30 Determination of size of lobolo There is no uniformity, regarding the size of the lobolo and the manner in which it is determined. The following may occur: 

(a) The size of the lobolo (that is, the number of cattle to be given as lobolo) is determined by convention (traditional custom). This is the case amongst the Hlubi, usually 20 (sometimes 25 cattle, one horse and the mbobo or ngquthu beast); the Sotho of East Griqualand, 20 (sometimes 25 cattle, one horse, ten sheep and the ngquthu beast); the Ntlangwini, 24 cattle, two horses and the mbobo beast; the Venda, usually eight head of cattle for the daughter of a commoner, ten for the daughter of a chief.

An agreement deviating from the convention has to be proved.

(b) The size is determined by negotiation and agreement between the parties. For example, amongst the Tsonga it is usually between nine and 13 cattle, amongst the Ndebele, usually between ten and 20. Amongst the Pedi the number is also determined by negotiation, as it is amongst the Swazi, where it is usually ten. This is also the case amongst the Shona, some Mfengu communities, and sometimes the Pondo.

The KwaZulu and Natal codes state that the lobolo is determined by agreement, according to the rank or position of the father or guardian of the girl or woman, with the following maxima stipulated: for the daughter of the son, brother or uncle of a chief, or of a chief's deputy or official, 5 head; for the daughter of any other person (except a chief) ten head. There is no limit on the lobolo payable in respect of the daughter of a chief. In cases of doubt the lobolo is not to exceed ten head. The lobolo for a divorced woman or widow is not to exceed five head of cattle or their equivalent (if, in the case of a divorcee, no cattle were returned to her former husband); if there is a dispute, the amount of lobolo must be fixed by the district magistrate (or magistrate or commissioner) — a provision which runs counter to the very essence of a consensual agreement. The codes provide, in section 43, that details of the lobolo agreement have to be entered into the register of customary marriages. It is an offence, under section 62, for any person to receive more than the prescribed number of cattle as lobolo. If the groom or his family pay more than the prescribed number under protest, for example on demand by the girl's father, the number in excess can be claimed back; if, however, more cattle are paid voluntarily the excess can not be claimed, as both parties are in pari delicto. The parties can, of course, agree that a smaller number than the prescribed number be paid.

(c) The number of lobolo cattle is determined unilaterally by (the family of) the groom. This is the case with, for example, the Tsawana.

(d) The size of the lobolo is not determined before, or at the time of, the marriage but is dependent upon circumstances. Amongst the Pondo, the Pondomise, the Thembi, the [southern] Mfengu and the Xhosa proper, there is usually no agreement between the parties as to the exact number of cattle to be delivered; a minimum number is normally transferred before the marriage, but thereafter the father of the girl has the right to demand more, especially after the birth of a child. In this way he can demand more and more cattle until a reasonable number have been delivered. What is to be regarded as reasonable depends upon circumstances. These communities practise the thelela custom, in terms of which the woman's father is entitled to "impound" her and her children until the husband delivers a further number of cattle as ikhazazi; the wife usually co-operates with her father as she deems it essential for her own status that an adequate number be given for her. However, the husband can have recourse to the courts if her father's demands are unreasonable and he refuses to let her return to her husband. The parties could, of course, enter into a formal agreement as to the number of ikhazazi to be delivered, but if such alleged agreement is disputed, it will have to be conclusively proved. There are conflicting decisions as to whether the father could institute an action for payment of the i khazazi in terms of the agreement or whether he is restricted to the use of the bade to enforce his demands.

The Transkei Marriage Act lays down that any agreement to pay "dowry" must be made and executed "in accordance with the customary law applicable to the father or guardian of the female party." The full lobolo is usually paid in the case of the regular proposal marriage and where the girl is a virgin.

