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**WOMEN OF ST. MARKS, TRANSKEI: NEGOTIATING CUSTOMARY LAW**  
**c.1940- c.1960**

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A minor dissertation submitted in partial fulfilment of the requirements for the award  
of the degree of Master of Arts in Historical Studies

**Faculty of Humanities**  
**University of Cape Town**  
**2009**

**DECLARATION**

This work has not been previously submitted in whole, or in part, for the award of any degree. It is my own work. Each significant contribution to, and quotation in, this dissertation from the work, or works, of other people has been attributed, and has been cited and referenced.

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## **Abstract**

This thesis explores the ways in which customary law affected the women of the St. Marks district, Transkei between 1940 and 1960. In particular, it examines how women worked within and through customary law and the customary law courts in order to obtain redress for their problems. The thesis discusses the argument that the codification of customary law was the result of collaboration between older African men and colonial administrators and that its effect was to increase and render more rigid the patriarchal control of women. It argues that literature on women and customary law shows that after African customs were codified, their form and content changed in accordance with British administrators' legal and administrative needs. Women's legal and social status was negatively affected. The codified law emphasised the patriarchal aspects of the African custom and reduced women's social status in society. However, the thesis concludes that the question of how far customary law oppressed women has not yet been resolved.

Using Customary Law Court Cases and records from the Chief's Courts, the Native Commissioner Courts and the Native Appeal Courts of St. Marks District in Cofimvaba in Transkei from the late 1930s to the early 1960s, this thesis explores how women viewed themselves in relation to the law and also to the way it was applied by officials in the courts. It also explores and how women negotiated customary law in a bid to deal with the changes in the lives brought about by Christianity, capitalism and migrant labour. Missionary teachings, colonial rule, capitalism and migrant labour were significant social and economic factors that greatly affected the lives of the women of St. Marks. In court, educated women married by Christian rites were able to manipulate and challenge patriarchal values and frustrate men's attempts to prevent their access to property and inheritance or their efforts to demean women in various ways. The thesis shows that African women were not merely victims of customary law. Rather, they found ways of negotiating their agency within the confines of the customary law courts.

## **Acknowledgements**

Writing this piece of work is the story of a journey that began in a distant time and a distant place; a journey on which I have had the honour and privilege to be guided, inspired and encouraged by the best people one could ever encounter. I am aware that this acknowledgement does not mention everyone who contributed in their own way. But it is a humble token of appreciation and most importantly a special dedication to my mother, Diana Sekeleti Kabandula and my brothers and sisters: Jack, Bisalom, Rachael and Reberiah. I hope it makes you proud.

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University of Cape Town

# Chapter 1

## INTRODUCTION

This study is about African women living at St. Marks in the magisterial district of Cofimvaba in Thembuland Transkei. It investigates women's efforts to use customary law to defend their agency. It explores collaboration of African men and colonial administrators to control women through patriarchal aspects of customary law. The study also examines how women negotiated customary law by investigating how women viewed themselves in relation to customary law, how they understood customary law compared to the way it was applied by magistrates and how they found loopholes in both customary law and common law that they used to their advantage. It shows how women subverted customary law and expectations of African men with regard to sexuality. It explores how women also tried to own or inherit property and negotiated their way around customary law to achieve this. The study also looks at how Christianity, capitalism and migrant labour affected the problems that women faced in court.

Patriarchy is one of the most over used terms in feminist debates. It grew out of the 1960s and 1970s feminist debates on gender. Western feminists used patriarchy to accentuate the importance of institutions in gender oppression. Feminist theory used patriarchy to highlight men's dominance of women in private and public spheres. Deniz Kandiyoti argues that radical feminists view patriarchy in a liberal sense, as any form or instance of male dominance, while socialist feminists analyse patriarchy through a class lens. Kandiyoti also argued that patriarchy in this feminist usage often treated as construct that disguises rather than reveals the intimate inner workings of the culturally and historically distinct arrangements between genders.<sup>1</sup> In this thesis, the term is used to show the systematic structural differences in the cultural, economic and social position of men in relation to women. As such patriarchy can be defined as 'a social system in which differences in privilege, power and authority are vested in masculinity and the cultural, economic and/ or social positions of men'.<sup>2</sup>

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<sup>1</sup> D. Kandiyoti, 'Bargaining with Patriarchy' in N. Visvanathan, L. Duggan, L. Nisonoff and N. Wiegersma (eds.) *The Women, Gender and Development Reader* (Cape Town: David Philip, 1997), p.86.

<sup>2</sup> A. Cranny-Francis, W. Waring, P. Stavropoulos and J. Kirkwood, *Gender Studies :Terms and Debates* (London: Macmillan, 2003), pp.14-15.

Patriarchy is not uniform, it varies over time and across environments and societies. Kandiyoti argues that patriarchy varies because women are not a homorganic group. They face different problems according to their class, caste or ethnicity. Even within a society, there are variations. Kandiyoti argues that patriarchal bargains apply a powerful influence on shaping women's gendered subjectivity and determine the nature of gender ideology in different contexts, influencing the potential and specific forms of women's active or passive resistance during oppression. Patriarchy is also susceptible to historical transformations that open up new avenues of struggle and 'renegotiations of relations between genders'.<sup>3</sup>

Women in this study faced male oppression that was unique and specific to their time, community and environment. The Thembu society under investigation is viewed to be patriarchal because women's access to among others land, property, employment and children was controlled by men.

The study utilised customary law court cases from the Chief's Courts, the Native Commissioner Courts (NC) and the Native Appeal Courts (NAC) of St. Marks District in Cofimvaba in Transkei, from 1938 to the early 1962. Twenty two main cases were looked at. Some cases were resolved by the chief, others were appealed to the Native Commissioner. If not settled, they went on to the NAC. This means that each record from each court was read as a separate case. Three factors were cardinal in selecting these cases- the legibility of the record, the time in which they occurred and the language in which they were recorded. A number of cases found in the archives written between the 1930s and 1960s were handwritten. These posed a challenge to the researcher's ability to read and analyses them. Therefore, only the ones that the researcher was able to read and understand were picked. In addition, the time frame was picked because by the 1930s, colonial rule was consolidated, customary law was systematically applied in magistrate courts and migrant labour was at its peak. As such these elements encouraged the researcher to look at this period. Finally, there were a few cases concerning Xhosa women recorded in Afrikaans but had not been translated into English. These cases were not dealt with as the researcher's use of that language was limited. However, the number of such cases was insignificant to make any impact on the findings.

In these courts, the headman or the chief heard cases between Africans and Africans only, if both defendant and litigant were resident in the chief's or headman's area of jurisdiction and

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<sup>3</sup> Kandiyoti, 'Bargaining with Patriarchy', pp.86-87.



civil cases which arose from native or customary law only but not Roman-Dutch law (European law). They did not preside over cases that had to do with divorce or separation arising out of a marriage.<sup>4</sup> A colonial official or native commissioner presided in Native Commissioners Courts. They were allowed to apply both customary and common as they saw fit in each case.<sup>5</sup>

The Native Appeal Court (NAC) heard cases from the Native Commissioner as appeals. The NAC was given authority to review the proceedings of the Native Commissioner's Court. Whatever decision the NAC took the NC was bound to follow it. NACs operated more like English courts; as judgement was passed using prior cases. Sometimes and only when it was necessary, the appeals court called upon chiefs and headmen as evaluators in indigenous law and custom. They also had authority to use civil law when it was necessary.<sup>6</sup>

Court records were utilised because court records possess information of great value and detail about changes in law, society and culture and the lived experience of African people during the colonial period. It is for this reason that nineteenth and twentieth century historians have increasingly used court records in writing history. Historians have realised that court records shed light on the lives of ordinary Africans, exposing their struggles with each other and with colonial states.<sup>7</sup> However, only a few of these scholars have addressed the question of gender and customary law in their works.<sup>8</sup>

To a very small extent, court cases also show the words of litigants and their witnesses, thereby giving the historian a chance to hear African voices which they could otherwise not hear using other colonial documents. Thus court cases and other legal records if properly used present a useful resource. If carefully used, they tell us about the beliefs and interests, thoughts and actions, understanding and experience of African and European participants during colonialism. Court cases present serious problems of interpretation and analysis because the transformation of oral testimony into a written text often affects the historical

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<sup>4</sup> See Section 12(1) of Act 38 of 1927.

<sup>5</sup> Created under Section 10(1) of Native Administration Act of 1927.

<sup>6</sup> According to Section 13(1) of 1927 Native Administration Act.

<sup>7</sup> T. McClendon, *Genders and Generations Apart: Labour Tenants and Customary Law in Segregation –Era South Africa 1920s to 1940s* (Oxford: James Currey, 2002), p. 26.

<sup>8</sup> Among scholars who have addressed gender in their works include: McClendon, *Genders and Generations Apart*, N. Erlank, 'Gendering Commonality: African Men and the 1883 Commission on Native Law and Custom,' *Journal of southern African studies*, 29, 41(2003)., J.H. Simons, *African Women: Their Legal Status in South Africa* (London: Hurst and company, 1968) and T. McClendon, 'Tradition and Domestic Struggle in the Courtroom: Customary Law and the Control of Women in Segregation-Era Natal,' *International Journal of African Historical Studies*, 28, 3(1995).

record. Most records of cases were written from one person's point of view. To some degree the view of the person and or his aims affected its content whether European judge, African clerk or local leader.

Also, the methods and circumstances under which the records were created affect their content.<sup>9</sup> Transcription and translation can change actual words spoken in court. Usually the records were written in English with a few phrases in Xhosa. It is likely that simultaneous translation from Xhosa to English may have resulted in errors, although the records do not tell us this. Also McClendon shows that 'adversarial questioning in the western-style courtroom calls for a fairly concrete and narrative structure'.<sup>10</sup> This means that the court links elements together that may not have been linked in that way for the litigants.

Exclusion is another problem. As McClendon shows, the eliciting of evidence in 'structured, adversarial court proceedings' can lead to exclusion of important information such as the context and history of disputes. More serious is the European exclusion of information because of their denial of the reality of some African practices that they did not agree with.<sup>11</sup> Further, Mann and Roberts point out, non verbal forms of communication were not reflected in court records. These include gestures, hesitations, clothing, tone of voice, laughter and irony. A researcher faces difficulties in seeing and feeling the litigants and understanding their attitude to the dispute.<sup>12</sup>

There is also the problem of archive holding. In 1970-1990 the former South African archives services carried out a policy of decimating court records in their possession. However, it is not clear what standard methods were used to destroy or retain certain records. Only very few court records and cases exist in the archives. Hence time and again, a researcher feels frustrated with gaps in court cases and incomplete case records in general.<sup>13</sup>

This thesis tries to make the court cases to be more meaningful by situating them in a historical context against the background of wider economic, political and social change. As McClendon cautioned, court cases cannot be understood entirely on proceedings in court

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<sup>9</sup> K. Mann and R. Roberts, 'Introduction,' in K. Mann and R. Roberts, eds., *Law in Colonial Africa: A Social History of Africa* (London: James Currey, 1991), p.47.

<sup>10</sup> McClendon, *Genders and Generations Apart*, p. 28.

<sup>11</sup> McClendon, *Genders and Generations Apart*, p. 31.

<sup>12</sup> Mann and Roberts, 'Introduction', p. 47.

<sup>13</sup> McClendon, *Genders and Generations Apart*, p. 28.

because local disputes usually had deep histories embedded in long term relationships and local institutions. Their analysis needs historical context.<sup>14</sup>

It is possible that litigants sometimes did not tell the truth in court in order to gain favourable judgements even though they swore to tell the truth or face legal and spiritual punishment. A number of court proceedings in this study revealed this tendency. McClendon advises that this problem may be overcome by substantiating the court proceedings with other court records and context to establish the truth.<sup>15</sup> However in this study, court records were used to establish what kind of disputes people took to court, in what types of courts the cases were held and how they established their claims or defended their innocence. Therefore, establishing whether a particular litigant testified truthfully or not was of less importance for this study.

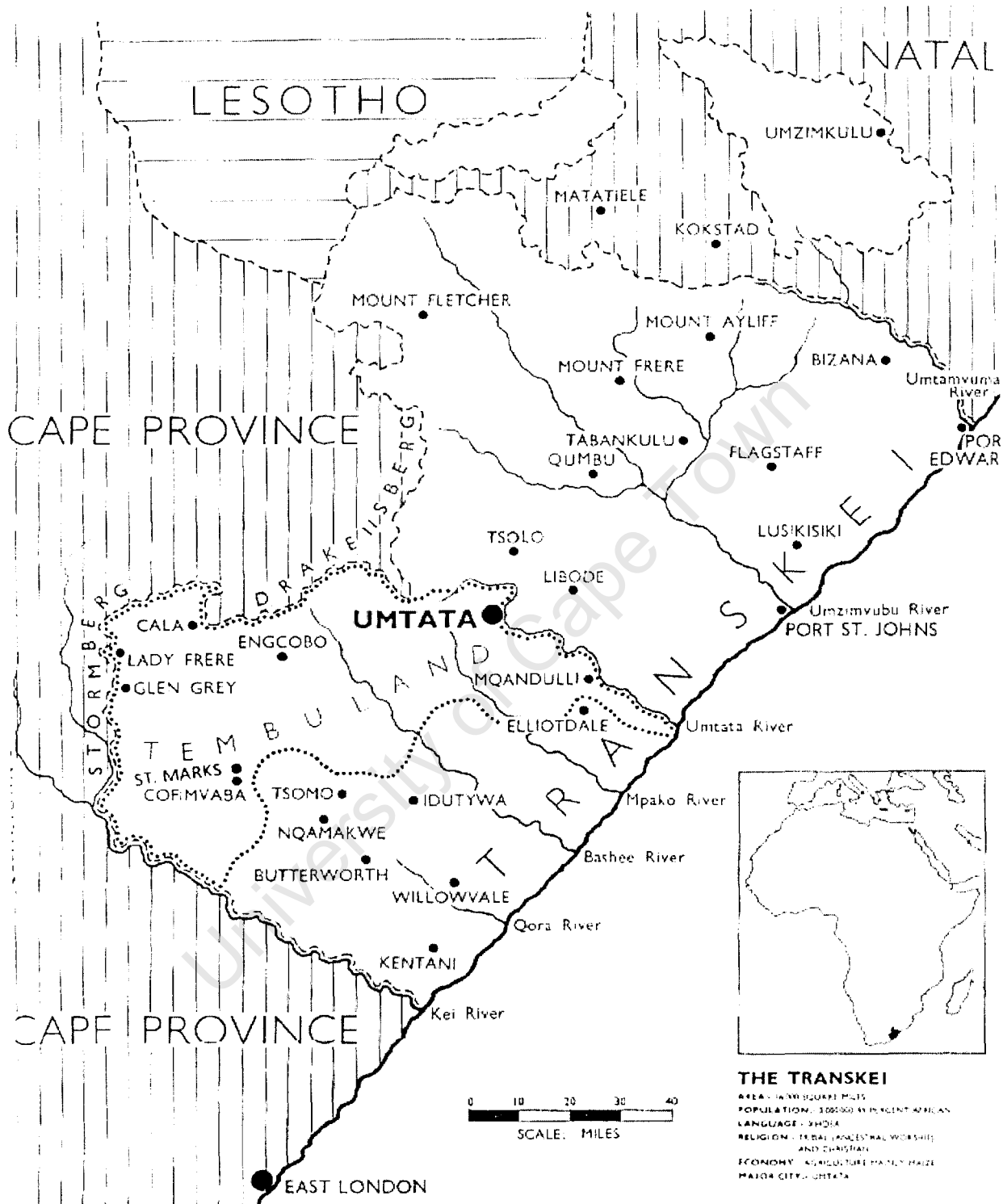
In Chapter 2, the study explores women's agency in customary law starting from codification and application of customary law. Chapter 3 looks at missionary work in Thembuland, Transkei. It introduces the area of St. Marks and explains how the mission came into being. The chapter also explores the place of women in the church. Chapter 4 investigates the customary status and place of women and it explores how gender relations changed as the result of influence of Christianity, colonial rule, capitalism and migrant labour. Chapter 5 analyses court evidence for cases involving litigants in St. Marks District for the period c.1940 to c.1960. The chapter tries to ascertain from the evidence how women in Thembuland explained how they became involved in adulterous relationships. The chapter explores whether women married by Christian rites had different views of adultery from those who were married by customary rites. Chapter 6 shows how women used customary law to defend their property and develop their rights to property. It also shows how women challenged African men who intimidated them. Finally, the conclusion summaries the findings of the thesis.

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<sup>14</sup> McClendon, *Genders and Generations Apart*, p. 27.

<sup>15</sup> McClendon, *Genders and Generations Apart*, p. 29.

Map of Transkei showing the position of St. Marks.



Source: Adapted from J. Broster. *The Tembu: Their Beadwork, Songs and Dances* (Cape Town: Purnell, 1967).

## Chapter 2

### WOMEN AND CUSTOMARY LAW

#### The Codification of Customary Law

The development and application of customary law has been one of the most contentious topics in historical, legal and sociological research as the chapter will show. It will begin by discussing the codification of customary law and its application in South Africa's Transkei.

Bennett and Vermeulen argued that British colonial administrators sought to reduce African law to a written text because they felt that it varied greatly from one area to another, that it was unstable and often lacked true judicial characteristics and so was challenges development. They argued that customary law was probably the reason for Africa's underdevelopment. Coupled with this view was the vision of civilising Africans. British missionaries and administrators from the onset viewed Africans' way of life as uncivilised and barbaric. Therefore, they sought to civilise indigenous societies based on western models of good government. If civilization of Africans was to be accomplished, law was to play a very significant role in the processes of cultural and political change. African law would be codified to facilitate this process.<sup>16</sup> Further, Bennett and Vermeulen argued that codification of customary law was more beneficial to European judicial officers because Africans 'are normally fully cognisant of their law. It is a part of their general education to adulthood'.<sup>17</sup> In short, Africans did not need professional legal services, as counsellors and chiefs were considered to be wise in legal matters. It was colonial officers who needed the written law.

Francis Snyder shows that the origins of customary law are quite recent and that they lie in the specific historical circumstances of the consolidation of the colonial state. Thus customary law was an ideology of colonial domination and codification was an attempt to interpret African legal systems in terms of European legal categories.<sup>18</sup>

In line with Snyder and highlighting the impact of capitalism on African societies, Martin Chanock argued that customary law was a device of control used by Europeans and part of the process of oppression. For him, customary law was a new way of conceptualising relationships and power and a weapon within African communities which were undergoing

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<sup>16</sup> T. W. Bennett and T. Vermeulen, 'Codification of Customary Law,' *Journal of African Law*, 24, 2 (1980), p.208.

<sup>17</sup> Bennett and Vermeulen, 'Codification of Customary Law ', p. 210.

