Considering the Abolition of *Ilobolo*: *Quo Vadis* South Africa?

N M Ngema*

Lecturer, Department of Public Law, University of Zululand

This paper examines whether or not the age-old custom of *ilobolo* constitutes gender discrimination against women. In doing so, the article gives a brief historical overview of the practice of *ilobolo/bohadi* in South Africa, its importance or justifications for its continued application and contribution to the perpetuation of gender discrimination. The analysis of discrimination is based on the South African Constitutional Court's equality jurisprudence. It is motivated by the discussions of the Convention on Elimination of Discrimination against Women (CEDAW) where it was concluded that *ilobolo* was a harmful cultural practice which discriminated against women. Deviating from the CEDAW condemnation, the article concludes by a finding that no justifiable evidence exists that supports the view that *ilobolo* perpetuates discrimination against women. Rather than violate women's rights to human dignity, the article argues that the practice of *ilobolo* guarantees them dignity. South Africa is unlikely to follow CEDAW's advocacy for abolition of *ilobolo*. Perhaps South Africa will allow the practice to die a natural death, as it seems to be the correct trend because the practice of *ilobolo* is widely practised. The writer argues that the abolition of *ilobolo* will result in paper law that would be largely ignored by the very target community whose behaviour the law makers would be intending to change in the first place.

1. INTRODUCTION

International community constitutes many countries and diverse cultures. This diversity is extant even in one country. In a country like South Africa a multiplicity of cultures co-exist in diversity. This diversity, which is also acknowledged by the motto which is emblazoned on the Coat of Arms, "Unity in Diversity", carries advantages as well as challenges because within a society, because there is a general tendency towards ethnocentrism, whereby one group regards its values and beliefs as superior to others, while the other group holds firmly to indigenous customary law practices which the former group regards as primitive rules for uncivilised barbarians.[1] Such

*LLB (UZ), LLM (UNISA), Certificate in Postgraduate Supervision (Rhodes). This is a revised version of the paper that I presented in the Law Teachers Conference 2012 July (Nelson Mandela Metropolitan University). I remain

prejudice can act as a barrier against social unity. This concern is clearly expressed in the following passage:

> South Africa is a country characterized by cultural and religious diversity. For this reason it has been described as a 'multi-lingual, multi-faith, multi-cultural, and multi-political' country. The kaleidoscopic panorama of cultures, religions, and languages is both strength and a weakness. While this cultural and religious pluralism adds to the [diversity] of the country, to enable these cultures, religions, and languages to coexist harmoniously in one geographical territory is not an easy task. The reason for this [skepticism] is that these cultures and religions often clash. Although the differences may not be too great, people tend to exaggerate and accentuate the differences in order to justify preferential treatment for their own particular group. There is a streak in human nature which makes people feel better than others upon whom they look down.[2]

This situation was a matter of serious concern when the application of customary law became subject to repugnance by the ruling groups. The repugnancy clause provided that customary law would be applicable provided it was not in conflict with the principles of natural justice and public policy. In this way the repugnancy clause subjected African customary law to European values and moral norms often resulted in an attempt to purge customary law of so called undesirable attributes.[3]

Even today African cultures have not escaped the ubiquitous and perennial threat of perishing under a purported universality of morality that is inimical of cultural diversity. It cannot be denied that there is a need for a move towards a universal culture that will protect all human rights. However, the attempts to completely eliminate diversity that does not infringe on human dignity are uncalled for. The aim of this article is to examine whether or not the custom of *ilobolo* infringes on the equality right of women. For a start it is appropriate to clarify what *ilobolo* denotes. There are different names for *ilobolo* in different languages, for example, *ikhazi*,

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[1] Pieterse "It's a black thing: Upholding Culture and Customary Law in a Society Founded on Non-Racialism" 2001 SAJHR 364 at 366.

[2] CRM Dlamini "Culture, Education, and Religion" in Van Wyk et al (eds) Rights and Constitutionalism: The New South African Legal Order (1994) Juta & Co, Ltd at 573.

