to have a bearing on the current rate of divorce include lack of knowledge and skills that prospective spouses need to have when they enter into the institution of marriage. The said skills used to be provided by the traditional initiation schools such as *vhusha, tshikanda, domba*, *murundu and thondo*. The above cited initiation schools are increasingly losing their significance and role in modern times.

This study also established that most Vhavenḓa couples reside in the areas under the traditional leadership. Traditional leaders are the custodians of the Vhavenḓa cultural heritage which includes the transmission of Vhavenḓa cultural practices. In terms of the Vhavenḓa cultural practices, men or husbands are regarded as the heads of households and the owners of all property in the marriage and women cannot own any property without the assistance of a husband or father. These provisions of the Vhavenḓa cultural principles contrast sharply with the provisions of section 6 of *the RCMA* which provides for equal status and capacity of spouses. The contrast between the Vhavenḓa customary law marriages and *the RCMA* provisions in terms of status and capacity of spouses has been found to have a significant impact on the prevalence of divorce.

The study also established that while many customary law marriages are still intact, a few have broken down and ended in divorce. Two factors have been found to have made a significant contribution towards stability in the customary law marriages. It is the way a customary law marriage is concluded which is a process where everyone in the family is involved resulting in the members of the two families as well as their clans having an obligation to ensure that the marriage is successful. The other factor is the customary law justice and conflict resolution processes which start with the couple's immediate senior family members and end with the most senior traditional leaders' council intervention and mediation. These processes serve as intervention and mediation for a couple intending to divorce.

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One other factor that has been found to make a significant contribution in customary law marriages remaining intact is the fear couples have that if they divorce they might become outcasts in their communities, more especially wives, because divorce is seen as a shame and a disgrace to one's image and family. This means the couple would rather go through an abusive and unhappy customary law marriage relationship than to opt for divorce.

Subconsciously couples who stay in customary law marriages even if they are unhappy engage in one or all of the following: wish the problem away; hope that the problem will sort itself out; deny that they have a problem in their marriage; or adopt a wait and see attitude.

This study endorses the position taken by *the RCMA* that customary marriages and divorce laws should be regulated since they are closely related. The regulation of customary marriage and divorce laws provide for protection of both spouses, more particularly women who find themselves at the receiving end of the customary laws and practices. It must be repeated that customary laws were framed in favour of men and the disadvantage of women. This means that social change was desirable and that the change from customary law marriages to the provisions contained in *the RCMA* is highly beneficial for the institution of customary marriages in the following respects:

(i) women have a say in whether they want to be in polygamous marriages or not;
(ii) women are no longer rushed into marriage as soon as they reach puberty;
(iii) women are no longer viewed as the property of the men;
(iv) marriage occurs by mutual consent, instead of by pre-arrangement or arrangement by parents;
(v) both the husband and wife have full status and capacity on the basis of equality subject to the matrimonial property system entered into which governs the customary law marriage.

The study also found that in terms of *the RCMA*, certificates of marriages and of divorces are important as they have implications for many legal and social arrangements which include amongst others, inheritance of marital property in a case of death and distribution of marital property in a case of divorce.

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The study also found that men are no longer free to take additional wives at will as they used to do under the customary marriage law but have to conduct themselves in line with the provisions of section 7(6) of *the RCMA*, which requires that a husband who wishes to enter into an additional customary marriage with another woman after the commencement of *the RCMA* must apply to court to approve a written contract which will regulate the future matrimonial property system of his marriages (i.e. the existing marriage and the prospective one). It also established that customs differ between different tribal groups, each with its own customary law. Thus, section 3(1)(b)which requires that for a customary marriage to be valid, it "must be negotiated and entered into or celebrated in accordance with customary law," may have as many interpretations as the tribal groups are with regard to the requirements for the validity of customary marriages in terms of *the RCMA*. Provisions of both section 7(6) and section 3(1)(b) need to be clarified further as it was established that they have been interpreted differently by the judges. This is clearly evident in the *Mayelane v Ngwenyama and other*, *CCT 57/12, [2013]* in which the judges of the High Court and the judges of the Supreme Court of Appeal ended up giving different judgements.

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9.3 THE NEED FOR DISSEMINATION OF INFORMATION

On completion of the study the researcher will engage in the following activities to disseminate content of the study particularly the findings and the recommendations:

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9.4 RECOMMENDATIONS

The registration of customary law marriages provision in *the RCMA* should be made known to the people and strictly enforced.