<sup>18</sup> F. Snyder, 'Customary Law and the Economy,' *Journal of Africa Law*, 28, 1 and 2 (1984), p. 35.

basic economic changes. Therefore, for Chanock, it 'cannot be understood outside of the impact of the new economy on African communities, nor can it be understood outside of the peculiar institutional setting in which its creation takes place'.<sup>19</sup>

Mann and Roberts observed that as colonial administrators began to be convinced of how law can be used as an instrument of social change, they also became convinced that the codification of African law would modernise and incorporate Africans in a pluralist colonial state.<sup>20</sup>

In South Africa between 1871 and 1881 the Xhosa speaking territories in the Eastern Cape in an area that came to be known as the Transkei were annexed to the British Colony at the Cape. Soon the British administrators realised that the new subjects had their own system of law which often came in conflict with the British law in this case, the Roman-Dutch law.<sup>21</sup> Thus when it came to the people of the Transkei, the British were faced with two main challenges; administrative and legal. These problems were encountered at a time when the British Colony at the Cape was facing financial problems, which led to the need to create a cost effective form of government through an amalgam of colonial and customary law similar to what had been implemented in other parts of Africa through a process that had come to be known as indirect rule.<sup>22</sup>

Mann and Roberts postulated that indirect rule rested on the principle of incorporating African institutions into colonial law and administration. It created the need for a single set of rulers, with Africans and Europeans working in collaboration. Indirect rule emphasised the need for customary law to be upheld among Africans unless it failed the repugnancy test or contravened local statutes. The need for indirect rule encouraged British administrators at the Cape to identify African systems of law and government that they could work with. However, Mann and Roberts observed that the application of indigenous law and authority created a

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<sup>19</sup> M. Chanock, *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia* (Portsmouth: Heinemann, 1998), pp 2-16.

<sup>20</sup> Mann and Roberts, 'Introduction', p.6.

<sup>21</sup> When the British took over the cape from the Dutch in 1814, they retained local law which was used by the Dutch, which was Roman-Dutch law. Other systems of law, such as those by indigenous people were ignored. For more details see T.W. Bennett, *Customary Law in South Africa* (Cape Town: Juta, 2004), p. 1-20.

<sup>22</sup> Indirect Rule was a form of rule developed by the British which utilised indigenous local authority such as headmen and chiefs to rule their subjects. Where they did not find such authority, they invented the positions of authority and gave them power to rule the people. Indirect Rule may be contrasted with what attained in for example, French colonies. In most of their colonies, the French used Direct Rule, a system that did not need to use existing traditional structures to rule the subjects. M. Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton: Princeton University Press, 1996), pp. 62-108, discusses these two systems of rule in detail.

challenge for British administrators.<sup>23</sup> Mann and Roberts and Bennett argue that unwritten African customs did not fit the aims of colonial rule and justice. Thus, the British saw the need to transform oral traditions into a written text so that the court could have a single authoritative text, to make the system of indirect rule work.<sup>24</sup>

In 1881-1883, a commission on native law and custom was launched to compile a code of criminal and civil law.<sup>25</sup> The commission was to research and make recommendations about African laws and customs, marriage and succession, land tenure and the introduction of local government.<sup>26</sup> By 1883, the commission had completed its enquiry and produced a report with recommendations.<sup>27</sup> It was after this report that customary law was codified and used in the Transkei.

The process of information gathering about African customs was not inclusive. Commissioners sent out questionnaires or conducted interviews with individuals that were considered to be authorities in Xhosa laws and customs. These were magistrates, lawyers, missionaries and other relevant European individuals. Interviews were also held with Xhosas, Thembus and Fingo chiefs, headmen and councillors both Christian and non Christian.<sup>28</sup> Natasha Erlank observed that these parties gave their opinions on *lobola*, initiation, circumcision, sexuality and virtue, polygamy and paternal relationships and marital relations. She observed that African women were not included even though issues discussed directly affected them. She noted that the Commission did not interview any African women. Instead, it trusted patriarchal African and European men to discuss issues on behalf of women. As a result, European men emphasized the superiority of Victorian gender ideology and its treatment of women.<sup>29</sup> African men gave their own perception of what the status of women ought to be and defended perceptions and practices that they felt comfortable with.<sup>30</sup>

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<sup>23</sup> Mann and Roberts, 'Introduction', p. 21.

<sup>24</sup> Bennett, *Customary Law in South Africa*, p. 6.

<sup>25</sup> The commission was appointed in 1878 but the frontier war from 1877-1878 delayed its commencement until 1881. Native was a term used by colonialists to refer to African people, this author will endeavour to avoid using this term because it was derogatory. African will be used instead.

<sup>26</sup> Erlank, 'Gendering Commonality', p. 938.

<sup>27</sup> The commission made a number of recommendations; most of them directly affected women. See *Report and Proceedings of the Government Commission on Native laws and Customs 1881-1883* (Cape Town: Government Printers), pp.29-42.

<sup>28</sup> *Report and Proceedings of the Government Commission*, Erlank, 'Gendering Commonality', p.950, also notes that through out the collection of evidence, the commission questioned African witness with an agenda which asserted the superiority of European customs.

<sup>29</sup> This should be understood in the context that Africa women where not even consulted as to whether or not this is what they wanted.

<sup>30</sup> Erlank, 'Gendering Commonality', p. 991.

The commission has been criticised not only for the lack of inclusion of women but also for lack of a wider consultation with African people. Mann and Roberts, speaking from a general view of the development of customary law, asserted that 'African voices did not all carry equal weight in the discourse about custom. Inequality in power affected the outcome of local conflicts over rules, procedures and institutions'.<sup>31</sup>

Bennett argued that the process of making oral customs into written ones meant that customs underwent enormous changes in both form and content. These changes were precipitated chiefly by the aims of the commission and the technicalities of British law. Writing customary law was done entirely in English, which meant that the translation had to be done from Xhosa to English.<sup>32</sup> Translation distorted the meaning and effect of the original words. In addition, for the commission it was a challenge to define concepts such as *ukulobola*, *ilobola*, *ikhazi* to mention but a few. Such concepts were foreign to British culture and detested by most colonial officials. For example, *ukulobola* was thought to mean bridewealth, brideprice or bridebarter. These definitions fell short of the exact meaning of *ukulobola* 'the giving of livestock for a wife'. And that 'Colonial courts system did not work with African litigants in mind'.<sup>33</sup>

Bennett and Vermeulen noted that the purpose of pre-colonial custom and the codified customary law were different. Influenced by strong European norms of rights and wrong, the codified customary law had to have the guilty and the innocent, the innocent having compensation and the guilty punishment. Punishment appeared to be very vital. Contrary to the European aim of law, for Africans the settlement of disputes and reconciliation of the parties involved was far more important than the application of rules of law. They added that application of pre-colonial custom was characterised by flexibility, an attribute that was retained and maintained because of the absence of analytical jurisprudence. Those vested in the law were not concerned with the analysis of the law, systematised definition of terms or determination of the historical evolution of their rules and their application. Rather, they were applying rules.<sup>34</sup>

Chanock adds that British colonial administrators underestimated the role of dispute resolution within and between families. They did not consider the role of the chief or

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<sup>31</sup> Mann and Roberts, 'Introduction', p.22.

<sup>32</sup> Even though the Transkei was inhabited by different Bantu groups, the majority spoke and still speak Xhosa language hence the name Xhosa speakers.

<sup>33</sup> Bennett, *Customary Law in South Africa*, p. 135.

<sup>34</sup> Bennett and Vermeulen, 'Codification of Customary Law', pp. 212-213.



headman as having judicial capacity and private justice within families did not seem like justice at all to them. Family disputes previously resolved within a lineage became public quarrels to be settled in court. Chanock shows that there was a disjuncture between pre-colonial dispute resolution and custom and the colonial practice of customary law.<sup>35</sup>

After codification, Bennett observed that flexible and ever changing African customs became fixed, the chiefs, counsellors and ordinary people no longer had a direct role to play in their change and adaptation.<sup>36</sup>

Therefore, Mann and Roberts conclude that written African custom, referred to as customary law was not the original African tradition. Even though it was influenced by pre-colonial African customs, it was not the original law rather a 'complex interplay of European beliefs about locals and African representation of themselves'.<sup>37</sup> As mentioned, most Europeans-missionaries, settlers, administrators and anthropologists came to Africa with different interests and ideals that blurred their understanding of local custom and culture which affected their view of African way of life. It was with this blurred view of Africans that they sanctioned codified customary law.

Thus, the above scholars are convinced of the inability of customary law to represent African traditions. This means that customary law as applied in magistrates courts was not in line with the way Africans understood their customs. Others noted that customary law did not address changing African problems.<sup>38</sup> These criticisms sprang from a number of flaws in the codification process. However, even among these scholars very few address women's agency in customary law.

Jack Simons observed that from 1883-1927 a 'medley of conflicting statutes and judge-made rules' were applied in the Transkei as customary law. Magistrates applied customary law as they thought it best suited Africans and not in line with African customs. Simons noted that the only justification for inconsistency in the treatment of African law lay in colonialism. There were also inconsistencies in the way African customs were applied. This made the law

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<sup>35</sup> M. Chanock, *Law, Custom and Social Order*, p.146.

<sup>36</sup> Before codification the chief had the final say in a case but he would not just say whatever he felt had to be said. Before the final decision was made, he listened to his people and the counsellors present at the trial. He took all their opinions into consideration when he made the decision. This process provided for the continual renewal of law according to the circumstances. It enabled Africans to get rid of ancient law that was thought to be bad or harmful to the community. Bennett, *Customary Law in South Africa*, p. 10.

<sup>37</sup> Mann and Roberts, 'Introduction', p.21.

<sup>38</sup> Mann and Roberts, 'Introduction'; Bennett and Vermeulen, 'Codification of Customary Law'; Bennett, *Customary Law in South Africa*.

complex, obscure, uncertain and unjust to Africans. Simons adds that the new law was alien to Africans and not in harmony with sentiments of majority.<sup>39</sup>

#### The Quest for Women's Agency in Customary Law.

Chanock argues that British colonial administrators and African men collaborated in the process of codifying Africans customs to strengthen patriarchal aspects so as to subjugate women and youths. While African men felt that magistrate courts allowed women relative freedom most scholars argue that customary law hardened the position of women in society as colonialism consolidated. There are also other scholars such as Phule Phoofole who disagree with this view, especially when studying specific aspects of the law such as adultery.

Terence Ranger, in *The Invention of Tradition Revised* argued that African rulers and elites shaped the content of tradition in collaboration with the colonial officials in order to reassert control over women and youths. This led to the expansion of the chief's authority and the hardening of custom or tradition.<sup>40</sup> However, even after patriarchal aspects of African customs were hardened in customary law, Mann and Roberts observed that African men felt that customary law favoured women during colonial rule. African men bemoaned the supposed new power and freedom that African women had been given by customary law. Mann and Roberts believe that colonial courts appeared to be sympathetic to African women, for instance when African women turned to magistrate's courts in an effort to escape violent marriages. In the process they managed to challenge the rights of men and elders.<sup>41</sup> Nonetheless, McClendon argues that this position drastically changed. As colonial rule was consolidated, customary law hardened and worsened the status and position of women in society. While customs themselves might change, customary law built and preserved systematic hierarchical control by male elders, which undermined women's powers.<sup>42</sup> It exaggerated and hardened the patriarchal elements of African law.<sup>43</sup>

Chanock reinforces this view and asserts that the colonial regime's strengthening of patriarchal qualities in African law stripped women of the right to own property in their own name. Women could not share in the ownership of the property which accumulated in the

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<sup>39</sup> Simons, *African Women*, pp. 43-45.

<sup>40</sup> T. Ranger, 'The Invention of Tradition Revisited: The Case of Colonial Africa' in T. Ranger and O. Vaughan, eds., *legitimacy and the State in Twentieth Century Africa: Essays in Honour of A.H.M. Kirk-Greene* (Oxford: Macmillan Press, 1993), pp 65-74.

<sup>41</sup> Mann and Roberts, 'Introduction', p.23.

<sup>42</sup> See Chief Matole's views about courts in McClendon, *Genders and Generations Apart*, p. 169.

<sup>43</sup> McClendon, 'Tradition and Domestic Struggle in the Courtroom', p. 161.

household. In terms of this law, they could not control property or even benefit from it during their marriage, or inherit it when marriage ended. Often widows found themselves stripped of property by their deceased husband's relatives.<sup>44</sup>

Looking at customary law from a feminist perspective, Natasha Erlank analysed specific aspects of customary law as British colonial administrators applied them. She too concluded that customary law worsened the position of women in society. It had the opposite effect of what the British colonial administrators had in mind when recommending that Victorian virtues of women, which were considered 'civilised' and 'liberating', be imparted to African women. Erlank argued for example that for a marriage to take place, it was a requirement that a woman gave her free consent. For many women, this requirement was liberating as they now had the opportunity to disobey their guardians and choose a man they felt they really loved and wanted to marry. Conversely, the choice between preferring a man and defying a guardian had far greater repercussions than anticipated. Erlank observed that especially young women were seduced and sometimes rendered pregnant by men who were not capable of taking care of them by meeting their livelihood needs in marriage. In pre-colonial African law, if such a situation happened, the guardian was paid reparation in form of a fine. Under the new law however, magistrates did not enforce the payment of the seduction fine if it occurred to them that the woman had agreed to a relationship out of her own free will. Lack of payment of the seduction fine seriously damaged a woman's status and her chance to get married in future.<sup>45</sup> Additionally, women were left with children to look after on their own. Erlank argued that magistrates made such decisions because colonial governance had no clear rule on fines and so magistrates tended to adjudicate according to their own inclination. As a result women with children out of wedlock were now blamed for their circumstances and low status in society which led to a new view of immorality. Instead of associating immorality with relations between people, Erlank notes that immorality was now associated with women.<sup>46</sup>

Further Erlank observed that the demand by missionaries that Christian marriages should not include *lobola* payments increased tensions between and among relatives. Often a young man or a husband would be harassed by his wife's relatives for non-payment of *lobola* and links to

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<sup>44</sup> M. Chanock, 'A peculiar Sharpness: An essay on the Property in the History of Customary Law in Colonial Africa,' *Journal of African History*, 32(1991), p.81.

<sup>45</sup> Erlank, 'Gendering Commonality', p. 944.

<sup>46</sup> Erlank, 'Gendering Commonality', p. 945.

the wife's lineage were undermined. Women essentially did not have a home to go back to in times of child birth for example.<sup>47</sup>

Erlank also argued that women who married without *lobola* payment faced the risk of being abandoned by their husbands because without *lobola*, the marriage (according to African customs) was not official and the husbands did not lose any cattle in doing so. For Africans, women married without *lobola* were 'prostitutes and their children illegitimate'. It is not surprising that most African women preferred *lobola* as it gave them status among themselves. For the missionaries and other Europeans, *lobola* was a terrible practice that undermined women.<sup>48</sup>

Since cattle were used for payment of *lobola*, Erlank remarks that missionaries argued that men without cattle to purchase a wife would commit adultery or fornication because they could not afford one.<sup>49</sup> Also, the missionaries argued that *lobola* encouraged polygamy because the more cattle a man had, the more women he could buy. For the British administration and missionaries, polygamy was wrong in all its ways. They believed one man ought to have one woman and one wife. Africans on the other hand, Erlank argues, saw nothing wrong with *lobola* and polygamy. For Africans *lobola* emphasised the link of friendship between families, unlike the European view of marriage as that between two people. Africans considered marriage to be between two families and *lobola* provided that link. When a man paid *lobola*, he did not purchase his wife but rather compensated the woman's family for the loss of her labour. The cattle or other property paid was meant to help her guardian or other male members of the family to marry another woman who would help replace her labour. *Lobola* was also a form of security for the woman. Without *lobola* payment, the husband could easily desert her, but with *lobola*, he could not for fear of losing his cattle. He was liable to forfeit his *lobola* and lose his wife if he ill-treated or neglected her. *Ikhazi* cattle were paid back once the marriage ended.<sup>50</sup>

Erlank noted that a number of African men who testified before the Commission appeared to have no problem with eradication of polygamy mainly because as the nineteenth century progressed, fewer and fewer men entered polygamous marriages for lack of cattle. However,

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<sup>47</sup> Consider Metu's testimony to The Commission quoted in Erlank, 'Gendering Commonality', p. 946.

<sup>48</sup> Erlank, 'Gendering Commonality', p. 946.

<sup>49</sup> Cattle were very important and most people in the Transkei depended on it. Cattle were the mode of exchange for goods and services, a source of livelihood, mechanistic power for farming. See Chapter 2 on the cattle killing of 1857.

<sup>50</sup> Erlank, 'Gendering Commonality', p. 945-947.

they highlighted that women encouraged men to have another wife because Xhosa speakers did not allow sexual relations between a husband and wife when the woman was pregnant or breast feeding hence the dislike for monogamy.

Erlank concluded that although the new colonial administrators' ideology seemed liberating to women, it altered male perceptions of women and sexuality which resulted in the formation of new gender and sex codes by the end of the nineteenth century. These were then labelled as traditional by the commissioners as they attempted to define what African custom and practice was.<sup>51</sup>

In contrast to Erlank's argument, Phule Phoofolo took a rather radical stance on the state and African men's effort to control women's sexuality. He argued that the state through customary law and African men did not manage to subjugate women. He based his arguments on early colonial court records and cases in Thembuland from 1875-1895 in the magistrates courts. Using the evidence of women testimonies in court, Phoofolo argues that these were not testimonies of women who were nervous, fickle and delicate and flinched in an overly masculine court where the differences in gender and power were heavily visible.<sup>52</sup> Phoofolo concludes that women were not subjugated because the very codes put in place to regulate women's sexuality (adultery) enabled them to keep their marital and extra marital relationships in a 'dynamic equilibrium'. Women were able to 'reassert their own interpretations of the edifice of customary practices that sought to control their sexuality'. Thus women managed to subvert men's efforts to control their sexual lives.<sup>53</sup>

Further Phoofolo explains that the root cause of failure to control women's sexuality lay in the social relations of the time. For example, women were unpunished, unashamed, and unaccountable in adultery cases. They were also very mobile in society at different times of the year.<sup>54</sup> As men sought to control women's fidelity they insisted on their wives' monogamy. However, these very men were deeply implicated in the adultery they sought to restrain because they failed to adhere to the moral code by being with other men's wives. In essence, men were the major threat to marital stability. Therefore Phoofolo concluded that male complicity greatly weakened men's ability to control women's sexuality. Consequently,

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<sup>51</sup> Erlank, 'Gendering Commonality', p. 952.

<sup>52</sup> P. Phoofolo, 'Female Extramarital Relationships and their Regulation in Early Colonial Thembuland, South Africa, 1875-95,' *Journal of Family History*, 30 (1) (2005), p.35.

<sup>53</sup> Phoofolo, 'Female Extramarital Relationships', p. 37.