1 See Mandela v Mini 3 NAC 91 (1915); Cebe v Silinembe 6 NAC 14 (1928); Ramocwana v Nyathana 137 NAC (C & O) 172; Ndabeni v Mbidi 1949 NAC (S) 1 6.
2 See Mago v Jan 1 NAC 317 (1909); Maghekana v Lwanga 1943 NAC (C & O) 49; Khumane v Nel 1948 NAC (S) 15, Ashton v Bheku 71-72; Shadick The Southern Sotho 33 et seq.
3 See Bangane v Nongazi 1931 NAC (C & O) 43; Mboqoka v Sithanda 1934 NAC (C & O) 3; Rubhume v Nyame 1952 NAC (S) 69.
4 See Van Warnello Venda Law 103.
5 See Mjoi v Mjikwe 4 NAC 75; Mjukikamane v Khapa 1938 NAC (C & O) 28; Zibonda in Jamboni 1948 NAC (S) 57.
6 See Shabangu v Mhlwane 1943 NAC (N & T) 1 9 6.
7 See MThunyane v Mthunyane 1938 BAC (N & T) 1 9 6.
8 Mhla Mhla 9 3 8 NAC (N & T) 1 2; see also Kgupula v Maphe 1949 NAC (N & T) 10; Harries The Laws and Customs of the Bantu and Nilotic Tribes of the Transvaal 7 1 3.
9 See Sibonya v Mokgolwane 1944 NAC (N & T) 2; Shoysi v Dhlamini 1953 NAC (N & T) 9.
10 Hollemann Shona Customary Law 101 161.
11 Hammond-Tooke Bhati Society 102.
12 Shaga Ama-Xosa Life and Customs 267.
13 Hunter Reaction to Conquista 1911-192.
14 See the KwaZulu Law on the Code of Zulu Law Proc R15 1 of 1987 s 61.
15 See Mdulhu v Zuma 1938 NAC (N & T) 164; Magwaza v Kanyile 1940 NAC (N & T) 4.
16 See Xulu v Magwaza 1954 NAC (N-E) 140.
17 See Schapera A Handbook of Tsawana Law and Custom 140; see also Coetzerte Familie-Ere- en Opvoeding van die Bafokeng van Rustenburg 227; Soga 267 281 in respect of the Mfengu.
18 See for the Pondo: Baleni in Sidio 4 NAC 344 (1918); for the Pondomise: Qhishanga v Mtswela 1936 NAC (C & O) 89; for the Thembi: Solani v Manwao 1940 NAC (S) 920; for the Mfengu: Rubhume v Jiyane supra; for the Xhosas: Masuru v Mboe 1954 NAC (C & O) 16; see also Kivi v Sibuya 1949 NAC (C & O) 161; Sloxeyi in Xolwane 1940 NAC (C & O) 162; Ngiqinikunu in Mdlayi 1947 NAC (C & O) 65; and Hunter Reaction to Conquista 1911-192.
19 Jacobs Judis!": Stel en Famili- ere en Opvoeding van die Islandeke 179; Micken's Compendium 70-71 171-1 8; Van Tromp Xhosa Law of Persons 48; Olivier 77.
20 See Ndlembwino v Mapoloe 4 NAC 345 (1919); Baleni in Sidio supra.
21 See Mgashizada v Mofungana 3 NAC 292 (1913); Kivi v Sibuya supra; Masuru v Mboe 1954 NAC (C & O) 16; see also Kivi v Sibuya 1949 NAC (C & O) 161; Sloxeyi in Xolwane 1940 NAC (C & O) 162; Ngiqinikunu in Mdlayi 1947 NAC (C & O) 65; and Hunter Reaction to Conquista 1911-192.
22 20. supra, and Govender v Mvelo 1959 NAC (S) 138.
of their mother's family. In most cases, however, even when the marriage is dissolved and the child is returned to the husband, cognisance is taken of the number of children born during the marriage; lobolo to be returned is adjusted accordingly and the status of the child is unaffected.

It is in this sense that the saying "the cattle bear the children" and "the children are where the cattle are not" have to be interpreted.

1 See, e.g., for the Tswana, Schapera A Handbook of Tswana Law and Custom 143 170.

**Consequences and Effects of Customary Marriage**

**41 Marriage binds the two individuals and also the families** The customary marriage not only binds the two individuals in a conjugal union, but also creates a special relationship between the two families; the two individuals are integrated into the respective families. This is particularly so in the case of the woman, who, traditionally, remains part of her husband's family even after her death.

The marriage produces a new family unit consisting of the man as husband and head of the household, the woman as wife and mother and the children she has raised. Within this family household there are well-established and recognized relationships, rights, privileges, duties and obligations. The marriage also creates a new and separate proprietary unit. In the traditional society it also heralds the emergence of a new geographical unit which takes its place in the politico-judicial order. In certain communities it is customary for the new family to live with the woman's family for a short while, thereafter in the homestead of the father of the husband, where it will initially be subject to the control and discipline of the father (and the wife to that of her mother-in-law), gradually attaining a degree of autonomy, and only eventually full autonomy and possibly even independence (when the husband has built his own homestead).

A distinction is made between a single (monogamous) household (consisting of a husband, his single wife and their children), and the (polygamous) extended or complex household (consisting of the husband, his different wives with their children and perhaps also other relatives or strangers living in his homestead); this system is also sometimes referred to as the "house" system. All communities allow polygamy.

**42 The Polygamous Household: Ranking of Wives** Generally speaking each wife in a polygamous household has her own rank and status and forms a separate proprietary and partly autonomous family unit within the framework of the polygamous family. Her rank and status determine to a considerable extent her social position and her relationship with and to the other "houses" of her spouse, and the status of her children in the law of inheritance. The unit created in this way is described in section 35 of the Black Administration Act as a "house" and defined as: "the family and property, rights and status, which commence with, attach to, and arise out of the customary marriage of each Black woman." The definitions in the KwaZulu-Natal codes are similar.