To improve on the registration of customary law marriages with the Department of Home Affairs and dissolution of customary marriages with the Department of Justice in the Vhembe district, the Vhavenḓa community population sub-group, which must be targeted, is the one that resides in the rural areas. This is the sub-group which has emerged from the study as the one which is most likely to fail to register their customary law marriages and divorces. They have limited access to registration offices of the Department of Home Affairs where they can register their customary law marriages, as well as to the Department of Justice where they can lodge their customary law divorces in terms of *the RCMA*. For the purpose of addressing the above challenges and meeting other legal obligations, the state should establish registration offices in rural areas to ensure availability of services such as registration of customary law marriages and lodging of customary law divorces as required by the provisions of *the RCMA*. In exceptional cases registration could take place in churches. Officers from the Ministry of Home Affairs could visit churches and traditional leaders' kraals on designated days for the sole purpose of carrying out registration of marriages.

It also emerged from this study that traditional leaders and their traditional structures play a trustworthy role in their communities. People in the rural areas have confidence in their traditional leaderships which is inspired by their ready accessibility and availability. In that light the state should create conditions that would ensure that traditional leaders become agents of change and facilitators of development for their communities. This suggests that the Department of Home

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Affairs should consider utilising traditional leaders and various other people in traditional structures for the registration of customary law marriages. To achieve all these, the Department of Home Affairs should engage in capacity building programmes for traditional leadership with regard to registering the customary law marriages. Capacity building approaches could take the form of training the traditional leadership, holding workshops and seminars in order to equip them with the knowledge they need to have to be able to register customary law marriages.

With regard to the administration of justice, the Department of Justice should also consider making use of traditional leaders and other people in traditional structures to complement its efforts in the dispensation of justice regarding marital disputes at the local level. This also means that the traditional leadership should undergo training, workshops and seminars to equip them with the knowledge of legal matters regarding customary marriages and divorce laws in terms of *the RCMA.*

Since traditional initiation schools are increasingly losing their role and traditional value to modern lifestyle, our political leaders should ensure that at least *domba* which is the most important of all initiations, is retained and maintained, for it is the final qualification for marriage. For people already in marriage who did not go through the *domba* initiation school, provision should be made to train and educate them to know and understand the basics of marriage from the cultural perspective. For the Christians, pastors should ensure that they conduct premarital counseling to their followers in accordance with the biblical principles before they marry them. Provision should also be made for couples who got married without proper counseling having been conducted so that they too can be taught the basics of marriage. In a nutshell, every couple should seriously consider marital counseling to increase their chances of having a long and happy marriage and to save their marriage from falling apart. Topics that should be covered during premarital counseling may include:

- Divorce, i.e. although no couple goes into marriage thinking they will be the ones who won't make it, divorce is not an easy decision, it requires careful consideration and the balancing of diverse factors including what is in the best interest of the children if the couple has any. Premarital counseling should respond to questions such as the following: should there be a prenuptial agreement in the event of

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divorce? When is divorce the best option for the spouses? How will divorce be handled?

- Marriage expectations, i.e. do they have the same expectations of marriage with regard to monogamy or polygamy?
- Conflict Resolution, i.e. how will they handle conflict? There must be a plan for handling conflict in the marriage. Proper conflict resolution could help couples to stay out of divorce.

In addition, traditional leaders should be allowed to issue certificates of attendance to all the *domba* graduates. The same goes for the pastors. They should be allowed to issue certificates of attendance to those who have successfully completed premarital counseling courses. The Department of Home Affairs should enforce this practice by making such a certificate of attendance a prerequisite for the registration of marriage.

The Department of Home Affairs should also ensure that prospective couples and couples married in terms of the customary law are educated about the legality of customary law marriages and are sufficiently motivated to want to register their customary law marriages. This could be achieved by visiting the tribal offices, chiefs' kraals and community cultural functions. They could also consider using both print and electronic media for education and public awareness.

The Department of Justice should on regular basis consider revisiting *the RCMA* so as to effect the necessary amendments as customary marriage practice challenges emerge. The Department of Justice should also consider holding regular workshops for judges on the interpretation of *the RCMA* and its provisions. *Mayelane v Ngwenyama and other*, CCT 57/12, [2013] could have ended in the Supreme Court of Appeal giving the same judgment, had the judges had the same interpretation of the sections 7(6) and 3(1)(b) of Act.

The Department of Justice should also consider amending section 3(1) (b) of *the RCMA* which reads as follows "the marriage must be negotiated and entered into or celebrated in accordance with customary law" to read as follows: *"the marriage must be negotiated and entered into or celebrated in accordance with customary law subject to the Constitution and its development must promote the spirit, purport and objects of the Bill of Rights*". The inclusion of this clause will ensure that the section is

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read together with the Constitution (Act 108 of 1996). Nevertheless, it remains the task of government, ministry of justice, the judiciary and other relevant stakeholders to bring customary law of each tribal group in South Africa in line with the values of the Constitution. This is in line with section 8(1) of the South African Constitution.