<sup>54</sup> Phoofolo, 'Female Extramarital Relationships', p. 11-37.

mechanisms that men constructed to bolster their dominance were not intended to control women but rather mediated social problems.<sup>55</sup>

Further, Phoofolo argues that the construction of adultery as a transaction between males meant that conventional legal and social mechanisms to control it marginalised women's responsibility in the action. This gave women a much better position to undermine the whole institution in the background while men were busy in public trying to control one another's access to women's sexuality.<sup>56</sup>

In summary, the scholarly literature is in agreement that customary law during colonial rule and as applied in colonial courts was not the flexible customary law practised in pre-colonial African societies. How far customary law oppressed women remains a matter of dispute. In line with most writers, this thesis adopts the view that the British changed customary law to suit their legal and administrative needs to the detriment of Africans especially women. As shown above, customary law worsened the position of women in both the court and the community. As colonial rule was consolidated, most women became more and more vulnerable. Their social status was reduced to lovers or single mothers and independent women were viewed as immoral. In court, they became legal minors who could not present a case on their own. They were to be assisted by a male African guardian.

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<sup>55</sup> Phoofolo, 'Female Extramarital Relationships', p. 53.

<sup>56</sup> Phoofolo, 'Female Extramarital Relationships', p. 54.

## Chapter 3

### WOMEN AT ST. MARKS THEMBULAND

Missionaries were sent to the Eastern Cape in the context of colonial conquest in nineteenth century to preach the gospel and to teach Africans legitimate commerce and civilise them through education.<sup>57</sup> From early on, most converts were women. Hastings argues that the Christian gospel appealed to women because they felt that it offered them a bit more freedom than African tradition and customs. However, even in Christianity, the status of women was low.

In about 1850, Bishop Gray, then overall Bishop of the British Diocese in South Africa wrote to the Society for the Propagation of the Gospel (SPG) about bloody wars between Africans and Europeans that engulfed the Eastern Cape and observed that these wars had alienated Africans from Europeans and Christianity. To sort out this problem, he proposed that the Society for Propagation of the Gospel send missionaries and funds to convert Africans to Christianity. He believed that only when Africans were converted would they stop fighting. His vision was in line with that of Cape Governor, George Grey. He too believed that only Christianity and education could reduce frontier wars.<sup>58</sup> Governor Grey held meetings with various religious bodies present in the Eastern Cape and made plans to open schools and mission stations.<sup>59</sup>

Four mission stations were established west of the Kei River. St. Matthews near King Williams Town, St. Lukes near East London, St. Johns on Kabusie River and St. Marks established in 1855. St. Marks was the first mission station in Transkei established among Gcalekas under Krela and the Thembu under Yiliwa who were a minor group. St. Mark was located at Butterworth station initially inhabited by Wesleyan missionaries who abandoned it

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<sup>57</sup> E.M. Nogwina, 'The Response of the Xhosa Speaking people of the Eastern Cape to the Impact of Missionary Expansion of Nineteenth Century', Honours thesis (University of Transkei, 1988), observed that in the nineteenth century, Britain was a power nation, ever growing in political, economic and intellectualism which gave way to a new understanding of man especially Africans. Like other Europeans, the British viewed Africans as a people without religion, pagans and savages. African religions, beliefs and customs were regarded as heathen and superstitious. This was so because African beliefs and customs were significantly different from Christianity or European culture.

<sup>58</sup> P. Hinchliff, *The Anglican Church in South Africa: An Account of the History and Development of the Church of the Province of South Africa* (London: Darton, Longman and Todd, 1963), p.47, C. Lewis, and Edwards, G.E. *Historical Records of the Church of the Province of South Africa*, (London: Society for Promoting Christian Knowledge 1934), p.525.

<sup>59</sup> There were a number of mission societies in South Africa and in the Eastern Cape. Various mission societies had different agendas. Often they did not agree on how the gospel should be preached. Animosity towards the Church of England (Anglican) was higher because they started mission work late and were thus seen as intruders.

due to ethnic wars. It later moved nearer to Queenstown. Reverend and Mrs. Waters were sent to the station.<sup>60</sup>

St. Marks grew fast. By 1858, it had two branch stations; St. John the Baptist at Bolotwa and St. Peters at Gwytyu among the Thembus. By 1860 about 320 Africans had been baptised and by 1862, 1300 were living at St. Marks. All had become Christian although not all were baptised. In 1865, the station resembled an English village. The population of St. Mark's 'grew steadily. By 1882, there were about 2000 children in the mission schools, which established 48 out stations and baptised 1252 communicants.'<sup>61</sup>

A number of factors account for rapid the growth of St. Marks. The 1857 cattle killing and crop destruction by Africans as a result of a prophecy given by a young African girl named Nongqawuse was one of them. Most people around the St. Marks area destroyed their crops (and not plant any more) and killed most of their cattle in the hope that their ancestors through the prophecy on a promised day would raise their dead warriors and livestock to annihilate all Europeans. None of the prophecy came true.<sup>62</sup> Coupled with the cattle killing was the Rinderpest epidemic that occurred around 1887. As a result there were very few cattle and no crops around St. Marks. These events led to acute hunger and famine from the 1880s. Reverend Waters described the area around St. Marks as follows:

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<sup>60</sup> Lewis and Edwards, *Historical Records of the Church*, p. 531.

<sup>61</sup> Lewis and Edwards, *Historical Records of the Church*, p.532-534, Hinchliff, *The Anglican Church*, p.60.

<sup>62</sup> A suspected wizard called Mhlakaza was believed to have collaborated with his niece Nongqawuse and told Xhosa under chief Krela to slaughter all their cattle, sheep, and goats and throw away all their sorghum and maize reserves. The people were not to eat meat or drink meat. All rifles and ammunition were to be destroyed. Nongqawuse promised that by the next moon, all livestock would rise again together with all the dead warriors. The dead warriors would come alive and join the living in the extermination of Europeans and liberate their land stolen by Europeans. Nothing of the prophecy happened. Instead, more than 400, 000 cattle were slaughtered, the Xhosa were left hungry. About 20-30, 000 people survived. There are a number of reasons given as to why most Xhosas believed this prophecy; the cattle killing was a reaction against military defeat and land confiscations by Europeans especially during Governor George Grey's policy of drawing the Xhosa into intimate dependency on white colonial society, which he called "Civilisation through mingling". This civilisation entailed drawing Africans into labour relations with colonialists. Peires, J. In his book *The Dead Will Arise: Nongqawuse and the Great Cattle Killing of 1856-7* (Johannesburg: Raven press, 1979.), explores cattle killing in detail. He brings in an interesting analogy of Mhlakaza. He argues that he was Archdeacon Merriman of Grahamstown servant who had been baptised as Wilhelm Goliath. He makes convincing parallels between the Nongqawuse prophecy and the Christian context and content in which it was made. However, S.B. Davies, 'Raising the Dead: The Xhosa Cattle Killing and the Mhlakaza-Goliath Delusion' *Journal of Southern African Studies*, 33(1)2007, pp.19-41 refutes Peires' claims and provides evidence as to why the argument that Mhlakaza was believed to be Goliath took hold in 1856, why it was revived 130years later and that Goliath and Mhlakaza are two different people, their link was a racist settler rumour. In his response to Davies' compelling evidence, J. Peires, in his latest article 'Cry Havoc!: Thoughts on the Deconstruction of Mhlakaza' *African studies*, 67 (2) 2008, pp.233-254, reluctantly agree with Davies' arguments. He acknowledges that Wilhelm and Goliath is not the same person although he disagrees that the Mhlakaza -Goliath debate was a racist settler rumour.



The country is now nearly empty, literally. All things are changed, everything dead; dogs, crawling about mere skeletons, others being picked by vultures. The chief himself (Kreli) is wandering in desert places, picking up a precarious living. The dancing and shouting, the cattle and crowds of people all gone!<sup>63</sup>

St. Marks became a place of refuge. Missionaries took advantage and began to preach the gospel to the poor, hungry, destitute and broken-hearted. In his 1881 report to the SPG, Archdeacon Waters recorded 200 baptised adults, 200 attendees of the services, 60 children, 144 boys and 97 girls.<sup>64</sup> It is difficult to ascertain exactly what role women played at the mission station and what opportunities were available for them in education.<sup>65</sup> While new comers were welcomed, it appears that the role of women in the church was not highly valued among missionary societies in the early years. Bowie argued that mission work was perceived as male work, to be performed only by men. Women were only to supplement men's efforts. Therefore, when women were found at mission stations, they were mainly wives and children of the male missionary meant to offer him emotional support. Even sending wives to the mission field led to a heated debate in mission societies. It is remarkable to notice that even reports and letters that appeared in the SPG *Mission Field*, a monthly magazine, addressed its readers as brethren and fathers, which indicated that women were not a full part of missionary work.<sup>66</sup>

Women at St. Marks mission occupied a secondary role. Bowie added that the same prejudices that the church had about European women was exhibited towards African women. When it came to education, girls who went to school were schooled in wifely and motherly duties based on European definitions of wife and mother. Girls' education was largely domestic; they learnt how to cook, clean, sew, do laundry and apply hygiene related information. Girls educated in the mission schools usually ended up working as maids in the homes of missionaries. There were exceptions. A handful of women missionaries and wives played a critical role in African women's education. With the help of dedicated women missionaries and other sympathetic European women, a few African women managed to

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<sup>63</sup> Society for Propagation of the Gospel Annual Report, 1859, p. 82.

<sup>64</sup> H.T. Waters, *St. Mark's Missions, Transkei South Africa: Report of Archdeacon Henry Tempest Waters 1881* (Grahamstown: H. Guest and Son, 1881).p.4.

<sup>65</sup> Davies, 'Raising the Dead', p. 23-25, highlights some of the challenges she faced when using excerpts from Archdeacon Waters' diaries.

<sup>66</sup> F. Bowie, 'Introduction: Reclaiming Women's Presence,' in F. Bowie, D. Kirkwood and S. Ardener (eds.) *Women and Missions: Past and Present: Anthropological and Historical Perceptions* (Oxford: Berg Publishers, 1993).pp. 1-6.

obtain an education that enabled them to play vital roles in their countries in subsequent years.<sup>67</sup>

Mager observes that by the 1940s women who attended SPG missionary schools were trained to be primary school teachers while men were preferred at secondary level. Women were not trained in higher education only; men reached that far. The situation put women's status in the teaching profession at a very low level. As a result there developed a feminisation of the lower primary school teaching and in the nursing profession. A good number of women dropped out of school to join the teaching profession even when there were opportunities to advance their education. Seldom did one find girls in secondary schools.<sup>68</sup>

Despite the status occupied by women in church, Hasting argued that most of the first African Christian converts were women. This was the case partly because women occupied a low status in African societies and their change in religion was not perceived as a threat to African societies or their political structures. It is therefore not surprising that early missionaries had a fair amount of female enthusiasm. These women were attracted to missionary teaching because it appeared more liberating than their African tradition and custom. Ordinary women were not the only early converts to Christianity. Women who were social outcasts such as those running away from cruel husbands and unwanted marriages were also eager converts.<sup>69</sup>

Even though Christianity was introduced earlier in the lives of the people of St. Marks, its impact was not powerful compared to colonial rule. A good number of people still lived their lives the way they used to before Christianity. Drastic changes in social, economic and political structure came with colonial rule. Colonial rule introduced capitalism and migrant labour which disrupted the social and economic lives of the people of St. Marks. For women these forces coupled with the introduction of customary law reduced their status to minors. Like children, they faced many restrictions which included lack of free movement in and out of Transkei. Redding also asserts that, when the colonial government introduced taxes to generate revenue for the state in the early 1900s, women's lives were adversely affected. She argues that taxes affected women's social and legal status (within family too) and their

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<sup>67</sup> Bowie, 'Introduction', p. 13.

<sup>68</sup> A.K. Mager, *Girls' Wars, Mission Institutions and Reproduction of the Educated Elite in the Eastern Cape: 1945-1* (Cape Town: University of Cape Town, 1992), pp.1, 10-13.

<sup>69</sup> A. Hastings, 'Were Women a Special Case?' in F. Bowie, D. Kirkwood and S. Ardener (eds.) *Women and Missions: Past and Present: Anthropological and Historical Perceptions* (Oxford: Berg Publishers, 1993), pp.110-111.

economic prospects. Redding adds that social and economic implications of tax payments were far further reaching than the colonial government had imagined. For a man to be liable to pay General Rate tax or poll tax of about ten shillings (one pound in 1925) per year, he was supposed to be eighteen years of age. Unlike the hut tax or later Quitrent – meant for married men – each man was liable to pay General Rate tax regardless of his marital status. This meant that at the age of eighteen, men stopped being legal minors, while women were still regarded as minors. Both forms of taxes ignored women. Thus the state did not accord women official adult status and denied them any legal claim to land. Even though taxes were a burden to most African men, they recognised and created an enhanced legal status for them.<sup>70</sup>

With heavy taxes to pay, a number of African men needed money to pay taxes. However, money was not easy to come by in rural Transkei especially as land or cattle were now difficult to acquire which could enable them to earn money. Beinart and Bundy argue that from 1890 to 1930, labour migrants became a central feature of Transkei's political economy. It was experienced by almost every man, young and old and affected every aspect of social relationships. Labour migrants varied from district to district. Modes of recruitment, the destination of migrants, patterns of looking for work, and work experience all played a part in the variation.<sup>71</sup> Labour migrants also changed and shaped rural power relations; some headmen entered arrangements with recruiters themselves to strengthen their position in society. This was especially in response to situations where chiefs and headmen failed to exercise any broking functions on labour migrants and found their authority weakened by homestead heads that now had independent access to wages. In the homestead, domestic division of labour and family power relations were restructured. This was in accordance with the availability of wages to younger men and sometimes women which often resulted in tension over the control of resources within families. These tensions usually found their way into disputes over land and location authority. Young men left their father's or guardian's homestead to set up their own independent homestead. Young migrants' worldview was changed by the discipline and pressures faced at work. These experiences played a vital part

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<sup>70</sup> S. Redding, *Sorcery and Sovereignty: Taxation, Power and Rebellion in South Africa* (Athens: Ohio University Press, 2006), pp.156-158.

<sup>71</sup> W. Beinart and C. Bundy, *Hidden Struggles in Rural South Africa: Politics and Popular Movements in the Transkei and Eastern Cape 1890-1930* (Johannesburg: Ravan Press, 1987), pp. 18-19.

in shaping the migrant view of rural life and reshaped their view of women, parents' and headmen's authority.<sup>72</sup>

With the above changes, women's responsibilities to their families and community were increased. Redding notes that with the commencement of migrant labour, women took on more and more responsibilities for taking care of the homestead in the absence of their husbands. As migrant labour took hold of African communities, a good number of men and a few women gained some kind of independence from their parents, guardians and elder men. This independence however came at the cost of most men losing their claim to land in their communities. Now more than ever women took on the burden of working the land all by themselves, keeping the family together and they were often blamed for men's problems and failures.<sup>73</sup>

Migrant labour disrupted gender roles in the rural areas. Redding argues that married women sometimes also took charge of the family's wealth which was contrary to African practice. Women whose husbands were away for long periods looked for ways to access wealth so that they could pay taxes and remain on the land. Women could not easily find employment in town because the government after 1923 passed legislation which restricted women's movement into town. The premise for the legislation was that women were minors who needed the presence of elders to control them like children did. This position put women and their new role of looking after the family's finances in direct conflict with men. The difference between expectation and reality created conflicts between women and homestead heads when they returned from their jobs. These restrictions exacerbated women's problems both in rural and urban areas.<sup>74</sup>

Although the state insisted on women remaining in rural areas, most women, specially married ones suffered at the hands of their in-laws. Redding argues that married women who remained at their husband's homes faced a difficult time with in-laws. She observed that although witchcraft was traditionally blamed on women, the 1900s had placed a new angle of blame. Newly married and widowed women were often blamed when things 'went wrong' at their husband's homestead. These difficulties ranged from bad harvest, poor rains, bad

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<sup>72</sup> Beinart and Bundy, *Hidden Struggles of Rural South Africa*, pp .18., S. Marks, *Not Either an Experimental Doll: The Separate Worlds of Three African South African Women* (Pietermaritzburg: University of Natal Press, 1987), p.20.

<sup>73</sup> Redding, *Sorcery and Sovereignty*, p.163.

<sup>74</sup> Redding, *Sorcery and Sovereignty*, p.163-169, also adds that the Native Urban Act was later used to exclude all Africans from having urban and political rights.

weather, a sick child, accidental death of a spouse at the mines and delaying returning from town. Witchcraft suspicions and migrant labour greatly weakened women's status in the rural areas. Redding observes that suspicion surrounding women increased as women became less dependent on men's support and access to land.

While women in town escaped rural male authority, Redding argues that the Native Urban Areas Act (1923) meant that Women's prospects of finding a job in town were small. In 1923, the state enforced the Natives Urban Areas Act in order to curb the influx of women in towns. White municipal authorities were given the authority to proscribe African women from urban areas. In the subsequent years, the Act was used by the state to implement segregation in cities and towns throughout the provinces. Some women however, did defy the law and found their way to town. These often found jobs as maids where they were paid meagre salaries or worked as prostitutes or shebeen queens.<sup>75</sup>

Redding observes that women's economic and legal position between the 1890s and 1950s degenerated. She asserts that women's economic and legal position became very marginal in the 1940s and 1950s. Initially, the more wives a man had the bigger his portion of land was because he could receive additional allotments of land for each wife he married depending on the availability of land. Therefore, men felt the pressure to marry and keep their marriages together. In the case where a man was fortunate to have access to land before he got married he too was under pressure to marry for fear of losing his land to a married man. The absolute need for wife and family gave some women a new power within families. However by the 1940s and 1950s, land shortages meant that even married women were not guaranteed a piece of land.<sup>76</sup>

In summary, initially Christianity did not have a significant impact on the lives of the people of St. Marks, particularly women. A good number of Africans still lived their lives the way they used to before Christianity. However, it was the Christian teaching and liberal ways of living in towns that came with colonial rule that encouraged women to assert themselves despite women's relatively low status within the church.

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<sup>75</sup> Redding, *Sorcery and Sovereignty*, p.170- 171.

<sup>76</sup> Redding, *Sorcery and Sovereignty*, p.171-172.

## Chapter 4

### **WOMEN AND SOCIAL CHANGE.**

The aim of this chapter is to explore the status of women and their place in society by looking at the way of life of the people of St. Marks in the Transkei from c.1940 to c.1960. In particular it explores how gender relations changed as a result of Christianity, colonialism, capitalism and migrant labour. The chapter maps out these overlapping spaces at St. Marks. The main purpose of the chapter is to contextualize the cultural, social and economic environment of the court cases that are analysed in chapters four and five. Court cases can be understood efficiently when interpreted in the context within which they took place.

To conceptualize issues of gender relations and the place of women in both pre and colonial Thembuland, the chapter uses Shula Marks' story of a young Xhosa girl called Lily Moya from the Transkei who struggled to finish her secondary school. This is done in order to illustrate the complexities of a young woman growing up in the interstices between Thembu custom and mission education. The chapter then engages into a discussion that enhances our understanding of women living in Thembuland.