1 The exceptions have reference to wives like the sitsha, the "seed bearers," etc.
2 See eg Shandu v Shandu 1956 NAC (N-E) 34; and, generally, Bekker Seymour's Customary Law in Southern Africa (4 ed) 126 et seq.
4 Olivier Privaatreg van die SA Bantostale spreken deurslegs 114 et seq.
6 Bennett Source Book of African Customary Law for Southern Africa 224 et seq.
7 See eg Shandu v Shandu 1956 NAC (N-E) 34; and, generally, Bekker Seymour's Customary Law in Southern Africa (4 ed) 126 et seq.
8 Bennett Source Book of African Customary Law for Southern Africa 224 et seq.
9 See eg Shandu v Shandu 1956 NAC (N-E) 34; and, generally, Bekker Seymour's Customary Law in Southern Africa (4 ed) 126 et seq.
10 Bennett Source Book of African Customary Law for Southern Africa 224 et seq.

**43 Legal Provisions in KwaZulu and Natal**

Sections 68-76 of the KwaZulu and Natal codes contain provisions regarding the ranking and status of women in a polygamous household. Section 68 reads as follows:

"(1) Whenever a customary marriage is contracted by a family head, a house which, subject to the provisions of paragraphs (b) and (c), is either a senior or affiliated house, shall be established for the wife of the marriage."

"(b) Except as provided for in para (c), there shall not be more than two senior houses in a family home, to one or other of which the remaining houses are affiliated, either, by the automatic operation of the essential principle governing affiliation, namely, that a junior house becomes affiliated to the senior house which provided the lobolo for the wife of such junior house, or by public declaration by the family head at the time of the celebration of the marriage."

"(c) In the family homes of chiefs and others of rank, influence or wealth there may be three senior houses, to one or other of which the remaining houses in the family home are affiliated, as indicated under paragraph (b)."

"(2) A family home may, in addition to the houses of the family head's various wives, contain those of relatives of the family head and also houses of non-relatives on sufferance. A poor relation, married or single, may have his house and property in the family home. A destitute Black may, for service rendered to the family home, receive in return the use of a certain number of cattle and the right to occupy a house in the family home. The house of any such Black shall occupy an inferior position in the family home."

"(3) In the absence of affiliation, the various houses in a family home shall be distinct from and independent of each other and each may acquire its own property and property rights."

The codes thus distinguish only two types of houses, namely senior houses and affiliated houses; they also distinguish between "chiefs and others of rank, influence or wealth" and the ordinary members of the community ("commoners").

A commoner may have a maximum of two senior houses in his family home, to which other houses of wives could be "affiliated". There could also be the houses of relatives or strangers; all these houses (except those affiliated) are "distinct from and independent of" each other and each may acquire "its own property and property rights." 3

1 The first wife married (by a commoner) is his chief wife, and her house constitutes the indlunkulu (the chief or main house); a commoner has no choice in this matter.

The second wife married by a commoner constitutes the second senior house, which occupies a status lower or inferior to that of the indlunkulu; however, the commoner can, by way of formal declaration at the marriage, assign the status of an affiliated house to her (ie affiliated to the chief house). In this way he can determine the status of each wife he subsequently marries. However, the family head, when marrying his second wife can in a formal declaration of status, declare that she will be the ikholo or left-hand wife, thereby indicating that his homestead will have two sections, an indlunkulu and an ikholo section. In other words, when he marries his second wife there are three possibilities:
he can declare her to be the *ikhohlo* wife (thereby creating two sections in his homestead); he can declare her house to be a junior house affiliated to the *indlunkulu*; otherwise she is automatically the second senior wife, ranking second to the chief wife.

Every other wife he marries will be regarded as constituting a junior house and will be affiliated to the *indlunkulu* or the other senior house or the *ikhohlo*? Affiliation takes place either automatically in that a junior house is affiliated to the senior house which gives the lobolo; or by public declaration by the husband at the time of the marriage.

“Affiliation” is defined in the codes as follows: “the attachment of one or more junior houses to a senior or superior house, either the *indlunkulu*, the *ikhohlo* or the *iqadi*, for the purpose of providing against the failure of an heir in such senior or superior house, and ‘affiliated’ has a corresponding meaning.” The primary object and effect of such affiliation is the provision of an heir in the direct line of the husband.12

In terms of section 74 of the codes, an affiliated house is “identified and grouped” with the senior house it is affiliated to, but this does not affect “the property or property rights”9 of the affiliated house; in other words, the affiliated house constitutes a separate proprietary unit. There exists an *ethula* relationship between the two houses; *Ethula* is defined as: “the custom whereby an obligation is imposed upon a junior house to refund lobolo which may have been taken from a senior house to establish the junior house. The lobolo for the eldest daughter of the junior house is usually indicated as the source from which this liability is to be met but the custom is not recognised as extending to the handing over of the *ethula* girl herself as a pledge of payment.”93

From the above it is obvious that in the homestead of a commoner there can only be two sections, the *indlunkulu* and the *ikhohlo* if he does not divide his homestead into sections his second wife or otherwise affiliated to the *indlunkulu*.