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CHAPTER NINE

GENERAL CONCLUSION

9.1 SUMMARY

The study comprised nine chapters which dealt with the ways in which the topic was approached as a way of examining the research problem.

Chapter one outlined the background, problem statement, aim and objectives, research question, hypothesis, rationale, significance, definitions of operational concepts and theory base. All these were aimed at exposing what necessitates couples to go for divorce.

Chapter two dealt with the theoretical framework. The following sub-themes were explored: understanding a custom, transmission of customs, modification of customs, impact of religion on customs, abolition of a custom, arranged marriages in Vhavenḓa community, a theoretical introduction, understanding customary law in South Africa, consent, status and capacity, gender roles, polygamy, dissolution of customary marriages, proprietary implications, and the impact of the Recognition of Customary Marriages Act on customary practice.

Chapter three presented literature reviews of different researchers who studied different forms of marriage and divorce laws and practices. This chapter depicted previous researchers' views on the following practices and laws: Marriage practice in the Western culture, African customary marriage, rationale for arranging marriages, forms of marriage proposals, current South African marriage laws, Recognition of Customary Marriages Act (Act 120 of 1998), divorce and South African divorce laws.

Chapter four dealt with the research design and methodology. The following were explored: definition of research design, method for collecting data, sampling and sampling methods, data analysis, and methods of data analysis and levels of measurement of the variables.

Chapter five contained an exposition of customary law marriages. The following sub-themes were explored: understanding customary marriage in South Africa, requirements for entering into a valid

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customary marriage, capacity, consent, bride price, developmental phases that children undergo in initiation schools to ensure child-bearing capacity, procedure for entering into a marriage, registration of customary marriages, rights and duties of spouses, property consequences of customary marriages, dissolution of customary marriages, and procedure for divorce and peculiar aspects of Vhavenḓa customary marriages

Chapter six dealt with the Recognition of Customary Marriages Act (Act 120 of 1998). The following were explored: Recognition of Customary Marriages Act (Act 120 of 1998), requirements for validity of customary marriages under *the RCMA*, registration of customary marriages, recognition of customary marriages, effect of non-registration, customary marriage registration, possible factors for non-registration, status and capacity of spouses, proprietary consequences of customary marriages and contractual capacity of spouses and dissolution of customary marriages.

Chapter seven presented the quantitative and qualitative findings of the study.

Chapter eight presented the impact of *the RCMA* on dissolution of customary marriages. The following sub-themes were explored: requirements of a marriage, registration of customary marriages, status and capacity, polygamous marriages, dissolution of marriages and gender roles.

Chapter nine presented the general conclusion, summary, findings, dissemination of information and recommendations of the study.

9.2 FINDINGS FROM THE STUDY

The study found that the settlement pattern of the Vhembe District is largely rural and consists of 576 villages with the majority of the Vhavenḓa residing in the villages while few reside in the townships. Most of the Vhavenḓa couples are married in terms of the customary law. Customary law marriage is an indigenous marriage that Africans including the Vhavenḓa of Vhembe district have practiced since time immemorial.

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The researcher found that in the area of customary law marriages, there is a substantial increase in the prospective couple's own arranged marriages compared to parental arranged marriages among the Vhavenḓa of the Vhembe district. This means that many individuals choose their partners and arrange their own marriages rather than living it in the hands of the family elders to choose and arrange a marriage for them. A significant rise was also observed in monogamous marriages. The shift from polygamy to monogamy is attributable to the increase in the non-arranged marriages. The available evidence suggests that polygamy and arranged marriages appear to be on the decline in the Vhembe District.

The study also established that a majority of couples in polygamy, specifically wives, are not happy in their marriage. Their unhappiness is the result of inadequate financial support by the husband, emotional problems such as jealousy and frequent arguments between the spouses. The evidence also suggest that engaging in additional marriages is not something that they actually plan for. The first wives in most cases never get consulted, instead, they just get informed of their husband's additional customary law marriage with another wife. Nevertheless, there are first wives who approach their husbands to marry another wife due to various factors that include ill-health. Some additional wives are not aware that they are getting into a polygamous marriage and only discover it at a stage when it is too late to pull out. Nevertheless, there are women who knowingly and willingly get married as additional wives to husbands for various reasons. For instance, when a woman marries a husband from the royal family, she is aware that she is getting into a customary law marriage which is potentially polygamous. A majority of husbands in polygamous marriage engage in additional marriages as a result of circumstances beyond their control, such as the migratory system of the country where one's employment is far from home. This suggests that to the husband, engaging in additional customary law marriages is a way of avoiding engaging in adultery when one is working far from home. Some husbands engage in polygamous marriage as partial fulfillment of their family group requirement, for example, traditional leaders.