Born in then Umtata district in 1934, Lily Moya attended St. Cuthbert's Anglican missionary school. Like most people living around the mission Lily's parents were Christians and so was she. Her parents, Walter and Harriet were not well to do. They struggled to support their family. Like others in the Transkei in 1930s, the Moya's did not have enough land to grow crops on or graze their animals. The 1913 Land Act had left only 8 percent of the total land in South Africa to Africans. There followed an acute shortage of land among Africans. Poverty among Africans was worsened by the 1930s world economic recession. It became difficult for most people living in Transkei whether Christian or not to fend for their families through peasant means of production. Lily's father left Transkei to search for a better future for his family, in Cape Town in the late 1930s. He shortly died after suffering from pneumonia.<sup>77</sup>

Lily's mother continued to struggle to support her three children, Lily being the eldest, from her teacher's salary. However her desire and Lily's own strong will to acquire secondary education made them move from one school to another. Lily had no time to develop friendships or play. Eventually Harriet could no longer manage to continue supporting her

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<sup>77</sup> Marks, *Not Either an Experimental Doll*, pp. 1-55.

family and went to Johannesburg in 1948 to look for better employment. Lily, now a teenager and in secondary school at St. John's, was left in the custody of an uncle in Umtata.

At her uncle's, Lily was treated more as servant than a niece. In exchange for food and lodging she was to perform household chores and look after her nieces and nephews before and after school. As a result her school performance deteriorated. Being the only girl she was isolated and unhappy which also contributed to her declining performance in class.

Lily's situation was noted by the local white Native Commissioner who put her in touch with Mable Palmer a retired educationist living in Durban. Palmer was surprised to hear that Lily, a poor African girl from the Eastern Cape, was in secondary school at fifteen years of age. When Lily wrote to Palmer to ask her for help with her education, Palmer promised to send her to Adam's College in Natal, a well known African high school and co-education. Mabel and Lily conversed through letters for some time even before obtaining essential documents for her transfer to the school. With Palmer's help, Lily started school at Adam's College in 1950. She ran away from Umtata because her uncle was about to marry her off to a man of his choice. It appears that Lily was not interested in marriage but since she was living in a world dominated by the guardians of women and customs that subjugated women to male authority, her chances of remaining single were slim.

In her appeal to Palmer to rescue her from her predicament, Lily wrote the following about marriage:

I could , or in fact try to endure every other difficulty patiently and humbly, but not to see myself getting married in an awkward manner to a man I hated so much. That is one of the things I so much hated being married. I don't even dream about it. That awful bondage.<sup>78</sup>

It was unfortunate that Lily did not complete her high school at Adam's College. She dropped out of school after complaining bitterly about the low morals exhibited by school mates who were mainly boys. Unwanted attention experienced at school clashed with her puritan Anglican principles. Lily did not feel comfortable being around 'raw school boys' <sup>79</sup> who had no respect for girls.

In response to Palmer's request to write about the life of a native girl Lily wrote:

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<sup>78</sup> Marks, *Not Either an Experimental Doll*, p. 21.

<sup>79</sup> Marks, *Not Either an Experimental Doll*, p. 25.

I have not been or very observant to such a subject. You will see little of my experience only based to what our people say of our girls and what ought to be preserved divinely and single minded, expecting ourselves to be the future mother's, the example to be admired and to be self respective of ourselves. We are frequently mislead (sic) by minor misleads. We never use our own intelligence. We are flying for only outside admiration, our action are rot, revealing our internal impurity. We forget the meaning of the word 'girl', that a girl should [ought to ] be preserved. Sometimes we are given wrong teaching by the people we stay with. We are only advised to marry and as we grow we think of nothing else but marry.<sup>80</sup>

It is clear from Lily's writing that she was influenced by Christian values and missionary education. Lily, like many other women, opted to break away from a traditional view of a woman as a mother and economic resource. She considered these views to be restrictive and lamented: 'Sometimes we are given wrong teaching by the people we live with. We are only advised to marry.'<sup>81</sup>

Desiree Lewis argues that Marks does not understand Lily Moya. Lewis points out that Marks is sympathetic to Palmer's point of view and cannot see that of Lily whose race, age and discursive resources are very different from Palmer's.<sup>82</sup> Lewis notes that both Palmer and Marks saw Lily as unreasonable and unable to take up the opportunity provided by benevolent Palmer. However, for Lewis, the problem lay with her patron who sent impossible and contradictory messages. At one point she instructs her to be independent and at another she tells her that she is 'irrevocably' dependent and inferior. All this points to the fact that Palmer did not fully understand Lily or was not sympathetic enough. In another incident, she describes Lily as a self-centred selfish young woman. Lewis argues that what Palmer does not understand is that Lily's self-centeredness, which she views as trivial, revolved around Lily's attentive perceptions of how others saw her and how she was expected to behave. Thus Lewis views Lily as someone who constantly longed for displacement, preoccupied with what she was not allowed to do thus occupying new physical and psycho-existential spaces which enable her to register her social entrapment. It is these forces that Lily reacts to and that inform her rebellion.<sup>83</sup>

Furthermore, Lewis argues that Marks failed to see that Lily's letters were a representation of her self-perception as a victim rather than absolute representations of her innermost thoughts.

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<sup>80</sup> Marks, *Not Either an Experimental Doll*, pp. 89-91. Above words were taken from Lily's letter to Palmer.

<sup>81</sup> Marks, *Not Either an Experimental Doll*, p. 25.

<sup>82</sup> D. Lewis, 'Constructing Lives: Black South African Women and Biography under Apartheid' in N. Yousaf, (ed.) *Apartheid Narratives* (Rodopi: Amsterdam, 2001), pp.179-180.

<sup>83</sup> Lewis, 'Constructing Lives', pp. 181-182.



Palmer wrote from the point of view of a public educator and patron; she sent some of Lily's letters to her colleagues and friends. Lily wrote from an interpersonal exchange in which she invented a particular person specifically for Palmer. Lewis adds that Lily 'operates out of fragments of the self, out of memory's echoes of strategies designed to cope with environmental particulars'.<sup>84</sup> Her letters do not confirm her complicity but rather show covert resistance.

Lewis points out that when considering Lily's letters as fragments of self, it is vital to bear in mind that her life extended to relationships, conflicts and encounters which neither Marks nor Palmer had access to. Lily hints at this life but Marks simply homogenized it as the 'undoubtedly pathogenic nature of her environment, a frightening amalgam of the cruelties structured by colonialism and individual circumstance'.<sup>85</sup> Further, Lewis observes that within correspondence between Palmer and Lily, there are traces Lily's overt though cryptic signs of struggle which Marks ignores or marginalises. For instance, when Palmer asked Lily to write a short article about the life of a native girl, Lily failed to satisfy Palmer's request. Palmer responded 'you only write interestingly and amusing when you writing about yourself'. Lewis argues that Palmer's comment reveals her crudely stereotypical perceptions of Lily and the black women's inferred resistance. Marks on the other hand paid very little attention to Lily's article. In essence she agrees with Palmer's assumptions about Lily's rationality.

This story serves to illustrate the complexities of a young woman growing up in the interstices between Thembu custom and mission education. With the experiences of women that Lily Moya's story represents in mind, the chapter will now conceptualize issues of gender relations and the place of women in both pre and colonial Thembuland.

Initiation and marriage customs played a role in determining status of both male and female. Initiation made a distinction between a boy and a man. Only a girl who had come of age was eligible to get married, have children and attain the status of a wife which was the highest status of a woman. Initiations provided a right of passage to manhood and womanhood. Important as they were to both male and female, only males appear to have enjoyed the benefits of being adults. Initiation and marriage customs were among the most significant customs of the Thembu of St. Marks.

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<sup>84</sup> Lewis, 'Constructing Lives', p. 183.

<sup>85</sup> Lewis, 'Constructing Lives', p. 183.

Among the Thembus, circumcision was a mark of manhood and a form of authority over women. Thembus practiced the custom of circumcision. The main aim of this custom was to mark the transition from boyhood to manhood. Mager observes that this passage was vital because it marked changing social duties, responsibilities, power and authority that senior boys who were now considered men exerted over young girls, boys and women. Initiation also signalled changes in personality, status and identity (manliness). Manhood revolved around the practice of initiation. An ideal man was one who was brave, strong, and able to restrain himself and observe the clan's customs, he was a good orator and a strong leader. These and other manly virtues were inculcated in boys through initiation. Therefore, initiation and circumcision were the backbone of Thembu masculinities.<sup>86</sup>

The custom was quite elaborate. Boys from the age of 16 to 22 years left their homes and lived in secluded homes (*Isuthu*)<sup>87</sup> about 14 feet in diameter. *Isuthu* were far from their home usually in the bush. The period of seclusion varied but was usually up to three months. It was here that boys learnt to be men. Circumcision was a very serious custom among Thembus. No uncircumcised man was allowed to marry. If at all such a man or boy seduced and impregnated a girl, the marriage was postponed until he was circumcised. The boy's parents usually paid the instructor. At the end of initiation, the boys were also required to have sexual intercourse with an untouched female or *idikazi*. She was neither a widow nor a deserted woman. If he did not do so, the boy was considered to still possess the polluted taint of boyhood and his children were believed to grow up unhealthy and without vigour.<sup>88</sup> To conclude the circumcision, a ceremony was held for the newly initiated boys at the home of the main host. A lot of beer was brewed and a great crowd of people gathered to see the *abakweta* who appeared on this day to participate in the festivities. *Abakweta* entertained the spectators through dance. Toward the end of the festivities, responsible persons such as the chief and elders made speeches in which they advised the young men on how to behave now

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<sup>86</sup> A.K. Mager, *Gender and the Making of a South African Bantustan: A Social History of the Ciskei 1945-1959* (Cape Town: David Philip, 1999), pp.129- 133.

<sup>87</sup> The home was built in circular form like the ordinary huts out of wattles thatched with long dobo grass from top to bottom. They stayed in the huts for about six months though no specific time was allocated. At the end of initiation, the hut was burnt. Hence the huts were well built or strong.

<sup>88</sup> H.H. Soga, *The Ama-Xosa : Life and Customs* (Lovedale : Lovedale Press, 1931), p. 151., D.S.Koyana, *Customary law in a Changing Society* (Cape Town: Juta ), 1980.pp.60-61, Highlighting the seriousness of the circumcision custom, Koyana illustrates some of the problems posed when an *Isuthu* was named after an illegitimate child, through a case brought before the NAC between Lize and Bushula Makalima.

that they were admitted to manhood. Wisdom, respect and restraint were re-emphasised in these speeches.<sup>89</sup>

Mager adds that after initiation, initiates were expected to work and support their parents and to attain means for marriage and *lobola* before they earned the status of *abafana* or young men. This period prepared and matured young men who became eligible for marriage and procreation.<sup>90</sup>

Girls also underwent their own elaborate initiation into womanhood. The initiation of a girl into womanhood signalled a process of change of status as it was only after initiation that she would be married. A girl undergoing initiation into womanhood was called *Ntonjane*.<sup>91</sup> Once the girl's mother was aware that her daughter's menstrual periods had started, she prepared for the initiation. There was no fixed date for it. Unlike boys, the girls were put in seclusion alone, seldom with a friend or age mate. Each family performed the custom according to their economic ability. If at all a girl's menstrual periods commenced at a time when the family was not financially stable, the initiation was postponed to next year or sometimes never conducted at all because it was costly a investment. Once a girl reached puberty and menses started, she was placed in a secluded hut within her father's or guardian's homestead. On second day of her initiation, in the morning, both her face and her body were painted with clay mixed with water and animal fat (or petroleum jelly). White clay among the Thembus symbolised contact with the ancestral spirits and seclusion from normal community life. She stayed naked except for a genital girdle and a blanket wrapped around her. In the hut she sat behind a curtain.

During the period of initiation, *intojane* was only allowed to speak in whispers and only when she was spoken to. A number of rituals were also performed including three main sacrifices. These sacrifices stressed the deep religious significance of the custom. It was part of the initiation that the *intojane* was brought into a close relationship with her Ancestral spirits through sacrifice. In turn, the spirits watched over her, if they were satisfied they ensured that safe passage to womanhood was healthy and fruitful. Thembus believed that women who did not go through initiation had misfortunes in their marriages. For example, some could not bear children. When a healer was consulted, it was often discovered that the cause of illness

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<sup>89</sup> For more details of how the circumcision was done, see Soga, *Ama Xosa*, pp. 253-260.

<sup>90</sup> Mager, *Gender and the Making of South African Bantustan*, p. 133.

<sup>91</sup> J. Broster, *The Tembu: Their Beadwork, Songs and Dances* (Cape Town: Purnell, 1967), p. 39., gives an interesting story of the origin of the name *I-ntonjane*. She argues that it originated from the larvae stage of the growth of a caterpillar.

was absence of initiation, a sign that the spirits were not pleased with her and illness was punishment for disobeying the ancestors. The remedy was to observe customs.<sup>92</sup>

Apart from teaching *intojane* about how to be a good woman, she was also told the importance of her father's clan and to remember that she belonged there. To emphasise this point, only her father's relatives were allowed to attend to her. Mainly, only three people attended to her the whole day and night. The *nkazana* or matron was a paternal aunt. She was assisted by the elder sister of *intojane* and a paternal cousin. These girls were called *amakankatha* or junior assistants. They shared duties, one cooked at night and the other in the morning. Two men were part of the team. They were called *amadindala*. The senior *dindala* was a prestigious man in the community and the *intonjane*'s elder brother or cousin was the junior *dindala*. The three women were the ones allowed free access to the *intojane*. Her father and mother and female relatives from the mother's side were not allowed to enter her hut because it was considered taboo.<sup>93</sup> The initiation was concluded by collecting fire wood from the forest early in the morning. Thembus believed that the leaves of the forest trees healed and blessed the people who went in the forest by touching their faces and bodies. *Ntonjane* also smeared red ochre on her face for a week so that people would know that she had been ritually cleansed.

Among the customs practiced by the Thembus, those pertaining to marriage were perhaps the most elaborate. Simons observed that a woman was married in two ways; through *ukuthwala* literally meaning to carry or *ukulobola*. In *ukulobola ikhazi* cattle was paid first before the woman or girl was married off. *Lobola* was the most relevant thing in a marriage and the validity of a marriage depended heavily on the payment of *lobola*. The payment was given to the father or guardian of the woman or girl. Men of all classes including the clergy after the advent of Christianity paid *lobola* irrespective of the marriage.<sup>94</sup>

The basic function of *lobola* was to compensate the woman's family for the loss of women's agricultural and reproduction capabilities. The cattle or other property paid were meant to help the father or brother to marry a wife into the family who would replace those capabilities. *Lobola* was also meant to remind the husband to perform his duties as husband and treat his wife kindly as he was liable to lose her and forfeit his *lobola* claim if he ill-

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<sup>92</sup> Broster, *The Tembu*, pp. 39-40.

<sup>93</sup> Broster, *The Thembu*, p. 41, *amadindala* did not enter the hut when *intojane* was there; they however helped to prepare it especially on the first day of the initiation. Broster gives more details about their duties.

<sup>94</sup> Simons, *African Women*, p. 85.

treated or neglected her.<sup>95</sup> Most women felt secure and their children if their guardian had received sufficient *lobola*. The less the *lobola* paid the easier it was for a man to forfeit it whenever he felt like divorcing his wife.<sup>96</sup>

Koyana explains that a woman could also get married through *ukuthwala*, when a young man forcibly took the girl to his home. He performed this act when she went to fetch water from the river or firewood from the forest. In the company of two or three of his friends, he lay in ambush. The girl, immediately aware of what was going on, resisted her capture although no girl ever managed to escape from a *thwalo* party. Later in the evening, messengers were sent from the young man's home to report to the girl's people of the development and to inform them to stop searching for her. Marriage negotiations and *ikhazi* payment then followed. If the negotiations went on smoothly, the girl was already considered as a wife at her husband's home. *Ikhazi* was paid as agreed and no questions on damages for the *thwala* would follow. However, if it so happened that negotiations broke down, the girl found her way back to her people. In this case, her father or guardian would be entitled to one head of cattle known as *thwala* or *bopha* if the girl became pregnant. The beast was referred to as *bopha* from the word *ukubopha*. *Bopha* cattle was meant to tie up or soothe the injury done to the girl and her family.<sup>97</sup>

Even in *ukuthwala* marriage, cattle remained the foundation of the marriage. The main difference between the two was the number of cattle paid and the absence of wedding ceremony. Usually cattle paid in *ukulobola* were more than in *ukuthwala*. *Ukuthwala* became common in the late 1950s because Transkei had become impoverished. Resources were scarce and cattle were in short supply. Very few families could afford a wedding feast.<sup>98</sup>

There were important social distinctions between men and women among people of St. Marks before colonial rule. Sean Redding in her quest to explore the impact of colonial taxes on women highlighted interesting aspects of the people of Transkei before they were burdened with colonial policies and the development of capitalism and migrant labour. She shows that African men and women had different social statuses with distinctions between older and younger cutting across gender divisions. An older married woman was junior to her husband but senior to her son and other younger men especially those not yet married.

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<sup>95</sup> Simons, *African Women*, p. 90.

<sup>96</sup> S. M. Seymour, *Native law in South Africa* (Cape Town: Juta, 1960), p. 101.

<sup>97</sup> Koyana, *Customary Law*, p. 1.

<sup>98</sup> Mager, *Gender and the Making of South African Bantustan*, p. 177.

All members of the family, both male and female, were dependent on their parents in pre-colonial Transkei. Young men depended on their fathers for *lobola* cattle when they wanted to marry.<sup>99</sup> Later, when cattle became scarce, horses, goats, hoes, money and other property were accepted. As young men began to hold on to their earnings and fathers found it hard to save, responsibility for *lobola* payment shifted. A woman at their father's or guardian's homestead had more rights and authority irrespective of her age than at her husband's homestead.<sup>100</sup>

A woman's social position was strongly influenced by *lobola*. In looking at sexuality, fertility and male power, Mager argues that *lobola* did not only provide security to the women and her children but status was also part of the arrangement. Mager observes that a woman for whom *lobola* was not paid had no status in her husband's family. However, even though *lobola* appears to protect women, in practice *lobola* endeavoured to control women's agricultural and reproduction capacities. The power of *lobola* to give women status also tied their place in society to a subordinate one. This link between *lobola* and women's place in society ensured that formal feminine ideas reinforced women's place in this male dominated society. Power came through ownership of cattle and the possibility of exchanging cattle for wives and their reproductive and productive capacities. Traditionally, taking care of cattle was never a woman's job but that of boys and men, which meant that, women could not own or handle the means of power (cattle). Without cattle women did not possess the power to change or influence their status in society. Women did not hold any decision making authority because they did not occupy positions with such power. Under colonial rule and its subsequent application of customary law, the same male practices were upheld and women still remained subordinate to men. When a man married, his status under the law enhanced while that of women remained that of a minor. He was eligible to receive a parcel of land on which to farm with his family.<sup>101</sup>

Furthermore, Bennet argues that *lobola* made it impossible for women to leave their husbands. For a marriage to be annulled, *lobola* had to be returned. Since inheritance was in the hands of men, women could not acquire wealth to pay back their *lobola*. Their guardians

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<sup>99</sup> Bennett, *Customary Law in South Africa*, p. 223., explains that *lobola* is a Bantu term which was used to denote, usually the cattle paid for a bride before marriage. The term was common throughout Southern Africa and in some parts of Central and East Africa.