In the family homes of chiefs and other persons of rank, influence or wealth there may be three senior houses, to which the houses of other wives can be affiliated.14

In terms of section 75(1) of the codes, the status of the various wives of a hereditary chief “in charge of a tribe”15 is declared only after he has married his chief wife; this usually happens later in life, i.e. after he has married his first and second wives. The lobolo for her is usually contributed wholly or in part by the whole tribe, and her status is announced publicly.16 When he marries her he has to report to the district officer the names of his various wives and the status of each; he also has to report the birth of the first-born son of his chief wife.17

If the chief dies before marrying his chief wife, the elders of the tribe have to meet and appoint one of the wives as chief wife and also decide on the rank and status of the other wives.18

The three senior houses which a hereditary chief or other people of rank, influence or wealth can have are the *indlunkulu*, the *ikhohlo* (*ikhothiwa*) or left-hand senior house; and the *iqadi* (*inqadi*) or right-hand senior house.19

The *ikhohlo* house is usually created with lobolo taken out of the family property, and, unless there is an explicit declaration to the contrary, the lobolo is not refundable.20

The *iqadi* (*inqadi*) ranks next to the *indlunkulu* for purposes of succession, despite the fact that the *inqadi* wife is married only after the *ikhohlo* wife.21

A family head, by making a formal declaration of status at the time of marriage, can divide his family home into sections.22 In addition to the three sections attached to his three main wives, he may create a “junior” section “composed of the Houses of poor relations and non-relatives which are usually placed in an inferior position in the family home.”23

When a family head marries his second wife and makes a declaration of status at the marriage, she is usually declared to be the main *ikhohlo* wife, thereby creating the *ikhohlo*, or left-hand, section.24

Houses established thereafter are affiliated to either the *indlunkulu* or the *ikhohlo* (according to the principles regarding affiliation) unless, of course, the third wife is given the status of *iqadi* wife. Wives married subsequently are then affiliated to the *indlunkulu* or the *ikhohlo* or the *iqadi*.25 Affiliation takes place either automatically (as indicated above) or by way of a public declaration at the time of the marriage.

A family head may at any time separate and divide the various sections of his family home into subsections; this does not affect his powers and authorities as family head.26

When a wife has been given a specific status, any subsequent dissolution of the marriage, or her death, does not affect the status and rights of her children in the law of succession.27

Affiliation can only take place to a senior house; a junior house cannot be affiliated to another junior, or affiliated, house;28 nor a senior house to a junior house.29

When a senior house has provided the lobolo for the wife of a junior house there is a presumption that the junior wife is affiliated to the senior house concerned.30 When the affiliated house has paid the debt, it has no further obligations to the senior house.31 The onus of proving affiliation rests upon the person alleging it.32

A hereditary chief has to make a formal and public declaration as to who his chief wife will be and to the house and section that will constitute the *indlunkulu*,33 this apparently also usually applies to the *ikhohlo*.34

A family head cannot arbitrarily, without adequate grounds, change the allotted status of his various wives; if by doing so, he intends to disinherit the eldest son of a wife, it has to be done in accordance with the provisions of the codes.35 If the whole tribe has contributed towards the lobolo for his chief wife, he requires the approval of the tribe to disinherit her eldest son?

When there has been no allocation of status, the sequence of the marriages determines the status of the wives and their sons.37 This also applies when a chief has declared the status only of his chief wife; the eldest son of the *indlunkulu* succeeds in a house in which there is no heir.38

The *ilawu* hut of a chief does not have the status of a house.39

The terms “left hand” and “right hand” used in connection with the *ikhohlo* and the *iqadi* respectively mean left and right of the line from the entrance of the homestead to the main house;40 with the Xhosa it is different.

The term *iqadi* used in the codes for the senior right-hand wife of the family head denotes amongst the Xhosa a wife and a house of inferior status affiliated to one or other senior house.

Amongst the Thembu, in its section. The (N

See also All other wives are subordinate in status, the one married fourth is an

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yekunene; NAC (N-E) 4. Regarding the status of

oindlunkulu; Shexi

and so forth. Each wife

is subordinate to a previously married

iqadi in its section. The various houses (whether main or subordinate) constitute

separate entities, each with its own rights, pheberty etc; their relative status, however, determines their place as regards succession and inheritance. Usually the ikhazi for an

iqadi wife comes from the cattle belonging to the senior house concerned, in which, case a debt is incurred.'

The general rule is that once the status of a wife has been determined, it cannot be changed; if it is changed, it has to be done publicly, and the onus of proof is upon the person alleging the change.7 The same -rule applies when a deviation is avered about the sequence of the marriage determining the status of the wife and her house.8 If the marriage with an iqadi wife is dissolved or if the house ceases to exist before an heir is born, another woman may be married in her stead.4 Amongst the Thembu, if the chief wife, being the only wife at that stage, dies or the marriage is dissolved without her having given birth to a successor, the wife subsequently married takes her place.5

Amongst these Nguni peoples, chiefs, however, have the right to determine the status of their wives in accordance with the unkungulu or ukuderka custom. The first wife is usually the chief wife;6 she is usually chosen by the chief in collaboration with the tribal council and the tribe supplies, in whole or in part, the ikhazi for her. She is known as "the mother of the nation". This is not the case among the Western Pondo, where the first wife married is also the chief wife.8 Once a wife's status has been determined it cannot be changed, except amongst the Thembu where the paramount chief has the right to do so if he marries a girl of higher (royal) lineage than the wife married previously.4

A completely separate house, the ishiba, is sometimes found amongst the Xhosas.10 Amongst certain communities in Eastern Pondoland the first wife is known as the indlungu, and the second as the ishiba; the third wife is the isithembu of the indlungu, the fourth is the isikhulu of the ishiba, and so on."