It was also found that the tradition whereby bridegroom pays a *lumalo* to the bride's family has been retained even in marriages where individuals choose and arrange with their partners to get married. This means that women have retained their value in the customary law marriage institution. There is a shift from the use of livestock as a form of marriage payment to money among the Vhavenḓa of Vhembe district. This is related to the present economic reality where

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majority of Vhavenḓa community no longer keep livestock or cattle as they used to do in the past. Hence they have adopted a style of using money as a form of marriage payment. The form of marriage payment used has been found to have no effect on the stability of customary law marriages.

It was also established in this study that while registration of marriages with the Department of Home Affairs works to the parties' benefit, very few Vhavenḓa couples have made use of this process. Majority of the Vhavenḓa couples were found to have 'registered' their marriages with the Traditional African Leadership in that their marriage is known to the traditional leader. Registration of marriage with the traditional leader could be related to the Vhembe district settlements patterns which are largely rural with the larger part of the land under the tribal authorities. This could suggest that majority of Vhavenḓa couples do not see the need to register a customary law marriage with the Department of Home Affairs as provided for by *the RCMA.* It is like once the groom's family has paid *lumalo* to the bride's family, and the marriage is appreciated by the two families, all that is left is for the marriage to be made known to the traditional leader. Making one's marriage known to the traditional leader is to most Vhavenḓa couples equivalent to registration. Some of the challenges that hinder registration of customary law marriages with the Department of Home Affairs have been found to be related to the cost involved in travelling to the registration offices of the Department of Home Affairs. Evidence from this research indicates that it is mostly township residents having relatively better knowledge and easy access to the registration offices of the Department of Home Affairs, who end up registering their customary law marriages. There are Vhavenḓa couples who undergo "double registration". They start by registering their marriages with the Department of Home Affairs and thereafter go and make their marriage known to the traditional leadership or the other way round, although the latter is not recognised as the agent of registration of marriages. This is usually practised by couples who reside in the villages where they are under traditional leadership.

The study also established that even though a customary law marriage is not registered with the Department of Home Affairs, the Department of Justice considers the couple married, provided there is sufficient evidence and information to that effect. This shows that the Department of Justice

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would handle divorce cases of customary law marriages irrespective of their registration with the Department of Home Affairs.

Furthermore, the study established that although many of Vhavenḓa couples are aware that *RCMA* exists, their knowledge about its provisions is very shallow. Most of them when interviewed showed lack of knowledge of the provisions of *the RCMA* which include marriageable age, registration of customary marriages, equal status and capacity of spouses, consent requirement as well as proprietary consequences of customary marriages. It is for these reasons that some married couples fail to comply with the requirements of *the RCMA*. Some couples are made aware of *the RCMA* and its provisions through the media, particularly the radio, which seems accessible to many. Others get to know about *the RCMA* through watching television soaps such as Muvhango, which is a Venḓa language prime time soap opera which broadcasts on SABC 2 from Mondays to Fridays at 21h00. In this soap, couples become aware of the challenges that customary law marriages face in this era of *the RCMA*. The respondents that know about *the RCMA* through listening to radio programmes as well as those that watch the Muvhango soap, were found to have very sketchy knowledge of the provisions of *the RCMA*.

It was found that there are people, including traditional leaders from the royal families, who while fully aware that customary marriages are potentially polygamous, would first marry in terms of the Marriage Act (Act 25 of 1961), and later when the need to fulfill their cultural requirement arises, would engage in additional marriages in violation of section 10(4) of *the RCMA*. What Mandla Mandela (an academic and chief of the Mvezo Traditional Council) did by engaging in additional marriages while still civilly married to Mabunu was in violation of section 10(4) of *the RCMA*? If a man of Mandla Mandela's caliber proves not to be aware of the provisions of the marriage laws of the country, ordinary rural folk can hardly be blamed for the same thing. The same is happening within the Vhavenḓa community of Vhembe district.

The study also established that the Vhavenḓa used to arrange marriages for their children with the rationale that young people are immature and impulsive to make good choices which is good for the family and the clans. In their choice of a suitable partner for their children, the Vhavenḓa would consider a traditional initiation school graduate. They would arrange a customary law marriage for

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reasons that include the following: strengthening friendship, financial or material benefit, maintaining a social class, payment of debt, cultural purpose, maintaining family relationships, acquiring cattle for agricultural purposes, arranging a wife for a person who is away from home and medical attention.

In arranging marriages for their children, the Vhavenḓa would engage in one of the different forms of marriage proposals which can either be regular or irregular. Irregular marriage proposals include arranging a marriage for unborn child, kidnapping and eloping. Though irregular, these marriage proposals are culturally accepted. In arranging a marriage for an unborn child, a family would pay *lumalo* whilst the mother is still pregnant even before the parents know whether the baby will be male or female. If it is a male, the groom's family would wait until she gives birth to a female child. It does not matter how long one waits. When the woman gives birth to a girl, the girl grows up knowing that she would become the wife of the person with whom marriage has been arranged.