<sup>100</sup> Redding, *Sorcery and Sovereignty*, p.152.

<sup>101</sup> Mager, *Gender and the Making of South African Bantustan*, pp. 175-176.

were seldom willing to return the *lobola* cattle. Only in very extraordinary circumstances such as severe wife battering did they return *lobola*.<sup>102</sup>

The close relationship between dress and the bearing of children also provides meaning of what place a woman held in the community. Mager adds that a woman's place in the community was marked by her bodily fertility signalled by the change in her dressing. A married woman covered her head with a big head scarf and wore a long swaying ankle length skirt braided at the hem. When she became a mother she covered her breasts with a straight narrow sort of apron tied above her breasts and hanging below the knees where it touched the first line of braid. A bride wore a black shawl. A nursing mother was recognised by the white paint on her face and her child. Marriage did not grant the status of *umfazi*; wife or woman. It was only after birth of a second child that a woman earned the status of *umfazi*. Therefore, even when a woman was married her status in society still remained uncertain and she was not recognised as a woman at all until she gave birth.<sup>103</sup>

A woman's place was also dictated by strict codes that placed men above over women. *Intlonipho*, a 'patriarchal code of respect centred on a system of language and behaviour avoidances',<sup>104</sup> subordinated women's position in society. In this code women were forbidden to speak certain syllables of their father-in-laws's name and to enter certain spaces. Women were expected to be silent. Through avoidance, men dictated what women were to do and not to. Thus *Intlonipho* (respect for men) ensured a wife's subordination to her husband and mother-in-law. Mager notes that by circumscribing language, controlling women's voices and prescribing behaviours, *Intlonipho* regulated the interface between male domination and female subordination. However, since most women were eager to be accepted in society, to get married and to have children they proudly accepted *Intlonipho* rules. However, some who were influenced by Girl Guide Associations and songs from towns even if they had not physically been to town refused to accept marriages based on *intlonipho* codes.<sup>105</sup> Such women were few and they were considered social misfits. Lily Moya was one such young woman.

An important determinant of an individual's position in the community was ownership of wealth. Because women were unable to accumulate and exchange wealth they were

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<sup>102</sup> Bennett, *Customary Law in South Africa*, p. 249.

<sup>103</sup> Mager, *Gender and the Making of South African Bantustan*, p. 175.

<sup>104</sup> Mager, *Gender and the Making of South African Bantustan*, p. 178.

<sup>105</sup> Mager, *Gender and the Making of South African Bantustan*, pp. 178-179.

economically dependent on older men even though they were the backbone of economic production and social procreation. Redding however points out that although women were always dependent on men and could not have wealth of their own, a few did manage to act independently and acquire wealth. These were usually women who were wives and daughters of chiefs, herbalists and diviners. Female herbalists and diviners used their supernatural powers to improve their social status. Their superior knowledge in this realm enabled them to exercise authority over both male and female members of the community. They accumulated wealth in the form of cattle and other livestock which people paid for their services.

In addition, ordinary married women could also accumulate a small amount of wealth from the *ubulunga* cattle given to them by their father or guardian when they got married. The *ubulunga* cow provided milk for young brides in the first year of marriage because they were not allowed to drink milk from their husband's homestead. *Ubulunga* cattle served as a symbol that the bride was still connected to her people.<sup>106</sup> Additionally some women, widows in particular, had some authority for example in deciding to remarry or not. This choice was subject to the custom of brothers -in-law having a duty to care for the widow in return for her sexual favours. Some women were given the opportunity either to remarry or not although their choices were limited by the desire to stay and raise their children who were in the custody of their husband's people and would remain there if they chose to get married elsewhere.<sup>107</sup>

Redding argues that while African women were not entirely without say in their marriage and were not always exploited or entirely dependent on men, this status quo changed over time. Jeff Guy does not agree with Redding's position. He argues that in societies that depended heavily on cattle and milk for livelihood and wealth, a new homestead could only be established or expanded through the exchange of cattle in form of *lobola* payment for a wife. Cattle provided the measure of value in exchange transactions and the passage of cattle marked all social events. Organisation and control of cattle was always in the hands of men. Guy observes that these societies were based on the appropriation of women's labour by men. A clear sexual division of labour under the control of either a husband or a father allocated arable land for use to various households to which wives were affiliated. He notes that even though the women and children were at the centre of economic production they were

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<sup>106</sup> Koyana, *Customary Law*, p. 15.

<sup>107</sup> Redding, *Sorcery and Sovereignty*, pp.151-153.



exploited for their labour by senior men. The control and appropriation of women's productive and reproductive capacities was a central social feature upon which the foundation of these societies lay.<sup>108</sup> Marriage was the key to setting in motion the production and reproduction processes upon which the society was based. These processes depended upon male control and exploitation of female production and reproductive capacity. The fertility of women was far more vital than the potency of a man. These processes had the potential to create and increase value. Women's capacity to create value in marriage was connected to cattle through *lobola* and child bearing, while men's status in society increased with accumulation of wealth in the form of cattle. Cattle accumulation was dependent on female fertility which made marriage and fertility compatible processes which were to be exploited by men.<sup>109</sup>

Though Guy does not entirely agree with Redding, he nonetheless notes that even when women were exploited, they had a significant degree of economic independence in the sense that they had access to arable land which they worked themselves and they were in charge of agricultural production. He admits that work was heavy but it was done in a community that offered considerable security for women because men needed to safeguard fertility, their passage to social status and integrity.<sup>110</sup>

In summary, it appears that these scholars agree that woman's place in pre-colonial times was different from colonial times. They argue that women's lives changed after the advent of colonialism, capitalism and migrant labour. These forces had an adverse impact on Thembu society which also affected gender relations and women's position negatively.

### Conclusion

This chapter showed the changing place and status of African women in Thembuland in the first half of the twentieth century. In the 1940s, through the eyes of young Lily, we see a different view of what a woman might be and what women could think of themselves. Marriage was no longer a sure passage to social status for women. Social and economic changes in Thembuland especially from the 1930s transformed that.

Missionary teaching and liberal ways of living in towns encouraged women to deviate from traditional teaching and became 'rebellious' by going against their father's or guardian's

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<sup>108</sup> J. Guy, 'Gender Oppression in Southern Africa's Pre-Capitalist Societies', in C. Walker (ed.) *Women and Gender in Southern Africa to 1945* (Cape Town: David Philip, 1990), pp. 34- 40.

<sup>109</sup> Guy, 'Gender Oppression in Southern Africa's Pre-Capitalist Societies', pp. 40-43.

<sup>110</sup> Guy, 'Gender Oppression in Southern Africa's Pre-Capitalist Societies', pp. 43- 46.

wishes. In the case of Lily Moya, she refused to get married as her uncle wished her to and instead she ran away to continue her education at Adams College. While her story ends tragically, it highlights the contradictions that young women growing up in Thembuland might encounter in the 1940s.

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## Chapter 5

### SEXUALITY, SEDUCTION, ADULTERY AND PREGNANCY IN ST. MARKS THEMBULAND

In this chapter, I analyse court evidence for cases involving litigants in St. Marks District for the period c.1940 to c.1960. The chapter will try to ascertain from this evidence how women in Thembuland explain how they became involved in adulterous relationships. Further, the chapter will ask whether women married by Christian rites had different views of adultery from those who were married by customary rites. The first part will discuss customs and attitudes to sexuality. It discusses literature on women's agency and evaluates historical arguments in the light of new evidence. Finally, the chapter comments on the ability of customary law to provide remedies in the context of absent men and competing ideas about adultery.

Mayer argues that Xhosa men and women, Christian or not, in his study of the migrants living in East London, regarded sexual satisfaction as a normal requirement of every adult man or woman, whether married or not. Mayer's interviewees told him that sexuality was a natural thing which one should not deny himself or herself.<sup>111</sup> In another study carried out by Reader, similar sentiments were expressed regarding adultery. When asked whether adultery was disgraceful, most African men, especially non-Christians, asserted that adultery was not disgraceful. They argued that adultery was something natural and could be cleansed with customary payment of damages and the offspring of the adulterous relationships were not 'spoiled' or affected by their status.<sup>112</sup> The idea of sexuality as an important aspect of wellbeing extended to widows.

Mayer suggests that widows in Xhosa tradition were allowed to have multiple sexual partners. Upon the death of a husband, the guardianship of a widow was passed usually to the elder brother of the deceased. Sexual privileges were not always passed. Widows were allowed sexual relationships with other non related men. These relationships were required to be conducted discreetly. Widows who were educated or Christian felt shame and guilt when they took on lovers because of the Christian expectation that a widow remained chaste. When they had lovers, they concealed the relationship to avoid shame. Christian values of sexuality

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<sup>111</sup> P. Mayer, *Townsmen and Tribesmen: Conservatism and the Process of Urbanization in a South African City* (Cape Town: Oxford University Press, 1971), p.251.

<sup>112</sup> See D.H. Reader, *The Black Man's Portion: History, Demography and Living in the Native Locations of Eastern Cape Province* (Cape Town: Oxford University Press, 1960).

clashed with Xhosa tradition which allowed widows to have multiple lovers.<sup>113</sup> Mayer pointed out that the separation between jural and sexual succession did not seem comfortable to widows especially those with small children because they had to stay with their husbands' relatives in order to secure an inheritance for their sons which would otherwise be lost if they took them away. Young widows often returned to their parents' homes. Their sexual freedom there was greater, sometimes causing rivalry with homestead wives.<sup>114</sup>

Mayer found that Xhosa men felt that Christian demands of monogamy or abstinence till marriage were straining and boring. They found themselves not living up to the expectations of 'civilized' people, that is, western educated men because they could not resist the thing that gave them most pleasure. Nonetheless, like men in the rural areas, men in town demanded that their wives or partners remained faithful. Most men in town expected their wives in the rural areas to stay faithful, although they did not have confidence in their wives to do so. They felt that women tended to be attracted to men of status such as teachers, headmen or agricultural instructors.<sup>115</sup>

In his study on the East London in the 1950s, Mayer observed that male adultery was widely practised among Xhosa speakers; he likened it to taking alcohol. He saw it as a way of life for both Christians and non Christians. However, he made a distinction between Christians and non Christians in the way adultery was committed. Unlike non Christians, Christians had a sense of shame and guilt which compelled them to do it in secrecy. There were a few educated or modern men who refrained from committing adultery on Christian principle. Additionally, Mayer noted that the idea of marital faithfulness among the Xhosa was very gender biased. Husbands could take lovers openly while wives were required to be faithful and submissive. Mayer pointed out that Christian men were likely to be faithful in their marriages than the non-Christians counterparts.<sup>116</sup>

Focusing on adultery cases in the late nineteenth century in Thembuland Umtata District, Phoofolo argues that adultery was not precipitated by social economic and political transformations. He argues that adultery merely followed existing patterns of behaviour in place before the advent of commercial capitalism, Christianity, colonialism and labour migrancy. He suggests that Thembu men and later colonial administrators made frantic

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<sup>113</sup> Mayer, *Townsmen and Tribesmen*, p.251.

<sup>114</sup> Mayer, *Townsmen and Tribesmen*, p. 241.

<sup>115</sup> Mayer, *Townsmen and Tribesmen*, p.214.

<sup>116</sup> Mayer, *Townsmen and Tribesmen*, pp. 213-214.

efforts to control female sexuality against the grain of established practice. Xhosa men managed to some extent to control young women's sexuality, though that of older women remained problematic. Phoofolo argues that this was so because married women had many opportunities to engage in extramarital relations which they fully exploited. For Phoofolo, customary law and husbands (and later, the colonial state) tolerated adultery as long as it occurred within the set codes.<sup>117</sup>

Phoofolo notes that prenuptial virginity illustrates the most elaborate way men controlled and maintained female sexuality. Since the virginity of unmarried women was highly valued, prenuptial sexuality had to be monitored. From adolescence, girls were expected to keep their bodies 'safe' by not getting pregnant before marriage. Control of adolescent sexuality was done through *ukumetsha* (i.e. external sex). Sexual activity was conducted by men between the girl's thighs and not by penetrating her vagina, thereby preventing unwanted pregnancies. Young girls and boys were allowed to practice *ukumetse* or sex play. *Ukumetsha* was encouraged by Thembus and other Xhosa speakers to control young people's sexual indulgences. It was meant to prevent full sexual intercourse. It was not meant for sexual repression but for sexual restraint.<sup>118</sup>

An *ukumetse* affair had to be 'public' (among peers). Mager adds that the demand that the sexual relationship be conducted 'openly' and 'publicly' indicated recognition of both female and male sexual desire and the need to control women's childbearing capacity.<sup>119</sup> When two young people were in an *ukumetse* relationship, they were said to be *metshas*. Adults were not directly involved in the practice. *Ukumetse* rules were drawn up and enforced by older boys and young men associations. The duty of girls was to protect their bodies and ensure that they did not get pregnant. Older women were also indirectly involved through a constant check of girls' vaginas to ensure that there was no sexual penetration.<sup>120</sup>

With time, particularly from the 1940s, the practice of *ukumetsha* became less prevalent. More and more unmarried young men and women engaged in full sex. When looking at changes that the people of Ciskei had faced after the advent of Christianity, De Jager and Raum noted that older people claimed that *ukumetsha* was strictly followed in the old days. Young people no longer followed it. External sex was spoken of only in theory. Most young

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<sup>117</sup> Phoofolo, 'Female Extramarital Relationships', p. 3 & 27.

<sup>118</sup> Phoofolo, 'Female Extramarital Relationships', pp. 10-12.

<sup>119</sup> Mager, *Gender and the Making of South African Bantustan*, p. 136.

<sup>120</sup> For more information on *ukumetsha* see Mager, *Gender and the Making of South African Bantustan*, pp. 136-137. Phoofolo, 'Female Extramarital Relationships', pp. 8-11., Soga, *The Ama Xosa*, p. 131.

people considered it suitable only for children. In the 1950s, young people especially those whose marriage negotiations had been completed and part of the *lobola* paid, argued that it was unfair for older people to expect young people to abstain from full intercourse.<sup>121</sup>

School girls or educated youth were criticised by the 'traditional' conservative people for abandoning *ukumetse*. Their indulgence in full sex was regarded as immoral. They were seen as not being careful about avoiding pregnancy. Older traditional men and women felt that young girls who attended school appeared to make a show of their pregnancies as a sign of their fertility. In a recent practice, young men openly had sex with women who had had babies. According to Mayer's information having sexual intercourse with a girl who had a baby was considered to have a bad effect on an unmarried young man.<sup>122</sup>

Youths, both male and female, appear to have changed their sexual patterns in the first half of the twentieth century. Mager in a study carried out in Transkei and Ciskei on youth organisation and the construction of masculine identities, observed that youth organisation regulated sexual behaviour aggressively in the 1950s. The church did not approve the traditional way of expressing youth sexuality through *ukumetsha*. They preached abstinence through self control. Older African men were anxious about the number of unmarried pregnant girls, demanding that youths control their sexual behaviour to prevent unwanted pregnancies. These pressures appear to have led youths to regulating their sexuality in their own way.<sup>123</sup>

While Mayer argued that Christians or the educated among Xhosa speakers stopped practicing *ukumetsha*.<sup>124</sup> Soga, speaking from a Christian point of view argued that *ukumetsha* had never been Xhosa custom. Rather it was an *i-sono* (a sin) and not an *isi-quelo* (a customary habit) even though its practice was widespread. He asserted that if it was a custom, parents would not have been taking *ukumetsha* cases before the court and customary courts would have had to award damages if the practice was not legal.<sup>125</sup> Further, Soga argued that married women tended to become involved in *ukumetsha* for material gain, although cases of such women were rare. Some scholars argue that the practice was allowed by parents (both

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<sup>121</sup> E. J. De Jager and O.F. Raum, *Transition and Change in a Rural Community: a Survey of Acculturation in the Ciskei, South Africa* (Fort Hare University Press, 1972), p. 48.

<sup>122</sup> Mayer, *Townsmen and Tribesmen*, p.235.

<sup>123</sup> A. Mager, 'Youth Organisations and the Construction of Masculine Identities in the Ciskei and Transkei, 1945-1960,' *Journal of Southern African Studies*, 24, 4(1998), p.766.

<sup>124</sup> P. Mayer, *Townsmen and Tribesmen*, p.39.

<sup>125</sup> Soga, *The Ama-Xosa*, p.131.

male and female) provided that senior women inspected girl's virginity and so controlled adolescent sexuality. Soga argued that the tolerance was a convenience for women and not men. Some women encouraged their daughters to have 'immoral connection' with young unmarried men for material gain because they did not own property, nor did they inherit anything at their husband's homestead and they were not given part of the *lobola* paid for their daughters. Soga added that these women had low moral instincts and connived with young men who approached them for consent.<sup>126</sup>

Soga claims that men did not get involved in 'illicit intercourse' because they feared risking reduced *lobola* cattle in the case of pregnancy. Fathers regarded daughters as *inkomo zomzi* (the cattle of the homestead) because they were the channel through which wealth was acquired in the family. For Soga, *ukumetsha* did not mitigate against young women getting pregnant; instead it put them at a very high risk which fathers did not like. Pregnancy greatly reduced a young woman's chances of getting married. As a result most fathers were kept ignorant about these relationships. In the event that they got wind of the matter, they launched investigations. If they found out that a wife was involved, she was severely beaten. Despite their own immoral behaviour, Soga noted, some fathers did not take any risks when it came to their daughters' virginites.<sup>127</sup>

Additionally, Soga refutes the argument forwarded by other scholars that parents indirectly got involved in *ukumetsha* through the regular inspection of girls' vaginas to ensure that they were not pregnant. He postulated that such scholars confused *ukumetsha* with *intonjane*, an authorised institution meant to educate young women about womanhood. Part of the practice was to inspect girls' vaginas. Individual families conducted examinations if they felt that there was something amiss with their daughters. These examinations were not meant for *ukumetsha*.<sup>128</sup>

Furthermore, Soga asserts that not having a *metsha* relationship did not deter a young man's chances of marrying. The matter did not even come up when he was about to get married. He added that scholars with such information acquired it from young men and women engaged in 'this disgusting habit' and that information was given to justify the practice under the guise

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<sup>126</sup> Soga, *The Ama-Xosa*, p.132.

<sup>127</sup> Soga, *The Ama-Xosa*, p.132.