[3] CRM Dlamini "The Future of African Customary Law" in Sanders (eds) The Internal Conflict of Laws in South Africa (1990) Butterworths at 2.

bogadi, munywalo, bride price, and bride wealth.[4] The Recognition of Customary Marriages Act 120 of 1998 (hereafter referred to as the Recognition Act) defines it as the:

> property in cash or in kind, whether known as *lobolo, bogadi, bohali, xuma, lumalo, thaka, magadi, emabheka* or by any other name, which a prospective husband or the head of his family undertakes to give to the head of the prospective wife's family in consideration of a customary marriage.[5]

The South African Law Reform Commission (the South African Law Commission)[6] noted that the giving of property by a husband or his guardian to the wife's family is probably the most important requirement for a customary marriage.[7] It posed a great obstacle for the SALC to reach consensus on a suitable term to express this institution. The SALC was reluctant to use any of the terms used in Bantu languages to express the latter institution, fearing that it might be perceived to be favoring a particular Bantu language to the exclusion of others. The SALC adopted the English term 'bride wealth', a term commonly used in academic literature. However, the adoption of bride wealth never solved the problem because many members of the public objected to the concept of bride wealth. They indicated that it could not do conceptual justice to the institution of *ilobolo.* There is no English equivalent to the verbal derivation of the noun *ilobolo*, which is *ukuloboba*; which is morphologically formed by the prefix *uku-* ('to') and stem '-*lobola*". The SALC was eventually persuaded to abandon 'bride wealth' because it appeared that it 'signifies the transfer of wealth, whereas *ilobolo* is a blood contract, a mandatory and imperative sine qua non for any marriage in indigenous African communities.'[8] The term *ilobolo* eventually gained preference because it is deeply embedded in the mindset and value system of indigenous societies living in Southern Africa and in the morphology of concept formation.

CEDAW, in some of its concluding observations, inferred that the "bride price" ought to be abolished because it is one of the harmful cultural practices that perpetuate discrimination

[4] Angeline, Shenje-Peyton "Balancing Gender, Equality, and Cultural Identity: Marriage Payments in Post Colonial Zimbabwe" 1996 (9) Harvard Human Rights Journal at 105.
[5] S 1 (iv) of the Recognition of Customary Marriages Act 120 of 1998.
[6] (Hereinafter referred to as the SALC).
[7] South African Law Commission 1998 Project 90 The Harmonization of the common law and the indigenous law chapter 4 (hereinafter referred to as The SALC).
[8] The SALC (Chapter 4).

against women.[9] It is surprising that CEDAW does not mention in its concluding observation with regard to South Africa that it is also a harmful cultural practice that perpetuates discrimination against women.[10] It is not clear why CEDAW perceives the payment of a bride price as a harmful cultural practice that violates women's rights to equality in Uganda and Kenya but not in South Africa. Perhaps this ambivalence could be ascribed to poor understanding, among non-Africans, of the significance of the custom of *ilobolo*. In spite of vilification over a number of decades, its popularity and widespread social acceptance has persisted. Perhaps this contributed to the concluding observations of CEDAW, or it may be a strategic stance taken by South Africa by not expressly providing for *ilobolo* as a requirement of a customary marriage in the Recognition Act.

However, the fact that *ilobolo* is not expressly mentioned does not mean that it is not recognised as a requirement for a valid customary marriage. The custom of *ilobolo* is widely socially accepted and practised. Therefore its legal abolition might lead to paper law that will have no practical consequence and effectiveness.[11] It is not the intension of this article to contribute to the continuing debate[12] about whether *ilobolo* is or is not an essential requirement of customary marriage.

As already indicated the aim of this article is to examine whether *ilobolo* breaches the right to equality. To this effect, the article will pay attention to the equality jurisprudence of the Constitutional Court of South Africa. As it will be argued, the impact of the concluding observations of CEDAW on the issue of the bride price is unlikely to change the current recognition of *ilobolo* in South Africa. Perhaps South Africa will choose to allow it to die a natural death as it seems to be the direction and the main rationale for not expressly mentioning it as a requirement in the Recognition Act.