Kidnapping is one of the irregular marriage proposals where a boy with the help of others, would wait for the girl he wants to marry to be alone and take her by force. This irregular marriage proposal is mostly used where the boy is impatient and cannot wait for the formal processes of a regular marriage proposal. Another accepted form of marriage proposals which is irregular but accepted is eloping. The arrangement is between a man and a woman to run away secretly with the intention of getting married, usually without parental approval.

The study also found that the average age of women at first marriage has risen quite significantly over the years. At the same time pre-arranged marriages of the unborn girl child as well as kidnapping as forms of irregular marriage proposal are fast disappearing. The end to these irregular marriage proposals might have been influenced by the provisions of the Children's Act, 2005 (Act 38 of 2005) which deals with topics that include the age of majority, child abduction, and trafficking of children.

It was also found that prior the enactment of *the RCMA* in 1998 the customary law divorce rate was lower compared to the customary law divorce rate after 1998. This suggests that the Vhavenḓa had their own customary law marriage mechanisms for dealing with the marital disputes. These mechanisms include the recognition of the extended family which comprises of parents,

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grandparents, aunts, and uncles. After the introduction of *the RCMA* in 1998, their customary way of dealing with the marital disputes was regulated by the provisions of the new Act. The current rate of customary law divorce, although low in comparison to other systems of marriage, is attributed to the parents' reduced influence and role in the marriage of their children. The reduced role in marriage by parents comes as the result of their non-involvement in the choice, arrangement and organisation of their children's marriages. Nowadays children choose and arrange and organise their own marriages with little or no involvement of their parents or families. Other factors that have been found to have a bearing on the current rate of divorce include lack of knowledge and skills that prospective spouses need to have when they enter into the institution of marriage. The said skills used to be provided by the traditional initiation schools such as *vhusha, tshikanda, domba*, *murundu and thondo*. The above cited initiation schools are increasingly losing their significance and role in modern times.

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With regard to the administration of justice, the Department of Justice should also consider making use of traditional leaders and other people in traditional structures to complement its efforts in the dispensation of justice regarding marital disputes at the local level. This also means that the traditional leadership should undergo training, workshops and seminars to equip them with the knowledge of legal matters regarding customary marriages and divorce laws in terms of *the RCMA.*

Since traditional initiation schools are increasingly losing their role and traditional value to modern lifestyle, our political leaders should ensure that at least *domba* which is the most important of all initiations, is retained and maintained, for it is the final qualification for marriage. For people already in marriage who did not go through the *domba* initiation school, provision should be made to train and educate them to know and understand the basics of marriage from the cultural perspective. For the Christians, pastors should ensure that they conduct premarital counseling to their followers in accordance with the biblical principles before they marry them. Provision should also be made for couples who got married without proper counseling having been conducted so that they too can be taught the basics of marriage. In a nutshell, every couple should seriously consider marital counseling to increase their chances of having a long and happy marriage and to save their marriage from falling apart. Topics that should be covered during premarital counseling may include:

- Divorce, i.e. although no couple goes into marriage thinking they will be the ones who won't make it, divorce is not an easy decision, it requires careful consideration and the balancing of diverse factors including what is in the best interest of the children if the couple has any. Premarital counseling should respond to questions such as the following: should there be a prenuptial agreement in the event of

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divorce? When is divorce the best option for the spouses? How will divorce be handled?

- Marriage expectations, i.e. do they have the same expectations of marriage with regard to monogamy or polygamy?
- Conflict Resolution, i.e. how will they handle conflict? There must be a plan for handling conflict in the marriage. Proper conflict resolution could help couples to stay out of divorce.

In addition, traditional leaders should be allowed to issue certificates of attendance to all the *domba* graduates. The same goes for the pastors. They should be allowed to issue certificates of attendance to those who have successfully completed premarital counseling courses. The Department of Home Affairs should enforce this practice by making such a certificate of attendance a prerequisite for the registration of marriage.

The Department of Home Affairs should also ensure that prospective couples and couples married in terms of the customary law are educated about the legality of customary law marriages and are sufficiently motivated to want to register their customary law marriages. This could be achieved by visiting the tribal offices, chiefs' kraals and community cultural functions. They could also consider using both print and electronic media for education and public awareness.

The Department of Justice should on regular basis consider revisiting *the RCMA* so as to effect the necessary amendments as customary marriage practice challenges emerge. The Department of Justice should also consider holding regular workshops for judges on the interpretation of *the RCMA* and its provisions. *Mayelane v Ngwenyama and other*, CCT 57/12, [2013] could have ended in the Supreme Court of Appeal giving the same judgment, had the judges had the same interpretation of the sections 7(6) and 3(1)(b) of Act.