<sup>128</sup> Soga, *The Ama-Xosa*, p.133.

of 'tribal authority'.<sup>129</sup> Soga thus concluded that *ukumetsha* was 'not a custom but an immoral state, without legal recognition'.<sup>130</sup>

Phoofolo argues that *ukumetsha* was a means of controlling the sexuality of unmarried women and was not effective when applied to married women. Phoofolo observes that Thembu women were 'relatively autonomous' and 'ravidly mobile'. Even before the advent of capitalism which forced most men to migrate to towns on large numbers, Thembu women were free to move about both within Thembuland and outside. After marriage, Thembu married women still visited their maiden homes to participate in family ceremonies, during child birth, for an *intonjane* ceremony if they did not go through it earlier when they were sick or could not bear children, when *teleka'd* in attempts by their guardians to obtain more *lobola* from women's husband's and during political upheavals. This link to their maiden homes ensured women's social and economic security and gave them space for autonomous action. Also a woman who was mistreated by her husband, or whose husband was impoverished by local disaster could leave her marital home to seek refuge at her maiden home or with kinsmen who had benefited from her *lobola*.<sup>131</sup>

Phoofolo further argues that most extramarital relationships resulted from women's mobility. Women had sufficient opportunities to succumb to predatory males and indulge in extramarital relationships depending on the opportunities available to them. They were most susceptible during drinking gatherings. Towards the close of the nineteenth century, beer drinking had become a social problem. Beer was now produced in large quantities because of new agricultural implements such as ox-drawn ploughs which were used to produce millet from which beer was made. Drinking together by adult men and women was not common and acceptable among Thembus before the coming of Europeans. However during the nineteenth century, a good number of Thembus began to indulge themselves in European ways of entertainment such as mixed beer drinking sessions. It was on such occasion says Phoofolo that women gave way to preying men.<sup>132</sup>

In addition, Phoofolo observed that sexual indiscretion increased during village festivities such as *intonjane* at which sexual pleasure accompanied drinking and dancing. *Intonjane*

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<sup>129</sup> Soga, *The Ama-Xosa*, p.133. Cf. with De Jager and Raum, *Transition and Change in a Rural Community*, p.48., like other scholars used in this study, their sources show that they did not interview young people. They used older people views on what *ukumetsha* was and its intended purpose.

<sup>130</sup> Soga, *The Ama-Xosa*, p.135.

<sup>131</sup> Phoofolo, 'Female Extramarital Relationships', pp. 16-19.

<sup>132</sup> Phoofolo, 'Female Extramarital Relationships', p. 23.



hosts paired women and men as dance partners so that they could dance and have fun together. Wives unaccompanied by husbands were not usually paired although many attended unaccompanied. Some husbands left early while others did not reveal their marital status. Dance pairing created opportunities and temptations for sexual dalliance. In anticipation of the volatility of these events, Phoofolo notes that hosts of these festivities accepted 'loves fees' for arranging twosomes. Some of these events lasted for weeks, sometimes months, all accompanied with excessive beer drinking and dancing, which put a strain even on honest participants.<sup>133</sup>

Phoofolo adds that in the large number of cases he reviewed, most women (74%) who committed adultery did it during visits to their maiden homes. He gives several reasons which could account for this situation. Upon marriage, women left their old lovers –*Isidala*– back in the villages after they married. Phoofolo argues that some women maintained their former adolescent relationships in 'dynamic equilibrium' when they were at their husbands homestead, while some found it difficult to resist renewing them once they visited their maiden homes. While adolescent relationships may have stopped short of consummation, now that both parties were married, the temptation was high and responsibility for pregnancy was assumed to rest on husbands.<sup>134</sup>

With respect to Ciskei in the 1950s, Mager argues that in their quest to control women's sexuality, some men would leave their wives in the care of a good male friend or a male relative.<sup>135</sup> Men who worked in towns spent long periods away from their wives and did not wish to find that their wives were involved in an adulterous relationship. Hence they engaged in the practice of arranging for other men to look after their wives' sexual needs for the period they were away. Wives were not consulted in these arrangements and they were not part of the agreement. They were only told that someone will come to look after them once their husbands were gone. The man in question was free to have controlled sexual intercourse with the woman he was left to look after. This sexual intercourse was not viewed as adultery because the man had permission to do so by the woman's husband. Mager argues that it was rare to find children born out of such arrangements.<sup>136</sup>

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<sup>133</sup> Phoofolo, 'Female Extramarital Relationships', p. 23-24.

<sup>134</sup> Phoofolo, 'Female Extramarital Relationships', pp. 20-21.

<sup>135</sup> Cape Archives (CA) Rotya Ndwanya vs. Joyini Tsobo Case no.8/1955.

<sup>136</sup> Mager, *Gender and the Making of South African Bantustan*, p. 180.

### Seduction, Adultery and Pregnancy Cases in the Courts

In the court cases involving St. Marks women in customary law suits pertaining to seduction adultery and pregnancy, appeared as witnesses and not as litigants. This meant that women could not be charged by the court in any way and they did not receive any blame for their part in the case. It was left to husbands and guardians to ensure that women kept to the rules of custom and family.

These court cases also show how economic changes influenced the lives of the people of St. Marks. The customary fine for adultery was three heads of cattle (or five if pregnancy resulted) or their market value.<sup>137</sup> The market value of cattle was not significantly different from one village to another. In 1949 for instance, the market value of cattle was £8 per head, this remained constant until 1954 when price increased by £2 to make it £10 although some villages put it at £9. In 1962 the currency was replaced by rand, the price for one head was R20.

Older married women involved in adultery appear not to have had any kind of education. They could not read the months of the year. They used the season of the year to tell time such as during the ploughing, reaping or weeding season. Often, they would contradict themselves in their testimonies especially if the months of the year were insisted upon. Some could not even remember the year when their husbands left for work. This was contrary to men who had received a little education. The court relied on men's testimonies to know the year and the month the women could have become pregnant. While women were the first people to go to school when missionaries first came to Transkei, yet during the period under investigation, older women were uneducated. This suggests that only a small percentage of St. Marks residents were affected by the mission.

Unmarried younger women were generally better educated than older ones. Most of them used their education to their advantage in challenging male power. They used their education to support their evidence in court and to prevent men from escaping responsibility for pregnancy and children. Several cases that involved seduction and pregnancy show that young women brought letters from their lovers as evidence to support their testimonies in court. They were also able to count and name the months of the year which helped them know exactly when they commenced the relationship, when they became pregnant and when

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<sup>137</sup>Phoofolo, 'Female Extramarital Relationships', p.17, gives more details of what costs were involved in law suits both for defendant and plaintiff.

their lover left for the city and returned. In giving evidence to support her claim that Mbekisa was the father of her child, Kholiwe testified as follows:

Mkekisa (defendant) is my lover. We started with our love affair while I was a child. He seduced and rendered me pregnant in July 1952. On the third month, he advised me to go to my sister in Pretoria and deliver the baby there. He said he wanted to see the child first. He gave me a sum of £4 as rail fare. I duly left for Pretoria. In March 1953 I wrote to him in Cape Town and advised him that I had given birth to a baby girl. He replied and sent me money. I wrote to him to tell him I was required at home by my brother. He told me to wait. I have got all the correspondence between defendant and myself and also his sister. I hand in the letters.

Using the letters, Kholiwe presented strong evidence for her brother who was the plaintiff in the case because she had no witnesses present in court. Part of the judgement read as follows:

Defendant's denial of these letters even though they all had his names and stamped 'Cape Town' addressed to Pretoria made the court to disbelieve the whole evidence of denial given by the defendant. The court believed defendant's admission of love and sexual relation with Kholiwe and put the onus on him to prove that he could not be the father of the child conceived by Kholiwe.<sup>138</sup>

Women who knew how to read and write were able to recount their love stories in a logical and chronological manner. This strengthened their testimonies.

Violet took her ability to read and write to another level. She forged letters from her former lover Galela in her quest to prove that he was the father of her child. According to Galela he and Violet had broken up before she conceived. In forging the letters Violet tried to prove that she and Galela were still lovers at the time she claimed to have conceived. The court was able to prove by comparing handwritings in three different letters that Galela did not write the two letters that she claimed he did. This evidence was based on the date that she claimed Galela wrote the fake letters. The court ruled against her guardian Markin Ntsimbo and said the following about her evidence:

Remember that Violet by means of a faked letter endeavoured to establish that she and the first defendant resumed this intimate relationship after she rejected him in April, 1949. Violet handed into court Exhibit 'A', a letter which she and her witness Nomamfengu claimed was written by first defendant. Comparing Exhibit 'A' with Exhibit 'B' (first defendant's transcription dictated to him by the court interpreter). I without hesitation concluded that first defendant could not have written Exhibit 'A' as claimed by Violet. On the other hand comparing Exhibit 'A' with Exhibit 'C' and Exhibit 'D' (Violet's transcription in court of part of Exhibit 'C' dictated to her by court interpreter) one finds that there is a marked similarity between Exhibit 'C' and 'D' and at least the signature on Exhibit 'A'. I had

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<sup>138</sup> CA Tetayedwa Nzwana vs. Mbekisa Malimke Case no. 23/1955.

no hesitation in concluding that Violet, despite her denial when recalled, wrote Exhibit 'C' and changed the signature on Exhibit 'A'. Her emphatic denial of having written Exhibit 'C' and her claim that Exhibit 'A' was written by first defendant are without doubt false and are further points discrediting her in her story.<sup>139</sup>

Even if the court proved that Violet lied about the letters, it does not mean that Galela did not impregnate her. It is possible that she could have had sexual intercourse with him even after they broke up. Upon realising that she was pregnant and that she had sent a letter to him to stop the relationship, Violet became desperate to have substantive evidence to prove that Galela was the father to her child knowing that he would definitely use her letter against her.

Proving that a man was responsible for pregnancy or was the father of the child was a daunting task for women, both married and unmarried. For a married woman, it was easier if the man was caught committing adultery (*ukumukwatha*) because that was more than proof that he had sexual relations with a married woman therefore, the offspring was automatically his.<sup>140</sup> *Ukumukwatha* custom did not always work in favour of women because men were responsible for the process. If the husband did not manage to catch the adulterous man, the onus was still on the woman to prove that a certain man was responsible for her pregnancy. As such women insisted that their lovers offer their friends or relatives who knew about the relationship gifts in form of money, tobacco and clothing. These gifts and the people who received them became strong witnesses for adulterous women when she needed to prove that her lover was responsible for the pregnancy.<sup>141</sup>

From the perspective of the young women, the court was stacked in favour of the male lover. It was what the lover said in court and how the court interpreted it that implicated him. Without DNA to prove paternity, it was almost impossible for a young woman without sufficient evidence to convince the court that her lover was responsible for her pregnancy or was the father of her child.

Speaking on the challenge of proving the paternity of the child Chief Matanzima lamented:

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<sup>139</sup>CA Markin Ntsimbo vs. Siyabulele Booï & Galela Booï Case no. 52/1949. Also see appendix for copies of letters.

<sup>140</sup> Phoofole, 'Female Extramarital Relationships', p. 34., and Mager, *Gender and the Making of a South African Bantustan*, p.180., argue that proving that a certain man had committed adultery was complex. Thembu tradition demanded that the adulterous man should be caught in the 'act' (*ukumukwatha*) and part of his clothing such as shirt, shorts or shoes retained as part of evidence. Even in this tradition, women had hand in it, if the husband failed to prove that a certain had sexual intercourse with his wife, the women could not claim that the man was responsible for the child she had.

<sup>141</sup> All cases used in this study revealed this trend.

On a question of paternity, a man is bound by admission of intercourse before confinement even if such admission relates to a period other than that at which conception could have taken place, if he can not establish that it was physically impossible for him to be the father of the plaintiff's child.<sup>142</sup>

It also appears that long absences due to migrant labour made it difficult for fathers and guardians to obtain damages for their daughters. When guardians went to claim damages it was usually found that the young man had left for the city. Without his presence, the case could not be tabled because he was the only one who could either accept or deny responsibility for the pregnancy. Therefore, the case was put on hold until he returned, often after several months.

In seduction and adultery cases both unmarried and married women challenged ideas about their sexuality set by men and customary law. Raum and Jager gave a list of important wifely duties based on the answer people whom they interviewed gave. The first and most important duties had to do with sexuality. The wife was expected to fulfil her conjugal duties in the area of sex faithfully or the husband was justified to return her to her parents if she failed. She was also to bear him children, failure to do so rendered her to severe ridicule. Christians were however a little more tolerant of barren women.<sup>143</sup>

Young women defied custom in the practice of *ukumetsha* by keeping their relationships a secret. As already alluded to, *ukumetsha* was meant to be a 'public' affair among peers. However a good number of young women opted to keep the relationship a secret which often ended in pregnancy. In the court cases for St. Marks, the young women who kept their relationship a secret ended up pregnant. Young men seemed to take advantage of the secrecy to have sex with them.

Nomabaca testified as follows:

First defendant is my sweetheart. He seduced me and rendered me pregnant when he came to Magwala Location as an Agricultural Demonstrator in September, 1950. First defendant proposed love to me and I accepted his proposal. He proposed love to me in person. And I accepted his proposal. Cohabitation between us started during the same month of September, 1950. The first defendant came to my home in person. There was no go between.<sup>144</sup>

Assistant Native Commissioner commented on the problem of secret love affairs:

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<sup>142</sup> CA Tetayedwa Nzwana vs. Mbekisa Malimke Case no. 23/1955.

<sup>143</sup> De Jager and Raum, *Transition and Change in a Rural Community*, pp. 76-77.

<sup>144</sup> CA Zinyusile Mazula vs. Delibandla Mangcengeza and Archie Mangcengeza Case no. 4/1952.

After all we have two very young people embarking upon secret love affair, one where the first defendant found it necessary to depart from the recognised custom in these affairs and propose love on his behalf.<sup>145</sup>

Mager argues that secrecy in love affairs was a response to the changing context in which young people were mapping their identities as sexual beings. She argued that it was less suggestive of commitment to ideas of individual choice than of remaking gendered hierarchies in a changing society. She warns that secrecy occurred in a context of insecurity, uncertainty and contestation over regulation of young people's sexual activity. These changes meant that young women often had to cope with male sexual pressures in private.<sup>146</sup>

A number of social forces played a role in influencing young people to choose in secret sexual relationships. Young people imitated town practices and change in the sexual practices and modes of regulation. The tendency for young lovers to make secret arrangements was influenced by the refusal of the church to condone any form of premarital sex. The church actually forbade the practice of *metsha*. Despite the strong presence of missionaries in both the Transkei and Ciskei, the prohibition was at odds with the processes socializing adolescents. Men who required *lobola* for daughters supported public sex play because they saw it as an expression of sexual desire and a means of exercising self-control needed to prevent pregnancy. Christian ideas of moral restraint and total prohibition were considered inadequate means of understanding desire and restraint. Even when most Christian youths did not attend *imitshotsho* (young people's dances) they employed other ways of avoiding church's sexual taboos.<sup>147</sup>

Adult women were less secretive and not always discreet. Several married women from St. Marks involved in seduction and adultery cases seem to subvert customary norms by testifying in the magistrate court that the defendant was their *metsha*. Women returned to their *metsha* partners for a number of reasons as Phoofolo observed. Several women appear not to have remorse or shame in their testimonies of having a *metsha*. Nopasile testified: 'I am the wife of the plaintiff. We are married by native custom. I know defendant who is my *metsha*'.<sup>148</sup> When giving testimony as the plaintiff's witness, Nobengezana said: 'Nozolile told me he (defendant) was her *metsha*'. While Nozolile in her own testimony referred to

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<sup>145</sup> CA Markin Ntsimbo vs. Siyabulele Booie & Galela Booie Case no. 52/1949.

<sup>146</sup> Mager, *Gender and the Making of South African Bantustan*, p. 141.

<sup>147</sup> Mager, 'Youth Organisation and the Construction of Masculine Identities in the Ciskei and Transkei', p.761, Mager, *Gender and the Making of South African Bantustan*, p.140.

<sup>148</sup> CA Mandyula Memani vs. Albert Maseti Case no. 65/1954 .

defendant as 'my sweetheart'.<sup>149</sup> 'My sweetheart' was a common phrase used mostly by women, their lovers and witnesses in court, which can also be interpreted as my *metsha*.<sup>150</sup> If having an extra marital lover was a shameful act, some women may not have out rightly testified the way they did. Some women returned to their *metshas* because they were lonely as their husbands were absent for a long time. It was not easy for some married women who were used to having sex to stay for a very long time without it. Some women returned to their *metshas* because they were their childhood lovers hence it was easy to rekindle childhood love which could now be consummated, especially when their husbands were away. Others could not simply stop their *metsha* relationships.

Nopasile testified:

I know defendant who is my *metsha*. I started *metshaing* with him when I was at home before I got married. I married plaintiff about five years ago but carried on with the affair with defendant. I had another child with him.<sup>151</sup>

Furthermore, women showed defiance of societal norms by committing adultery within their husband's homestead, sometimes even in their marital beds. This can also be viewed as challenging male power over them or a testament of their husbands' absences from home. If the women's argument for having a *metsha* is to be considered, it was not the practice that they should take their *metsha* to their homestead. For young people, a special hut (*imitoshotsho hut*) was designated for such functions. Nonetheless, since they did not fall within the category of *ukumetsha*, the practice did not apply to them, they opted to use their husband's homestead and taking advantage of the absence of their spouses. Nozolile, asserted as follows: 'On this day, defendant had intercourse with me amongst the mimosa trees. He then decided to visit me at night. He came to me and had intercourse with me in the kitchen'.<sup>152</sup> In a similar manner, Nohombile committed adultery at her husband's home and gave the following testimony:

<sup>149</sup> CA Douglas Hobna vs. Fudumele Mangali Case no. 85 /1960.

<sup>150</sup> See the testimonies of women and their witnesses CA Poto Matanzima vs. Mbabi Mkanduvana Case no. 2/1954., CA Qondiso Petele vs. Mfo Magoqwana Case no.N.A.C 62/1954., CA Nathaniel Mwanda vs. Edwin Kuse Case no. 3/1962 and CA Rotya Ndwanja vs. Joyini Tsobo Case no. 8/1955.

<sup>151</sup> CA Mandyula Memani vs. Albert Maseti Case no.N.A.C 65/1954.

<sup>152</sup> CA Douglas Hobna vs. Fudumele Mangali Case no. 85 /1960.

I was caught in adultery with defendant by my brother in - law Paul while sleeping with the defendant in my kitchen hut. Paul found defendant under the same blanket with me. At the time, intercourse had not resumed. Defendant had just started kissing me.<sup>153</sup>

While Gladys testified as follows:

Whilst my husband was away he (defendant) made love proposals to me during May 1961. In due course, I accepted his proposal and committed adultery. These acts took place in a hut at my husband's kraal. The defendant would come in the evening and if the children were awake we went outside and defendant would tell me that he will come back later.<sup>154</sup>

These cases illustrate how women, individually and collectively, pushed the boundaries of acceptable behaviour. In each of the cases involving adultery or seduction women collaborated in organising lovers and keeping lovers a secret.