It is not customary to marry an iqadi for another iqadi.12 Amongst the Ntlangwini and the Bhaca the wife first married is the chief wife; the status of all other wives is determined by the chronological sequence of their marriages; the institution of iwadi wives is not known.10

The Transkei Marriage Act14 lays down that the status of wives, in both customary and civil marriages, is determined by the rules of customary law.

In accordance with Swazi law, the first wife is the chief wife and her house is the indlungu; the second wife is the right-hand wife and she occupies the indlu yekunene, the third wife is the left-hand wife, and her house is the indlu yekhohlwa; every other wife, known as an inhlanti, is a subordinate wife attached to one of these main houses?

With the Tswana the chronological sequence of the marriages determines the status of the wives. The first wife married is the chief wife (mosadi o mogo); the second wife is simply called the "second wife" (mosadi o wa boedi), and so on. Exceptions to this rule occur when the wife is the gir to whom the husband was betrothed as a child; or when she is a preferential marriage partner according to custom, especially the mother's brother's daughter. Each wife, with her children, comprises a separate house, a distinct and independent proprietary entity (with its own fields, cattle, house- hold utensils etc). In bigger polygamous households subordinate wives are sometimes married and affiliated to one of the senior wives; if she fails to produce a direct heir, the eldest son of the affiliated wife would succeed in preference to a son by a wife in another senior house.

Amongst the Pedi, the woman who is a preferential marriage partner (preferably the daughter of a younger brother of the man's father) is the chief wife; the husband

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ranks as he pleases the other wives he may marry. The community contributes to the
konyelo for the main wife of the tribe’s chief; she is known as the lebene or “tribal
candle” who will produce the successor to the chieftainship.17

Amongst the Sotho of the Orange Free State, Lesotho and Transkei the woman
who is betrothed as a child or the woman who is a preferential marriage partner has
the status of chief wife. The ranking of wives is otherwise determined by the chrono-
logical sequence of their marriages?

Amongst the Venda the principle applies that the wife whose thaka (lobolo) is paid
by the husband’s father or family ranks first. For most people this is also the first-
married wife, as the young man is usually not in a position to supply the thaka
himself. Usually she is a cross-cousin, that is, the father’s sister’s daughter or the
mother’s brother’s daughter. Even if the first wife is not the chief wife; she (the first
wife) occupies a position of eminence in the family household.19

The first wife married by a Tsonga commoner is usually the chief wife, the second
wife the right-hand wife and the third the left-hand wife. With some Tsonga groups
only the first-married wife has status; others married after her are regarded as sub-
ordinate wives. The lobolo for the chief wife of the tribe comes from the tribe as a
whole.20

In general, amongst the people of South Africa two systems are practised in pol-
ygamous family structures. In the one, in addition to the chief wife, there is usually
also one or more senior wives, to whom other subordinate wives can be affiliated; the family
establishment (or umuzi) may be divided into separate sections, as e.g. with the Zulu;
this is known as the “complex system” or “complex establishment”. In the other, the
so-called “simple establishment”, there is usually only one wife with status, and she is
usually the one who is married first; to the extent that there is ranking of wives
(e.g. for the purpose of succession), the chronological sequence of the marriages is
the determinant.

In connection with the various principles stated above, see: Pelo v Matliso 1 NAC 60
(1901); Tadyzinwa v Sango 4 NAC 375 (1902); Bokeleni v Bokeleni 6 NAC 43 (1929);
Mabikile v Mabikile 529 NAC (C & O) 37; Ngcogoalo v Ngcogoalo 1930 NAC (C & O) 38;
Razeni v Razeni 1935 NAC (C & O) 17; Dlunge v Dlunge 1937 NAC (C & O) 176;
Ganga v Ganga 1949 NAC (S) 117; Mapikane v Mnyendzi 1952 NAC (S) 3; 16
Van Tromp Xhosa Law of Persons 82 et seq; Jacobs Judikile Stelten en Familie-Erf-
en Opperhawe van die Umushane 203 et seq; See Ywonyama v Ywonyama 3 NAC 301 (1912);
Fikeni v Lukuni 1926 NAC 192; Peto v Costa 1932 NAC (C & O) 38; Dyason v Bokela
1933 NAC (C & O) 47; Dumalisile v Dumalisile 1945 NAC (S) 7; Duna v Duna 1949
NAC (S) 7; Van Tromp v Saba 1954 NAC (S) 174; Van Tromp v Saba 1954 NAC (S) 174;
Hovemwe v Hovemwe 1955 NAC (S) 55; See Ywonyama v Ywonyama supra.