The Department of Justice should also consider amending section 3(1) (b) of *the RCMA* which reads as follows "the marriage must be negotiated and entered into or celebrated in accordance with customary law" to read as follows: *"the marriage must be negotiated and entered into or celebrated in accordance with customary law subject to the Constitution and its development must promote the spirit, purport and objects of the Bill of Rights*". The inclusion of this clause will ensure that the section is

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read together with the Constitution (Act 108 of 1996). Nevertheless, it remains the task of government, ministry of justice, the judiciary and other relevant stakeholders to bring customary law of each tribal group in South Africa in line with the values of the Constitution. This is in line with section 8(1) of the South African Constitution.



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ANNEXURE A

RESEARCH QUESTIONNAIRE

DEAR SIR/MADAM

INTRODUCTION

THANK YOU FOR PARTICIPATING IN THIS RESEARCH. THIS QUESTIONNAIRE IS PART OF A RESEARCH STUDY DESIGNED TO INVESTIGATE THE POTENTIAL IMPACT OF THE CUSTOMARY MARRIAGE ACT NO 120 OF 1998 ON DIVORCE. IT IS A CASE STUDY OF THE VHAVENḐA COMMUNITY OF VHEMBE DISTRICT, LIMPOPO PROVINCE, SOUTH AFRICA.

INSTRUCTIONS:

1. PLEASE DO NOT WRITE YOUR NAME IN THIS QUESTIONNAIRE.
2. PLEASE READ THE QUESTIONS CAREFULLY.
3. INDICATE THE CORRECT ANSWER BY A TICK.
4. THERE IS NO RIGHT OR WRONG ANSWER.
5. DATA COLLECTED WILL BE TREATED WITH STRICT CONFIDENTIALITY.

PART 1

INDICATE YOUR ANSWER BY A TICK IN THE SPACE PROVIDED.

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1. AGE GROUP:

25-30	31-35	36-40	41-45	46-50	51-55	56-60	61-65	66-70	71-75

2. GENDER

MALE	FEMALE

3. PLACE OF RESIDENCE:

TOWNSHIP	VILLAGE

4. IN WHICH AREA OF THE VHEMBE DISTRICT DO YOU RESIDE?

THOHOYANDOU	MUTALE	NZHELELE	VUWANI

5. RELIGION:

CHRISTIAN	TRADITIONAL AFRICAN	MUSLIM	OTHER

IF OTHER, SPECIFY_____

6. EDUCATION:

PRIMARY SCHOOL EDUCATION	SECONDARY SCHOOL EDUCATION	TERTIARY QUALIFICATION	NO FORMAL EDUCATION

7. OCCUPATION:

GOVERNMENT EMPLOYEE	PRIVATE SECTOR EMPLOYEE	SELF-EMPLOYED	UNEMPLOYED

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8. ARE YOU OF ROYAL BLOOD?

YES	NO

9. ARE YOU A TRADITIONAL HEALER?

YES	NO

10. MARITAL STATUS:

MARRIED	DIVORCED	SEPARATED	WIDOW	WIDOWER

11. HOW DID YOU GET MARRIED?

CUSTOMARY LAW	CHRISTIAN	MUSLIM	OTHER

IF OTHER, SPECIFY_____

12. WHAT FORM OF MARRIAGE ARE/WERE YOU IN?

MONOGAMY(ONE HUSBAND TO ONE WIFE)	POLYGAMY(ONE HUSBAND TO MANY WIVES)	OTHER

IF OTHER, SPECIFY_____

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13. EXPLAIN WHY YOU FAVOURED THE TYPE OF MARRIAGE YOU INDICATED ABOVE.

_____

_____

_____

14. HOW OLD WERE YOU WHEN YOU FIRST GOT MARRIED?

10-15	16-20	21-25	26-30	31-35	36-40

15. HOW OLD WAS YOUR SPOUSE WHEN HE/SHE GOT MARRIED TO YOU?

10-15	16-20	21-25	26-30	31-35	36-40

16. HOW DID YOU GET YOUR SPOUSE?

PARENTAL ARRANGEMENT	OWN ARRANGEMENT	KIDNAPPING	ELOPING	OTHER

IF OTHER, SPECIFY_____

17. WHAT FORM DID YOUR 'MARRIAGE PAYMENT' TAKE?

LIVESTOCK	MONEY	OTHER

IF OTHER, SPECIFY_____

18. WITH WHAT BODY/INSTITUTION DID YOU REGISTER YOUR MARRIAGE?

HOME AFFAIRS	CHURCH	TRADITIONAL AFRICAN LEADERSHIP	OTHER

IF OTHER, SPECIFY_____

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19. HOW MANY TIMES HAVE YOU BEEN MARRIED?