Sometimes unwanted pregnancy occurred but abortion was also a carefully guarded secret. It is not clear why some women opted to abort because children born out of wedlock were not an issue in this society as long as damages were paid for them. Phoofolo observes that 'illegitimacy did not stigmatize the offspring. Neither did it disinherit, nor place its paternity in question'.<sup>155</sup> Further, Africans had strong prejudice against abortion and contraceptives. Simons notes that, partly because of this prejudice, Africans by far had the most number of illegitimate children.<sup>156</sup>

In No-Orange's case she aborted because her lover Mbabi asked her to do so.

When I discovered that I missed my periods, I told Mololile and defendant. Defendant said I was putting him in trouble. On the second occasion Nofanelo called me. I found her and Mongangile. Mongangile said she wanted to give me medicine. Defendant told me to drink the medicine to get rid of the child as he was afraid of my husband. I drank the medicine in the presence of the defendant and Nofanelo. It was a yellow powder. It was in bottle. Defendant told me to go to my people's home because people at my kraal would see my condition.<sup>157</sup>

In the case of Nathaniel Mwanda vs. Edwin Kuse, Gladys also attempted to abort her pregnancy because her lover Edwin asked her to do so.

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<sup>153</sup> CA Rotya Ndwanya vs. Joyini Tsobo Case no 8/1955.

<sup>154</sup> CA Nathaniel Mwanda vs. Edwin Kuse Case no.3/1962.

<sup>155</sup> Phoofolo, 'Female Extramarital Relationships', p. 29.

<sup>156</sup> Simons, *African Women*, p. 221. Added that most unmarried Africans, both male and female indulged in sex before marriage because of late marrying age, uneven sex ratios both in towns and the rural areas, unsettling effects of migrant labour, instability of family life, influence of European sex habits and excessive prominence given to sex in modern European culture.

<sup>157</sup> CA Poto Matanzima vs. Mbabi Mkanduvana Case no. 2/1954.



The defendant visited me regularly and adultery took place. I missed my period during June 1961. My periods were due on the 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, of June and I did not see them. I informed the defendant and he gave me money to go to Dr Murro. Dr Murro told me that I was pregnant. I told the defendant. He suggested that I should commit abortion and he brought me tablets that I took and which had no effect. I reported to the defendant and he gave me money to see Dr Kuietgh at the Cala. This was at the end of August 1961. I returned from Cala to Cofimvaba. I informed the def about the report of the Doctor at Cala. Defendant was satisfied and suggested that we should return to the Doctor at Cala. Defendant took me by taxi that of Mr. Qaugo. Defendant and I entered consulting room. Defendant asked the Doctor to remove what was in his wife's stomach as she experiences pains when in this condition. The Doctor recognised me as the one being there previously. The Doctor refused defendant's request. We then returned by taxi and at mhlahlawi defendant told me to get off. He was afraid to come to the village with me.

Mbabi and Edwin were anxious about their lovers' pregnancies because of the fine they would have to pay. In 1954 the value of cattle per head was £10 which meant that Mbabi would pay £50. Edwin was liable to pay R100 in 1962. These fines were steep because of the impoverishment of the Transkei and mining wages had not increased.<sup>158</sup>

Nonetheless disputes over children born out of wedlock usually arose out of competing claims for damages or *lobolo* received or expected for girls. The husband or the guardian had the right to claim damages amounting to five head of cattle. Guardians sued payment on the part of the seducer but had no regard for the child. Even in court, it was customary that only damages for seduction (and pregnancy in case of unmarried women) and adultery (and pregnancy for married women) were awarded rather than payment for the maintenance of the child. While the child became the responsibility of the guardian, it is not clear that the compensation he acquired was used for the child's maintenance.<sup>159</sup>

#### Ability of Customary Law to Provide Remedies

While customary law did not require that men remain faithful to their wives, women were expected to remain true to their husbands.

It is fair to argue that prolonged absence from their husbands caused women to rekindle their childhood love especially when they went back to visit their maiden homes. This was so in

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<sup>158</sup> J. Seekings and N. Nattrass, *Class, Race, and Inequality in South Africa* (Scottsville: University of KwaZulu-Natal Press, 2006), pp, 79-82. Seekings and Nattrass add that the Wage Board established in accordance with the 1925 Wage Act set wages for all workers African or European who were not covered by industrial councils. The board pursued interests of workers differently. African workers' wages were set at a minimum to prevent the unskilled European workers from competing for the same jobs as Africans. This also helped the state to prevent highly skilled African workers from getting jobs meant for Europeans.

<sup>159</sup> Koyana, *Customary Law*, p. 20 and Simons, *African women*, p. 188.

the case of Nopasile who had an on and off affair for five years with her lover. Nopasile testified that she carried on her relationship with her lover because she frequently visited her maiden home owing to her husband's absence. Albert was her lover before she got married and she had one child with him. Each time her husband went away to work, she went back to her father's home where she met with him and they committed adultery until she fell pregnant for the second time, five years after her marriage.<sup>160</sup> Nozamile too fell pregnant while at her maiden home, when she resumed her affair with Qondiso. Her husband was at work for a year and had not visited or written to her during this time. These cases support Phoofolo's argument that women's mobility encouraged adultery.<sup>161</sup>

Other women acquired lovers at their husband's home. In such instances, Phoofolo's argument that Thembu women were in a position to have lovers because they were 'rabidly mobile' and 'too free',<sup>162</sup> may not hold any ground because these women were at their husband's or guardian's homestead. Most married women were proposed to while at their husband's or at the guardian's home using a messenger. It was not at drinking party, dance or market place, which makes Phoofolo's argument weak in this situation.

No-Orange testified that she became Mbabi's lover when her husband was away at work in Cape Town. Mbabi proposed love to her at her marital home, even though they did not commit adultery there. Qondiso was well aware that Poto Matanzima (No-orange's husband) was away at work when he took the opportunity to propose to her.<sup>163</sup>

Nohombile was found committing adultery by her brother-in-law at her marital home in the kitchen while her husband was away for work in Cape Town. She and Joyini usually met at her home in the night when her husband was away. The relationship had been going on for four years before she was caught in the act. Joyini was careful not to meet Nohombile when her husband was around. He sent a message to her through Nohombile's friend Nojisoni. Nojisoni testified that on one occasion he

At one time defendant sent me to convey a message to Nohombile that he was greeting her and that she should not be surprised why he did not visit her. It was because Nohombile's husband was at his kraal.<sup>164</sup>

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<sup>160</sup> CA Mandyula Memani vs. Albert Maseti Case no.65/1954.

<sup>161</sup> CA Qondiso Petele vs. Mfo Magoqwana Case no. 62 /1954.

<sup>162</sup> Phoofolo, 'Female Extramarital Relationships', pp. 16-20.

<sup>163</sup> CA Poto Matanzima vs. Mbabi Mkanduvana Case no. 2/1954.

<sup>164</sup> CA Rotya Ndwanya vs. Joyini Tsobo Case no. 8/1955.

Some of the women who remained at their husband's homesteads appear to have indulged in marital affairs for economic reasons. Nozolie had this to say:

He (defendant) found me collecting wood amongst the bushes-mimosa trees. He said he had caught me but if I accepted his love proposal, he would not arrest me. I accepted him. I did not have intercourse with him that day. He said we should meet the following day, and he promised to give me wood.<sup>165</sup>

Nozolie could have accepted Mbabi's proposal because she did not have the money to pay the fine. Firewood was used as fuel for cooking, without which she could not prepare meals for her children. It is not clear why she was fined for collecting firewood in this particular area. It could have been a restricted area. Whatever her reasons were for collecting firewood from this area, Mbabi, took advantage of the situation to propose love to her. As a forester he had the power to fine and see to her subsequent imprisonment if she did not pay the fine. Strictly speaking the relationship may not be viewed as a love relationship, rather an economic arrangement or a payment in kind because there would not have been a relationship if she had not been caught in the forest. Mbabi capitalised on his position and authority as a forester with power to take advantage of women by paying Nozolie's friend Nontsalu with firewood so that she did not tell people of their adulterous relationship. This trick did not work on a male counterpart, Nobengezana who later testified against him in court.

Non Christians and Christians had different views about immorality and sexuality. Phoofolo argues that the man's honour was not linked to his ability to control his wife's sexuality but to his political and economic status. Husbands did not press charges against their wives' lovers in order to defend his personal integrity but rather to acquire damages for seduction and pregnancy because it was their customary entitlement, their 'property rights' having been violated.<sup>166</sup> This view was contrary to the western and Christian view of morality. Adultery and fornication was unacceptable and shameful among Christians. Erlank observes that in African custom, sexual wrongdoing applied when sexual relations occurred between wrong people or under 'wrong' circumstances. This view was linked to the view that sexual unions were vital for procreation hence conception needed to occur in conditions approved by the ancestors or the clan. Therefore, sexual transgression was a matter for the community rather

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<sup>165</sup> CA Douglas Hobna vs. Fudumele Mangali Case no. 85 /1960.

<sup>166</sup> Phoofolo, 'Female Extramarital Relationships', p. 30.

than individuals. All sexual sins could be atoned for, which made sexual guilt hardly ever an issue.<sup>167</sup>

Customary law condoned adultery. Koyana argued that whether committed by a man or woman, adultery could not be a basis for divorce. This was unlike the colonial view in common law which viewed adultery as a sin and a shame and divorce could be granted if one spouse indulged in adultery.<sup>168</sup>

Therefore, it can be deduced that African conceptions of sexual transgression were different from those of missionaries (Christians). Gladys, unlike most women in the cases under review, was married by Christian rites and appeared to have a different view of adultery. She viewed it as a shame to the extent that she tried to hide her extra marital affair with Edwin. She did not tell anyone about it until her sister in law Nokaulisile accidentally found Edwin in her hut. Gladys did not have any 'go betweens' or a string of women whom she told about the relationship. This was unlike women who were married under customary rites. They had numerous 'go betweens' and others who were told about the relationship to bear witness in case they were caught by their husband. Witnesses were needed to make the case for the husband strong so that he could get his 'damages'.<sup>169</sup>

Erlank argues that towards the end of the nineteenth century, Christian views of morality affected women's sexuality more than those of men. Women became more vulnerable to sexual exploitation and they carried the guilt of sexual sin. This also contributed to the new way in which African men viewed sexuality. African men frequently associated immorality with women. They too shifted the entire sexual guilt on women alone. This was facilitated by the fact that no damages were paid by men under Christian rites.<sup>170</sup>

As McClendon and Chanock argue, women's agency was targeted as the problem in society and the collaboration between African men and colonial administrators through customary law was intended to control their agency.<sup>171</sup>

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<sup>167</sup> Erlank, 'Gendering Commonality', p. 947.

<sup>168</sup> Koyana, *Customary Law*, p. 10.

<sup>169</sup> See Gladys' testimony in CA Nathaniel Mwanda vs. Edwin Kuse Case no. 3/1962.

<sup>170</sup> Erlank, 'Gendering Commonality', p. 947.

<sup>171</sup> McClendon, *Genders and Generations Apart*, p. 169. , McClendon, 'Tradition and Domestic Struggle in the Courtroom', pp.538-540 and Chanock, *Law, Custom and Social Order*, pp.149-150.

## Conclusion

This chapter has argued that married women subverted male expectation because they considered it acceptable under the circumstances. Firstly, women regarded sexual enjoyment among adults as a given. Therefore, the demand of men that their wives remain faithful and without sexual intercourse while they were away for long periods of time were not realistic or reasonable.

Men who remained in rural Transkei took advantage of the absence of their fellows. In a number of cases, men proposed to women as soon as they noticed the woman's lover or husband had left for work. Most women appeared to try to resist the temptation of having more than one lover or extra marital affair, however the long periods of time imposed on them by their partners did not render this feasible in cases where women needed the material support of a man.

Some women testified that they committed adultery while at their father's or guardian's home. From their accounts they were propelled to go to their maiden homes primarily because their husbands were away for long periods of time. There is little evidence to show that these women went back home under any of the circumstances that Phoofolo gives, that is, to find a lover.<sup>172</sup> Moreover, this chapter has argued that migrant labour, Christianity and colonial rule influenced attitudes to adultery. These forces cannot be ignored when looking at women and social history. Each one of them impacted Thembu society differently but had particularly adverse effects on women. To ignore changes brought about by these forces as Phoofolo does is to deny that the lives of the people of St. Marks especially women's vulnerability did not change in relation to them over time. Scholars such as Phoofolo regard women's character and behaviour as fixed and unchanging with a tendency towards 'waywardness' and 'wickedness'.<sup>173</sup>

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<sup>172</sup> Phoofolo, 'Female Extramarital Relationships', p.17-18., gives a number of reasons why women went back to their maiden homes where they eventually acquired lovers.

<sup>173</sup> D. Hodgson, and S. McCurdy, 'Wayward Wives, Misfits Mothers, and Disobedient Daughters: "Wicked" Women and the Reconfiguration of Gender in Africa,' *Canadian Journal of African Studies* 30, 1 (1996), pp.1-9, gives detailed insights about African women who stood up for themselves.

## Chapter 6

### NEGOTIATING PATRIARCHY IN LEGAL DISPUTES OVER PROPERTY

This chapter endeavours to show how women used customary law, access to African men and the Native Commissioner's Office to defend their status and rights to property ownership. It also shows how some women challenged African men who intimidated them. The chapter also shows how, in the face of social and economic problems, men opted to bend some African customs to suit their interests particularly in cattle and inheritance matters. In the 1940s, failure to resolve conflicts amicably and quickly especially among brothers created tensions within families and the community as a whole. Following Richard Roberts, this chapter shows how what is going on outside the courtroom shapes what happens inside the court.<sup>174</sup> For example migrant labour and absence of men often led to failure to resolve conflicts quickly. Men found themselves away from their homesteads at times of important family or clan meetings. The scarcity of cattle and general impoverishment of Transkei also contributed negatively to the many family feuds especially concerning wealth accumulation in form of cattle and inheritance. Even though most family members fought over cattle, some fought over less significant things such as clothing which were mainly a result of tensions built up between family members. Most brothers or clansmen failed to settle their disputes over inheritance cattle and found their way through a string of legal battles that went on for long periods of time. Attempts to resolve these conflicts started with family meetings and went through to sub headman, headman, chief and NC, and some reached the NAC.<sup>175</sup>

Under customary law, the place for women in court was as witnesses and not litigants. However, as chapter three has shown, women found ways to subvert patriarchal norms and expectations. As McClendon observed, NC courts ironically provided opportunities for women and youths to challenge patriarchal authority and unchanging notions of tradition expressed in customary law regime. He also noted that African men complained that western courts (NC and NAC) and urban life made women acquire 'independent powers' and 'action' which made men anxious about losing their control over women. African men complained that wives and daughters no longer took their concerns to the head of the family but rather complained to western courts. This anxiety, says McClendon, prompted the NC to be more

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<sup>174</sup> R. Roberts, *Litigants and Households: African Disputes in the French Soudan 1895-1912* (Portsmouth, 2005), p. 7-15.

<sup>175</sup> See CA Macebo Bokolo vs. Jikeleza Bokolo Case no. 89/1952., CA Sincamatela Qhotswayo vs. Vice Tafeni Case no. N.A.C 14/1952., CA No-Maitland Kambi vs. Maqendwana Kambi Case, no.62/1952 and CA Silulami Nkatazo vs. Ntombentsha Mpakwana Case no. 49/ 1949.

sympathetic to African men by trying to enforce a uniform view of tradition and reasserting the control of elder male Africans.<sup>176</sup> In his view customary law in the 1930s reinforced hierarchies of gender and harnessed those hierarchies to reproduce social order amidst social tensions caused by industrialisation (labour migrancy).<sup>177</sup>

In this chapter we see how St. Marks women used the courts to weaken patriarchal control. Some women discovered that they had more rights under common law than under customary law. They took advantage of this situation and took male counterparts to court. This was one way that women subverted their subjugation under customary patriarchal controls.

In *William Nopanajwa vs. Elias Mhlambiso*, Jessie, wife of William, complained to Elias headman of the location she lived in that her husband was not supporting her. It is not stated exactly what she meant, but it seems that the court understood this as financial and material support. The headman, Elias assisted her by taking her to the Native Commissioner's office at Cofimvaba so that she could launch her complaint. Unfortunately her husband did not take her actions kindly. He directed his anger at Elias by accusing him of committing adultery with her under the pretence of assisting her as headman. Elias reacted by suing for defamation of character in the NC's court. The court found William guilty of defamation and ordered him to pay £35. Displeased with the amount he had to pay, William appealed to the NAC which still found him guilty. The NAC upheld the NC's judgement and dismissed the appeal.<sup>178</sup>

One way of reading this case is to argue that Jessie managed to use customary law and an influential African man (the headman) to get her husband's attention and financial support. She managed to use patriarchal values which subjugated women to get what she wanted from her husband.

Even educated, professional women used customary law courts. Gertrude, Sister-in-Charge of the only clinic in St. Mark's sued Arthur Mfebe, headman of the same location for defamation of character for damages that amounted to £200. According to Gertrude, Mfebe uttered false and defamatory words against her and the clinic she was heading at a church service and in front of many people when he called a meeting by announcing:

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<sup>176</sup> Nyongwana, a court messenger's quoted by McClendon, *Genders and Generations Apart*, p.171., lamented that: 'In the olden days, the ideal of law or custom amongst the natives (was that)if a man marries a women he marries the women to feed him...what do you find now? The court is the husband of the wife; the court is the father of the daughter. They run there for their clothing and food'.

<sup>177</sup> McClendon, *Genders and Generations Apart*, p. 3.

<sup>178</sup>CA William Nopanajwa vs. Elias Mhlambiso Case no. N.A.C 3/1964.

‘Laa mzi awyseyiyo iclinic,yobrori ngangobunzila obuphaya’ when translated into English the statement reads as follows; ‘That establishment is no longer a clinic, it is a brewery, considering the amount of drunkenness that is there’.<sup>179</sup>

Gertrude was convinced that these words were targeted at her because the clinic in question was the only clinic in St. Marks location. She also believed that the words were meant to destroy her good name, character and reputation. Gertrude was one of the women who considered herself modern by virtue of having an education and behaving like a western educated person. She took male intimidation seriously and sought to challenge it.

With the help of an attorney, Gertrude first sued in the Native Commissioner’s court where she lost the case because her witnesses, who were all males, did not give identical evidence to support her case. Unsatisfied with the Native Commissioner’s Judgment, she appealed to the Southern Native Appeals Court where Arthur was found guilty. The NAC ruled that witnesses gave different statements because they were giving testimony after a couple of months had passed since the incident took place. Despite the difference in what the witnesses could have said in regard to what Mfebe uttered, they all had the same substance to convey.

This case shows how one educated women took a case all the way to the NAC to clear her name rather than being intimidated by powerful men.