Husbands and wives must provide reasonable sexual accommodation to each other;
there are customary practices and rules which have to be observed (e.g. he is expected
not to render her pregnant while she is still suckling a baby). A greater degree of marital fidelity is expected from the wife than from the husband.)

The husband is obliged to supply his family with the necessary sustenance, which
normally means providing the required land and building material for the erection
of the family hut(s), fields for cultivation, seed, cattle, clothing, cash etc. He is obliged
to maintain them, and look after them, also in times of illness.2 The wife is expected
to work in the fields, to collect the vegetables, to cook for her family, to harvest,
to keep the family establishment clean and tidy, etc. There is a generally accepted division
of labour between the sexes. The family head controls the family property (which
could include wedding presents brought by the wife, income derived from her labour
or that of the children etc); he is expected to use this in the first place in the interests
of the particular house, but may use it for the family as a whole if needed. The wife
must reside where he decides; in some communities, however, she has the right to

45 Personal relationships within family Each member of the family — the husband,
the wife (wives) and children — has specific rights, functions and obligations, governed
by the family interests and exercised within the family grouping. The husband is
spouse, father and family head, and as such represents the family in all its dealings
with outsiders. He exercises authority over his wife (wives) and children; his position
is comparable to that of the paterfamilias of Roman law, except that he does not have
the ius vitae et necisque. He gives, in consultation with other members of his family,
his daughters in marriage, and plays a leading role in choosing the first wife
of each of his sons. His wife (wives) and children owe him obedience and loyalty,
and must respect his authority; he has moderate powers of punishment. He has to
be treated with consideration and respect, and must be reasonably fair and impartial
in his relationships with them; he has to avoid favouritism (e.g. not treating
them equally sexually, or in the provision of clothing, or rendering assistance in
the ploughing of the fields or partaking of the food which has been prepared). Favouritism
of this kind could, and would, be interpreted by the wife concerned as an indi-

uation by him that he no longer wants her as wife. Although she has no legal remedy to compel
him to fulfill his obligations, she can leave him and return to her guardian,
who has a duty to support her until her husband comes to fetch her. If he refuses,
or maltreats her, he runs the risk of having the marriage dissolved and losing the
child given by him or his family as lobolo.

The husband is obliged to supply his family with the necessary sustenance, which
normally means providing the required land and building material for the erection
of the family hut(s), fields for cultivation, seed, cattle, clothing, cash etc. He is obliged
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or that of the children etc); he is expected to use this in the first place in the interests
of the particular house, but may use it for the family as a whole if needed. The wife
must reside where he decides; in some communities, however, she has the right to

leave her husband’s residence and go to live with her eldest son when he marries and has his own family home.3

In her own home the wife enjoys a great degree of autonomy, but is subject to her husband’s authority in all important matters. In traditional customary law she remains a minor in perpetuity: under the guardianship of her father until she gets married, and thereafter under that of her husband and his family. If the marriage is dissolved she reverts to the tutelage of her father (or his family). The KwaZulu-Natal Code4 brought about a radical change in this situation: they now provide that “[subject to the provisions of the Age of Majority Act, 1972 (Act 57 of 1972), a black shall become a major in law on marriage or on attaining the age of twenty-one years.” The effect of this provision is that “majority now determines a person’s personal status in KwaZulu-Natal and no longer gender.”

The Transkei Marriage Act5 provides explicitly that in a registered customary marriage the wife shall be “under the guardianship of her husband, for the duration of such marriage”; this also applies to civil marriages.

Other provisions in the codes stipulate that inmates of the family establishment are subject to the family head in all family matters; the “inmates of a family home irrespective of sex or age shall in respect of all family matters be under the control and owe obedience to the family head”; the family head has the right to inflict reasonable corporal punishment upon the minor inmates of the family home; “every person who by natural duty is responsible for the provision of the necessities of life for any other person and fails or neglects to provide those necessities shall be guilty of an offence.”

There is uncertainty whether a wife of a customary marriage can institute a claim for maintenance against her husband.6

The wife is expected to treat her husband’s family and in particular her mother-in-law and father-in-law with the utmost respect and deference, according to the rules of etiquette and customs prevailing in the community; in Nguni societies these are reflected in the ukhunoma practices.7

In present circumstances there is growing opposition, especially by children, against the traditional parental authority and increasingly a breakdown of the close family unity that was so characteristic of the traditional society.


2. See Williams v Moose 1951 NAC (C & O) 3.

3. See in general Sekelo Zulu v Tshipise 1952 SC 1118; Siija v Mabunu 1940 NAC (C & O) 42; Mzimaza v Duruza 1940 NAC (C & O) 57;


5. See also s 40(a) (3).

7. 21 of 1978 s 37.