ONE	TWO	THREE	OTHER

IF THE ANSWER IS ONE, SKIP QUESTIONS 20 TO 22.

20. HOW OLD WERE YOU WHEN YOU CONTRACTED YOUR FIRST MARRIAGE?_____

21. WHY DID YOUR FIRST MARRIAGE END?

DIVORCE	DEATH	OTHER

22. IF DIVORCE, WHAT WERE THE GROUNDS?

INFERTILITY	FAMILY PRESSURE	WITCHCRAFT	OTHER

23. FOR HOW MANY YEARS HAVE YOU BEEN MARRIED TO YOUR PRESENT SPOUSE? ------

24. IF YOU WERE GIVEN A SECOND CHANCE IN LIFE, WOULD YOU GET MARRIED TO THE SAME SPOUSE? AND WHY?

YES	NO

25. MOTIVATE THE CHOICE YOU MADE IN 24 ABOVE

_____

_____

_____

_____

_____

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26. DO YOU KNOW ABOUT THE (RECOGNITION OF CUSTOMARY MARRIAGES ACT (ACT 120 OF 1998))?

YES	NO

27. IF YES, HOW DID YOU KNOW ABOUT THE RECOGNITION OF CUSTOMARY MARRIAGES ACT (ACT 120 0F 1998)?

MEDIA	HEADCHIEF	HOME AFFAIRS	OTHER

28. HAVE YOU REGISTERED YOUR MARRIAGE IN TERMS OF THE RECOGNITION OF CUSTOMARY MARRIAGES ACT (ACT 120 0F 1998)?

29. ?

YES	NO

30. IF YES, WHAT INSTITUTION/BODY DID YOU REGISTER YOUR MARRIAGE?

HOME AFFAIRS	CHURCH	TRADITIONAL AFRICAN LEADERSHIP	OTHER

IF OTHER, SPECIFY_____

31. IF YOU REGISTERED WITH HOME AFFAIRS, WHERE DID YOU REGISTER?

THOHOYANDOU	MUTALE	NZHELELE	VUWANI	OTHER

IF OTHER, SPECIFY_____

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ANNEXURE B

Interview questions:

1. What do you know about the Recognition of Customary Marriages Act (Act 120 of 1998).
2. How do you compare the stability of customary law marriages before and after the commencement of the Recognition of Customary Marriages Act (Act 120 of 1998) in 1998?
3. What is your opinion about the divorce rate before and after the commencement of the Recognition of Customary Marriages Act (Act 120 of 1998) in 1998?
4. Which factors do you attribute the divorce rate you mentioned above to? Elaborate.
5. How does each of the following elements affect the rate of divorce**?** Marriageable age, marriage payment, registration of marriages, equal status and capacity of spouses, proprietary consequences of customary marriages.
6. Elaborate on how the manner in which a marital problem is addressed could have an impact on the decision by the spouses to seek a divorce.
7. What best do you think could be done by the traditional leaders as well as the parliamentarians who represent the vast majority of customary law-orientated people of this country with regard to the prevalence of divorce?
8. Which regime of marriage in your opinion is more likely to lead to divorce- Customary marriages or civil marriage? Elaborate.
9. If you had the option to contract the civil law marriage or customary law marriage, which regime would you have opted for? Give reasons.

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ANNEXURE C

P.O. Box 1646
Thohoyandou
0950
10 September 2012

Dear MAANDA DAVID MUDZANANI.

This is to confirm my offer to you of a temporary appointment as research assistant for 30 inconsecutive days from 14 September 2012 to 28 November 2012 at a rate of R20 per hour. Termination of this appointment may be initiated by either party giving one (1) week notice.

This agreement exists solely between me as a researcher and you. In no manner or form does this appointment extend to or affect the University of Venda in any way.

The primary purpose of this appointment is to assist me in the collection of data for my research study from the participants within the Vhembe District.

Hours of work: There will be a great deal of flexibility exercised in the time and place of the performance of this activity, but I expect these hours not to exceed 4 hours per day.

Benefits: You are entitled to one food parcel and a drink per day.

If you accept the terms of this appointment, please sign and return the enclosed copy of this letter, retaining the original for your records.

Yours truly,

_____

Raphalalani T.D (Researcher)

I agree to the conditions of this appointment as set out above.

Signature of research assistant: _____ Date: _____

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ANNEXURE D

PARTICIPATION INFORMATION SHEET

Dear Participant

My name is David TshinetiseRaphalalani. I am a doctoral student at the University of Venda. I am interested in establishing the impact of the Recognition of Customary Marriages Act 120 of 1998 on the prevalence of divorce among the Vhavenḓa in the Vhembe District.