Young unmarried women sued men with the assistance of other older women when challenging men’s attempts to take their inheritance. Ellen sued her uncle and heir to her father’s estate Gideon for removing and transferring nine head of cattle registered in her name to his name after her father died. Gideon removed and transferred the cattle according to what he knew and believed to be his rights under customary and common law. In giving reasons for the transfer of the cattle, Gideon wrote to the Dipping Foreman saying:

It will be noted that there are nine (9) heads of cattle presently registered in the name of Ellen Mwanda. These cattle therefore are part of the estate of the late Gideon Mwanda but they fall outside the will as the late Gideon Mwanda died intestate and they therefore fall to be devised according to intestate succession. As heir to native custom I am the person entitled to exercise ownership and control over these cattle. Kindly therefore cause the transfer in the dipping registers of these cattle from the name of Ellen Mwanda to my name.<sup>180</sup>

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<sup>179</sup> CA Gertrude Somtunzi vs. Arthur Mfebe Case no.N.A.C 47 / 1957.

<sup>180</sup>CA Ellen Nandipa Mwanda vs. Gideon Mwanda Case no.19/1960.



Gideon was well aware of the implication of customary law when he claimed the cattle. After his brother's death he quickly requested that the cattle be transferred to his name even when he knew that they were registered under Ellen's name because under customary law, he had the right to inherit. It appears his brother had no male children that the cattle should devolve to him as was customary. Thus he knew that even if the cattle were registered in Ellen's name she did not stand a chance of inheriting (under customary law) or possessing the cattle (under common law) because her husband did not leave a will for such a purpose. In defence of his actions, he stated that 'it is foreign to native custom for the late Gideon Mwanda to have an allotment of the said 9 head of cattle to the plaintiff'.<sup>181</sup>

However, Ellen and her mother recognised their rights to inherit the cattle in Common Law because her father married her mother under Christian rites and because her father had given her the cattle before he died. Therefore, Ellen requested that the case be brought to trial under common law. The court records also show that from the 1940s, it became common practice for litigants to request the court to apply common law to their cases. By choosing which court and law to contest their claims, Ellen and her mother successfully achieved what Roberts calls 'crossing court boundaries' in a 'landscape of power'.<sup>182</sup> Although a record of the full judgement was not found in the court records, the warrant of execution shows that the cattle in question were returned to Ellen and her mother. In spite of their status as legal minors, Ellen and her mother found a way to repossess their cattle and obtain their inheritance despite the weight of customs. Even though property and inheritance was the domain of men, these women found ways to obtain legal remedy. It was evident that these women went to the magistrate court when they felt customary law failed to work for them and when they could not accept the unfairness and suffering that customary law inflicted upon them.

In *Silulami Nkatazo* (duly assisted by his cousin Mbalekwa Maqana) vs. *Ntombentsha Mpakwana* Nkatazo (a very young boy), Mosmane mother of the young boy sued her step daughter Ntombentsha. It's only after reading through the case carefully one realises that the little boy and his cousin Mbalekwa were used by their mother to sue their sister Ntombentsha who had removed from her marital home after her husband died. Mosmane explained:

I am a widow of Mapeta's and mother of guardian Mbalekwa. Defendant is the daughter of the late Nkatazo. At the time of his death, defendant returned to assist in the nursing of him. I know what was at Nkatazo's kraal the time of his death. 3 boxes, 4 pots. I allege certain articles were removed from

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<sup>181</sup> CA Ellen Nandipa Mwanda vs. Gideon Mwanda Case no.19/1960.

<sup>182</sup> Roberts, *Litigants and Households*, p. 19.

the kraal. These articles were: 2 pairs of trousers, 2 shirts, 3 dresses, 2 aprons, 1 Doek, 2 Washing basins, 2 Native pots, 1 primus stove, 8 plates these were the articles removed from the kraal. There was only: 1 overcoat, 1 trek chain, 1 shawl. At the time of his death these things were at Nkatazo's kraal. On his death, I, the defendant & Mengamili remained at his kraal. I was actually living at the kraal at the time. I then went home, there was no-one at my kraal. The other two then remained at the kraal and eventually left. They brought children to me and notified me that they were leaving. After their departure, I went to Nkatazo's kraal with men to check the articles because they left the huts unlocked. I then found the articles detailed missing. I reported the matter. I also notified my son, Mbalekwa. Defendant replied that she had taken the articles as she claimed them as her property. Defendant also said that she wanted the cattle. She was claiming all these things as her own personal property. She did claim that certain of the articles were given to her by Nkatazo as wedding present. I myself know of no such gift.<sup>183</sup>

The elder brother relied on the information given to him by his mother. He said:

I am the guardian of the defendant in this matter. I arrived back from work in August of this year. I was sent for by my mother. I have heard what articles my mother alleges as missing. I have never seen the articles. My mother in my presence detailed what articles were missing. I have placed a value on these articles of £16.60.<sup>184</sup>

He clearly stated that it was his mother who told him what Ntombentsha had got from the house. His testimony was seemingly not against his sister, he gave the impression of simply reporting what had been taking place in the family as guardian, while he was away and when he came back.

Mosmane used customary law to get what she wanted from her husband's estate after her husband died. It could be true that late Nkatazo had left some of his possessions for his daughter. But without evidence and in the face of customary law which promoted male primogeniture, Ntombentsha did not stand a chance in getting anything that her father left. On the other hand, his widow Mosmane managed to find a way to use customary law to her own ends.

No-Maitland, a widow of Qaqauli location in St. Marks also sought to claim her inheritance. No-Maitland endured a year of not receiving support from her guardian Maqendwana, brother of her late husband Jokani to support her son Xolile as was customary for a widow. She took her guardian Maqendwana to court. She sued unassisted since Maqendwana was her guardian and defendant in the case. Surprisingly, the court allowed the case to go on despite

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<sup>183</sup> CA Silulami Nkatazo vs. Mbalekwa Maqana Case no. 49/ 1949.

<sup>184</sup> CA Silulami Nkatazo vs. Mbalekwa Maqana Case no. 49/ 1949.

her suing unassisted under customary law. There was no record to suggest that No-Maitland requested the court to use common law in the case nor was there any record to show that the case was tried under common law.<sup>185</sup>

An investigation into the matter was launched. Family members were called and questioned. In defence, Maqendwana said that he had not stopped supporting No-Maitland and claimed that he was ready to continue doing so even out of his own property because his brother did not leave any livestock as No-Maitland claimed. She claimed that her husband had left 5 head of cattle and 15 sheep which Maqendwana was using to enrich himself. Later Maqendwana changed his statement and said that he had reported to No-Maitland that 5 sheep had died, but she answered him with an insult saying '*voestsak*' (a vernacular vulgar term) meaning 'go away'. Maqendwana repeatedly absconded from family meetings ordered by the court. He was found guilty and ordered to pay £13.53d with costs. With the help of other family members, a new guardian was appointed for No-Maitland. The court here clearly protected the young widow.

Women also featured prominently in other cattle and inheritance cases that were between men. At the surface, most inheritance and property cases were between men. Reading through the cases, one discovers that the under lying basis of conflict was usually cattle paid for sister's *lobola* or a brother's wife.

Court records also demonstrate that migrant labour was one of the problems that families and households involving men and women of St. Marks Thembuland grappled with. It appears from the court cases that most families failed to resolve their disputes promptly because most male family members were often away for work at the mines. As a result some older men resorted to bending some customs to suit them.

As a result of many men's prolonged absences from their homesteads, dispute resolution in families and among members of a community took a long time, which often led to animosity and tension. In *Sindapi Ranisi vs. Ncitakalo Ranisi*, the two brothers appear to have misunderstood each other over their sister's wedding arrangements and other customary obligations because they were far away from each other. At the time of the first wedding talks, Ncitakalo the oldest was away at work in Cape Town. He was informed about the arrangements through a letter which the younger brother Sindapi wrote to him. He testified in

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<sup>185</sup>CA No-Maitland Kambi vs. Maqendwana Kambi Case no.62/1952.

court that he was in agreement with the arrangement though he asked his young brother to contribute £6 towards the wedding. He sent £15 as his contribution. Sindapi claimed that he conducted the wedding as he was instructed by his brother. When the *lobola* cattle were finally brought to the Ranisi family, Sindapi was not present; he had been ill and sent away to traditional healers. When he returned he was told of the cattle given to him as his share from the *lobola* cattle by his brother. He then proceeded to Cape Town to work. Years later, one cow reproduced two calves. When Sindapi returned, he found that these cattle had been claimed by his brother on the basis that he had not paid £6 which he owed him. The complication of settling the misunderstanding over the £6 was caused mainly by failure of the brothers to sit together during family meetings and talk it through. Sindapi claimed that his brother never mentioned £6 to him. The other members of the family giving evidence on behalf of Sindapi also said that Ncitakalo did not mention the £6 that his brother was due to pay during the family meeting. None of the other family members had to pay any money. On the other hand, Ncitakalo and his witness (not part of the family council) insisted that he had told his brother about the £6 and his brother promised to pay him back. The court found Sindapi's story more credible and ordered his brother to give him back the remaining two head of cattle since the mother cow had died.<sup>186</sup>

Whichever story was true, the conflict between the two brothers could have been avoided if they did not have to leave home to work so far away. It is possible their mode of communication was not effective. They had only primary education which may have made communication by letter difficult.

It appears from court records that the custom of paying *lobola* or 'damages' by parents or guardians for male children when they married their first wives or when they impregnated girls was slowly declining. It was customary among the Thembu and other Xhosa speakers in the Transkei for guardians or fathers to provide *lobola* cattle for male children when they desired to marry their first wives or pay 'damages' if a son impregnated a girl. If at all a son sought for a second wife, it was no longer the responsibility of the parents to pay his cattle. However, the court records show that some guardians did not pay *lobola* or 'damages' for their children for free as custom demanded. They lent them cattle, horses or the money

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CA Sindapi Ranisi vs. Ncitakalo Ranisi Case no.41/1949. A similar situation occurred in CA Macebo Bokolo vs. Jikeleza Bokolo Case no. 89/1952.

needed for such purposes. Young men were required to pay back after working as migrant labourers. Additionally, guardians demanded more money than was needed to pay for either *lobola* or ‘damages’. Most young men found it hard to pay back their debts and support their wives from their meagre salaries in the mines. This caused tensions, conflicts and legal prosecution of the youths by their guardians.

In *Macebo Bokolo vs. Jikeleza Bokolo*, Jikeleza rendered a girl pregnant, Macebo used Jikeleza’s cattle to pay the damages by placing them as security when he borrowed money to pay the ‘damages’. When giving reason for his actions, Macebo said that he had to pay the ‘damages’ because Jikeleza had admitted seducing and rendering the girl pregnant, but refused to pay. This meant that Macebo knew that he was liable to pay the ‘damages’ and if he did not, he was likely to face legal charges and not his brother. Jikeleza was left without choice but to pay the money pay for damages on his behalf to the money lender otherwise, he risked losing his cattle.

Court records also show that Macebo demanded more money from his young brother than was needed to settle his brother’s debts. There was a discrepancy between how much Jikeleza sent and what Macebo claimed was needed to pay for damages. Consider Jikeleza’s testimony:

When I went to work in Cape Town I sent £30 to plaintiff for the purpose of paying damages for Nqgele’s girl whom I had seduced and rendered pregnant. After sending that money plaintiff said he had taken money from the shop. I told him that I would not pay that money as I had sent E30. When plaintiff came to Cape Town he told me that he had placed my cattle as security. I gave plaintiff sum of £14 for the purpose of paying my debt. When I came home I paid to the trader who gave plaintiff money a sum of £28:10- in full settlement of the debt.<sup>187</sup>

When it was time for Jikeleza to marry, Macebo did not pay for his *lobola*, instead he used Jikeleza’s cattle to pay and lent him a horse because his cattle alone was not enough.

Unfortunately Jikeleza took a long time to pay back his brother. Among other reasons that Macebo sued his younger brother was non payment of horse debt. Macebo testified:

I paid a red hornless cow and its hornless heifer as dowry for defendant’s wife in addition to the cattle he acquired from me in exchange. I lent defendant a grey gelding (horse) and made it clear that he

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<sup>187</sup> CA Macebo Bokolo vs. Jikeleza Bokolo Case no.89/1952.

should refund it when he goes to work in Johannesburg. This grey gelding was paid out for the defendant's wife's dowry.<sup>188</sup>

Court records reveal that older Thembu men bent customs that involved paying cattle or money to suit the day they lived in. This change in behaviour maybe partly attributed to the scarcity of cattle and general impoverishment of the Transkei. When men did not have enough cattle or money to give out during ceremonies, they demanded that young men contribute. For example in the *ukufakwa* (put into) custom, male members of the community from the women's side contributed towards the girl's puberty and marriage ceremonies. In the case of *ukufakwa* in marriage ceremonies, the contributor was expected to receive something in return when the *lobola* was paid.<sup>189</sup> However, in *Sindapi Ranisi vs. Ncitakalo Ranisi*, Ncitakalo decided to *fakwa* only his young brother Sindapi for £6 despite his contribution of a goat and organising the ceremony while he Ncitakalo was away for work in Cape Town. Ncitakalo, refused to give his brother his part of *lobola* (a cow) until he paid the £6.<sup>190</sup>

Ncitakalo's actions were contrary to the *fakwa* custom. He bent the custom to suit him. If the rules of the custom were strictly adhered to, Ncitakalo was supposed to announce during the family meeting that Sindapi was *fakwaed* and the amount he was expected to pay. On the other side Sindapi was supposed to have paid the said amount before the *lobola* cattle were brought and shared among family members. As head of the household, Ncitakalo did not ensure that any of these rules were followed. Instead he claimed that he had told his brother about the money he was expected to contribute in letter he wrote to him while in Cape Town. It appears Ncitakalo was trying to cheat his brother out of his cattle which by then had multiplied by bending the *ukufakwa* custom by insisting that Sindapi paid the £6 in question before having access to his cattle.

As Chanock observed, rights claimed by elders over the labour of the young (especially young men) and by men over that of women turned in quarrels over money earned and goods acquired by young people.<sup>191</sup> This scenario is evident in these disputes involving family members. Older men were at pains to get hold of the wealth that the youths acquired (especially male) in the mines. Since older African men could not easily get the money that the youths earned, they come up with all sorts of ways as shown above to possess that money.

<sup>188</sup> CA Macebo Bokolo vs. Jikeleza Bokolo Case no.89/1952.

<sup>189</sup> See judgement in CA Sindapi Ranisi vs. Ncitakalo Ranisi Case no.41/1949.

<sup>190</sup> CA Sindapi Ranisi vs. Ncitakalo Ranisi Case no.41/1949.

<sup>191</sup> Chanock, 'A peculiar Sharpness', p.68.

In view of the above, migrant labour cannot be ignored when looking at the social economic problems that faced the people of St. Marks. Labour migrancy brought about changes to the lives of the people, all of which affected women directly. Prolonged absences of men meant that women assumed some roles that men performed such as paying tax or looking after the family cattle. Family quarrels also affected them because they were part of families despite their status as legal minors. More than often they had to give testimony of events that led to the feuds.

Throughout the 1930s and the 1940s, colonial administrators were making frenetic efforts to address the problem of women's agency as represented by older African men who were demanding to 'regain' their supposedly lost control over women and youths. McClendon aptly argued that male anxiety over the control of women was linked to social tensions which came from increased migrancy and reduced availability of resources. These tensions resonated in rural households and found their way into the NC's and NAC's courts. He adds that domestic struggles in rural South Africa also contributed to women's burdens even though it increased their 'independence too'. When men were away, women often assumed their responsibilities and to some extent made decisions in their homesteads.<sup>192</sup>

### Conclusion

This chapter has shown that in some instances women were able to manipulate and challenge patriarchal institutions and thwart men's attempts to prevent their access to property or to demean them in other ways. Women used both customary law and common law to their advantage. It is evident from the records that cattle remained one of the most important means of wealth accumulation in St. Marks from the late 1930s to early 1960s. However, cattle scarcity became part of the breeding ground for social conflicts. People became susceptible to conflicts.<sup>193</sup> Anything that had to do with cattle became a very sensitive issue.

These conflicts and the scarcity of cattle had a contradicting effect on women. In some instances women were able to sue for support or inheritance, in others, women were less protected as a result of men's absences and cattle shortages.

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<sup>192</sup> McClendon, *Genders and Generations Apart*, p. 169 & 7.

<sup>193</sup> L. Kriesberg, *Constructive Conflicts: from Escalation to Resolution* (Lanham: Rowman & Littlefield Publishers, 2003), pp.28-54, argued that 'A Social conflict arises when two or more persons or groups manifest the belief that they have incompatible objectives'. It appears that Thembu men were constantly seeking to establish ownership over cattle which made them prone to disagreements and sometimes led to fights among family and clan members.

## Chapter 7

### CONCLUSION

This study set out to investigate women's agency in colonial Thembuland between the years c.1940 to c.1960. The objectives were to examine how women negotiated the structures of Customary Law and how it was applied by chiefs and Native Commissioners in Customary Law courts and to examine how women used Customary law to cope with changes brought by Christianity, capitalism and migrant labour. The thesis investigated how women perceived themselves and exercised their agency within the confines of customary law and the customary law courts.

As the thesis has shown, scholars agree that after African customs were codified, their form and content changed in accordance with British administrators' legal and administrative needs. All Africans were affected but women were affected the most. Although women in pre-colonial African societies did not occupy a significant status economically and politically, their social status was respected because of their productive and reproductive abilities. However, after the advent of colonialism and the codification of customary law, women's legal and social status changed. While the codified law emphasised the patriarchal aspects of the African custom and reduced women's status, how far customary law oppressed women is still a contentious subject. This thesis has shown that women were not merely victims of this law. Rather, they found ways of negotiating within the confines of the customary law courts.

In the context of St. Marks, Christianity influenced how women perceived themselves in society. Between c.1940 and c.1960 women married by Christian rites and educated women fought hard to defend their status and dignity and their access to property. Formal education and the possibility of moving away from the homestead meant that marriage was no longer a sure passage to social status for women. At the same time, the Transkei was facing increased impoverishment with land hunger and limited access to cattle making it difficult for fathers to help young men acquire *lobola* cattle. As a result, a number of African young men could not afford to marry. Their meagre salaries in the mines did not provide sufficient means to purchase cattle.

Nevertheless, the exchange of women for cattle still remained part of everyday life in the Transkei and *lobola* cattle often sparked disputes among male family members. This thesis



has shown how these conflicts had a contradicting effect on women socially and legally. Socially, some women were less protected because of men's absences and cattle shortages. There were several instances where women were able to sue for support or inheritance.

This thesis has demonstrated that missionary teachings, colonial rule, capitalism and migrant labour cannot be ignored when looking at women at St. Marks. In court, there were instances where some women were able to manipulate and challenge patriarchal values and frustrate men's attempts to prevent their access to property or to demean them in other ways (for example character defamation). Women used both customary law and common law to their advantage. Both young and old women subverted male expectations of sexual fidelity. Like Thembu men, women regarded sexual enjoyment among adults as a given. Male demands that their partners remain faithful and without sexual intercourse while they were away for long periods appeared to them as unfair. However, women's assertiveness did not impress African men or the colonial government. Women who stood up for themselves were often regarded as 'misfits' or 'wayward'.

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