46 The proprietary consequences of the marriage and relationships within the family The marriage creates a separate proprietary entity; if there is only one wife there is only a single undivided economic unit, under control of the husband as head of the family, which contains all the assets and income, from whatever source, belonging to or collected or earned by members of the family.” If, however, the family is polygamous, a distinction is made between general family property and house property, over which the individual house has a large measure of autonomous control. In a plural household, consisting of the husband and his various wives and their children, the proprietary “assets” in the family may be separated or divided as follows:2

(a) the house property belonging to a house;
(b) the general family property; and
(c) personal property

House property is the property that belongs to or accrues to a particular house; it is defined in the codes3 as: “property vested in and pertaining specially to any house in a family home; such property is acquired by donations, earnings or apportionment and by receipt of lobolo in respect of the girls of the house”. A family head is compelled to keep the estates of the various houses in his family distinct and separate.4

Family property as defined in the codes5 comprises all the property in a family home “other than (i) the property vesting in or pertaining specially to any particular house of that family home and (ii) the personal property of any major inmate or any inmate not related to or belonging to the family of the head”. Personal property is property which vests in or belongs to a specific individual.

(a) House Property

House property is made up of the following:6

(aa) The earnings of the wife and other members of the house, e g what she earned as herbalist or midwife; or a son in the form of wages etc. (According to the codes7 whatever a wife earned as a medicine woman or a midwife is her personal property; the family head is entitled only to a “reasonable share of the earnings of the minor members of his family”). The family head is obliged to use these earnings for the maintenance and benefit of relevant house or for general family purposes, as long as he does not benefit one house at the expense of another.

(bb) The agricultural products produced by the wife on her fields and anything obtained by way of sale or barter of the products.8

(cc) Lobolo received for daughters, unless it is earmarked for the settlement of an inter-house or other debt. Amongst the Venda such cattle become family property.9

(dd) Fines or other compensatory payments received in respect of the wife or daughters (for example, for adultery or seduction), or for defaults committed against any member of the family or in respect of house property.

(ee) Donations received by the wife or other members of the house, including wedding gifts.10
In traditional society there is no individual or private ownership of land. Today it is possible for the family head to become an owner of property, in which case it will be regarded as family property; it is certain circumstances it may also be house property. 

Amongst the Venda, cattle received for girls become family property, not house property. 

(c) Personal Property

In traditional society the presumption seems to obtain that everything in the household (except house property) belongs to the family head, including the earnings of junior members of the family. This does not apply to:

(aa) Clothing and other smaller items of a personal nature made by or donated to a member. It is customary for a father to provide his daughter with a wedding outfit; it is not always clear whether the ownership therein vests in the woman concerned or in her husband. It appears that a wife may have personal ownership of livestock, pigs etc but that she will not, or may not, dispose of these without consulting her husband.

The earnings of a wife who has been chased away by her husband belong to her personally. Reference has already been made to the provisions in the codes that the earnings obtained by a wife as mid-wife and herbalist belong to her.

Generally the trend is towards greater individualisation. Amongst the Tswana it is even possible for women today to own cattle.

A major in Transkei (above the age of 21) can own property over which the family head has no say; this has in effect been the position since 1905. Especially important today are the provisions contained in sections 39, 40 and 41 of the Transkei Marriage Act.
of him to consult the wife and her eldest son (if old enough), of the house property he uses in this way. Refusal or omission to do so could seriously disrupt the family harmony.

It is a serious matter if the family head deals in an irresponsible way with house property or gives it away. If the protests of the particular family prove to be in vain, the wife could appeal to the husband’s family council; if this is also fruitless, she (or her son if he is a major) may institute an action in court asking for an injunction to restrain the husband from using house property in this way.18

48 Inter-house debts Flowing from the principle that one house may not be enriched at the expense of another or be impoverished in favour of another, where house property is utilized at the interests of one another house a debt arises between the two (unless there is a clear intention to the contrary) and there is an obligation on the heir of the recipient house to repay the debt. The general rule applies that good cause must be shown for the transfer of property; in other words it must not be an arbitrary or capricious act on the part of the family head. If this is the case, the wife (or her eldest son if a major) can institute an action for the restoration of the status quo ante. Refusal or omission to consult the wife (or eldest son) creates an assumption that the transfer was done without good cause.19

Inter-house debts arise in the following instances:

(a) When a house has to pay a debt and has no assets, the family head may use the property of another house for this purpose.20

(b) When the family head takes cattle from one house to pay lobolo for a son in another house; usually the lobolo received for a specified daughter (very often the eldest) born of this marriage is used to meet the indebtedness. Should she die before marrying, the obligation to repay remains.21

47 Family head’s right of control and disposition In a household with more than one wife the general family property is differentiated into a number of -household entities, attached to each of the wives, under the control and supervision of the family head. Since all these entities form part of the greater family unit, property belonging to a house in one instance:

1. Family head’s right of control and disposition

2. To use property

3. Instances:

4. Family head’s right of control and disposition

5.ب) When a house has to pay a debt and has no assets, the family head may use the property of another house for this purpose.

6. Inter-house debts

7. Inter-house debts arise in the following instances:

8. (a) When a house has to pay a debt and has no assets, the family head may use the property of another house for this purpose.