Your participation in this study is voluntary. You may withdraw from the study at any stage without giving reasons. In this study you will be expected to complete the questionnaire and respond to the interview questions. The whole process will take about 30 minutes.

I am conducting the research in this manner in order to obtain discussion and ideas that you may have regarding the relationship between the Recognition of Customary Marriages Act (Act 120 of 1998) and divorce. You may have access to the findings of this study upon request.

I request your permission to audiotape the interview so that the discussion can be accurately portrayed. In transcribing the discussion, no names will be included and any discussion in the interview will remain confidential. Once the discussion has been transcribed, the tape will be cleaned and destroyed.

The data sheets will be kept locked and secure at all times during the study and they will be destroyed after successful completion and analysis of the data. You will not be asked to identify yourself on the data sheet in order to maintain your confidentiality and privacy.

Thank you for your participation.

T.D Raphalalani

Cell: 072 613 1444

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ANNEXURE E

CONSENT FORM

FULL TITLE OF STUDY: THE IMPACT OF THE CUSTOMARY MARRIAGE ACT ON THE PREVALENCE OF DIVORCE AMONG THE VHAVENḐA IN THE VHEMBE DISTRICT.

NAME : T.D RAPHALALANI
POSITION : RESEARCHER
CONTACT ADDRESS: P.O.BOX 1646
THOHOYANDOU
0950
CELL : 072 613 1444
EMAIL : raphalalani.td@webmail.co.za

	PLEASE INITIAL BOX
I CONFIRM THAT I HAVE READ AND UNDERSTAND THE INFORMATION SHEET FOR THE ABOVE STUDY AND HAVE HAD THE OPPORTUNITY TO ASK QUESTIONS.	☐
I UNDERSTAND THAT MY PARTICIPATION IS VOLUNTARY AND THAT I AM FREE TO WITHDRAW AT ANY TIME, WITHOUT GIVING REASON.	☐
I AGREE TO TAKE PART IN THE ABOVE STUDY.	☐
I AGREE THAT MY DATA GATHERED IN THIS STUDY MAY BE STORED (AFTER IT HAS BEEN ANONYMISED) IN A SPECIALIST DATA CENTRE AND MAY BE USED FOR FUTURE RESEARCH.	☐

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PLEASE TICK BOX

	YES	NO
I AGREE TO THE INTERVIEW BEING AUDIO RECORDED.	☐	☐
I AGREE TO THE USE OF ANONYMISED QUOTES IN PUBLICATIONS.	☐	☐

NAME OF PARTICIPANT	SIGNATURE	DATE
NAME OF RESEARCHER	SIGNATURE	DATE

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ANNEXURE F

ETHICAL CONSIDERATIONS

According to Gray (2009:69) research ethics are the moral principles which guide research. Gray further says that any research that involves data gathering or contact with human subjects involves ethical considerations. Research ethics should be applied on all stages of research, including planning, conducting and evaluating a research study.

This research study involves human subjects. The researcher will be working with married and once married Vhavenda persons in the Vhembe District. Engagement of human subjects in a research study presents many ethical challenges that need to be considered carefully. Some ethical issues that the researcher will consider when collecting data include the following:

- **Information**

  The participants will be informed that their participation in the research study is voluntary and they are free to withdraw from the study at any stage without any obligation. It will also be made clear that in this research study participants will be expected to complete the questionnaire and respond to the interview questions. The whole process of completing the questionnaire and responding to questions could take approximately 45 minutes.

- **Permission**

  The researcher will seek permission from traditional leaders of each of the 30 sampled villages to engage their subjects in the study research. Permission will also be sought from the participants to audiotape the interview so that the deliberations may be accurately portrayed.

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- **Privacy and confidentiality**

  The researcher will safeguard the privacy and confidentiality of each participant. This will be achieved by not including names of participants on the questionnaire, codes will be used instead. Names of participants will also not be included when transcribing the discussion and any discussion in the interview will remain confidential. Once the discussion has been successfully transcribed, the audiotape will be cleaned and destroyed immediately. The data sheets will be locked and secure and only upon successful analysis of the data will they be destroyed. Residential names of participants will not be revealed to other people without the participant's written consent.

- **Deception**

  The researcher will not use deception on people participating in this research study. He will ensure that participants understand fully the purpose of the study. The researcher will achieve all these by outlining, discussing and explaining the main aim of the research study to the participants, which is to investigate the impact of the Recognition of Customary Marriages Act (Act 120 of 1998) on the prevalence of divorce within the Vhavenḓa in the Vhembe District

All the above ethical issues shall be in the participant information sheet that each participant will receive before the commencement of the engagement with them.

For the researcher to meet the university's ethical standards for research involving human subjects, it is required that the Ethical Clearance Form is completed as per the policy. Only after the issuing of the Certificate thereof, shall the researcher embark on collecting the primary data from human participants.

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