9. (b) When the family head takes cattle from one house to pay lobolo for a son in another house; usually the lobolo received for a specified daughter (very often the eldest) born of this marriage is used to meet the indebtedness. Should she die before marrying, the obligation to repay remains.
56 Other factors relevant to dissolution

The customary marriage is automatically dissolved if the husband or wife enters into a civil (common law) marriage with someone else. If the husband concludes such a marriage, he forfeits all the cattle; if it is the wife, the husband must return all the cattle (less the recognized deductions). A civil marriage ipso facto amounts to a repudiation of the customary marriage. It is not clear to what extent imprisonment provides grounds for dissolution. In terms of thecodes a jail sentence of five years may lead to an action for dissolution; it seems as if the same principle is applied outside Natal-KwaZulu. Imprisonment is unknown in customary-law; hence the uncertainty about the implications of imprisonment. It could be argued that a long period of imprisonment would in fact run counter to the normal continuation of the marriage and the fulfillment of its primary objectives, and that it would be justified to dissolve the union for this reason. It is doubtful whether an action for dissolution on this ground would succeed if the woman had adult children or had reached menopause.

If the union is dissolved for this reason, it would appear logical that the cattle be returned to the husband’s family (the less the allowable deductions), unless the imprisonment has been imposed on the grounds of the husband’s assault of his wife.

Adultery by the husband does not provide grounds for dissolution, and the wife is not entitled to leave her husband because of it. Amongst some communities a husband is even allowed to have a concubine, as long as he does not provide her with a permanent dwelling place in the homestead; if he does so, the wife would have the right to leave. It is self-evident that a wife is not entitled to leave her husband when he enters into a second — or further — customary marriage. However, if the husband commits adultery, he is bound to intercourse with someone within the prohibited degrees of consanguinity, his wife is entitled to leave him and to have the union dissolved; the husband forfeits the cattle already delivered.

The marriage is automatically dissolved if the wife does not provide grounds for dissolution, nor does the fact that the husband is incapable of providing the extraikazi to his wife from the theleka. If, however, the husband has cattle available but refuses to hand over the additional ikhazi to release his wife from the theleka, it is regarded as repudiation on his part and he stands to lose (at the subsequent dissolution) the lobolo he has already delivered.

The husband’s neglect of his wife and his unwillingness to support her usually do not provide grounds for dissolution, unless the husband neglect and lack of support amount to repudiation of the marriage (e.g. he treats his other wives differently).

In earlier times chiefs and other members of the royal family apparently did not have to return the lobolo cattle when the marriage of a daughter was dissolved.

57 The custom of phuthuma

There is, in certain circumstances, a legal obligation upon the husband to phuthuma his wife, that is, to fetch her from her father’s homestead or to request that she should return to him. These circumstances are:

(a) when the wife left him as a result of his behaviour (e.g. after physical ill-treatment; or accusations of witchcraft); or
(b) when the wife left him without justification in terms of customary law;
(c) when the husband drove his wife away, i.e. when he had no legal justification to do so;
(d) when he abandoned her; or
(e) when she had been the dead’ by her father in order to obtain further ikhazi.

In all the above cases the husband is bound first to phuthuma his wife (i.e. request her return) before he can institute proceedings for the return of his lobolo. Should he refuse to do so or allow a considerable time to elapse, it is regarded as an indication on his part that he does not want his wife back, and he will be held responsible, in whole or in part depending upon the facts in each particular case, for the repudiation of the marriage.

There is a legal obligation upon the wife (except when she left him because of assault or accusations of witchcraft) to return to her husband when phuthuma’d; her return must be bona fide. Should she refuse, she is regarded as having left him and he will be entitled to the return of at least part of the lobolo.

The husband must satisfy the court that he personally phuthuma’d her before he can succeed in an action for dissolution; a written request for her return is not regarded as adequate.

Phuthuma as a custom is found amongst the south-eastern Nguni; it is not known whether it is also practised by others.

If the wife bona fide stays with her husband for some length of time and then leaves him again, this is regarded as a separate occurrence and there is an obligation upon the husband to take steps to phuthuma her again.

1 See Gqamane v Sentele 1 NAC 113 (1906); Zondi v Gwana 4 NAC 105 (1910); Kos v Lephila 1945 NAC (C & O) 4; Nkumbula v Linde 1950 1 SA 377 (A); Njamada v Tikali 1952 NAC (S) 62; Kumalo v Kimba 1954 NAC (S) 54; Bucwa v George 1956 BAC (S) 110.
2 See Nkumbula v Linde supra; Mabuza v Ntlapho 1980 AC (C) 141-142.

4 See Gxeka v Mashikana 3 NAC 176 (1944). However, see Gxeka v Mlangeni 1947 NAC (C & O) 76.
5 See Jst v Mphunga 1946 NAC (C & O) 5.
6 See Stoleka & Mtshwari 1947 NAC (C & O) 3.

58 Dissolution of marriage and lobolo: general principles

If the husband is wholly to blame for the break-up, he forfeits all the cattle — as for example when his wife