The following section discusses the historical background of the recognition of *ilobolo*.

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[9] Kenya, CEDAW/C/KEN/CO/7 (2011) para 17 and 18; Uganda, CEDAW/C/UGA/CO/C (2010) para 19 and 20.
[10] South Africa, CEDAW/C/ZAF/CO/4 (2011) para 17 and 18.
[11] Dlamini (n 3) at 3.
[12] LL *Mofokeng* "The *Lobola* Agreement as the 'Silent' Prerequisite for the Validity of a Customary Marriage in Terms of the Recognition of Customary Marriages Act" 2005 (68) THRHR 277-278.

2. HISTORICAL BACKGROUND OF THE RECOGNITION OF *ILOBOLO* IN SOUTH AFRICA WITH REFERENCE TO THE REQUIREMENTS FOR CUSTOMARY MARRIAGES CONCLUDED BEFORE THE RECOGNITION ACT[13]

This discussion of the requirements will differentiate between the requirements that were applicable only in Kwazulu-Natal and those that were applicable outside the provice. The distinction arises because customary law was partly codified in Kwazulu-Natal under the Natal Code of Zulu Law[14] and the Kwazulu Act on the Code of Zulu Law.[15] The three requirements for customary marriages contained in both the Natal Code and the Kwazulu Act were as follows:[16]

- Firstly the consent of the bride's father or guardian was needed if the bride was still a minor. The Act stipulated that the consent could not be withheld unreasonably;
- Secondly the consent of the bridegroom's father or family head was also needed, if the bridegroom was still a minor. Interestingly, in the case of the bridegroom the Act made no stipulation that the consent could not be withheld unreasonably; and
- Lastly a public declaration by the bride to the official witness was needed to the effect that the union took place with her voluntary consent.

It must be noted that the Natal Code and the Kwazulu Act also did not expressly provide for the payment of *ilobolo.* As a result a customary marriage could be a valid marriage even if *ilobolo* was not delivered, more the civil marriage, which did not require payment of *ilobolo* at all.

According to Bekker[17], the requirements outside Kwazulu Natal are:

- Consent of the bride's guardian;
- Consent of the bride;
- Consent of the bridegroom;
- Payment of ilobolo, bogadi or ikhazi to the bride's family group; and
- The transfer of the bride to the bridegroom's family group

[13] The Recognition of Customary Marriages Act 120 of 1998 (hereinafter referred to as the Recognition Act).
[14] The Natal Code of Zulu Law Procl R 151 of 1957(hereinafter referred to as the Natal Code of 1987).
[15] The Kwazulu Act on The Code of Zulu Law 16 of 1985 (hereinafter referred to as the Kwazulu Act).
[16] See s 38 (1) of both the Natal Code and the Kwazulu Act.
[17] JC Bekker Seymour's Customary Law in Southern Africa (1989) at 105.

According to Olivier et al,[18] the requirements outside Kwazulu Natal were:

- The consent of the bridegroom's father or guardian in circumstances where the bridegroom is still a minor;
- Consent of the bride's father or guardian;
- Consent of the bridegroom;
- Consent of the bride;
- The handing over of the bride to the family group of the man or the man himself;
- An agreement that *ilobolo* will be delivered; and
- Non-existence of a civil marriage. This means that each of the parties must declare that they are not a party to a subsisting civil marriage.

An analysis of the above requirements listed by Olivier shows important changes regarding the requirements for a valid customary marriage even before the enactment of the Recognition Act. The consent of the father of the bridegroom was no longer necessary more specifically if the bridegroom would manage to pay *ilobolo* himself. Consent would however, still be required if the prospective bridegroom was a minor.[19] It appears that in terms of the official version of customary law women were not allowed to negotiate *ilobolo.* However, according to the living version of customary law women are able to do so.[20] The decision of the court in *Mabena*'s case, which allowed women to negotiate *ilobolo* ought to be congratulated as it demonstrated that women enjoyed equal status with men. The consent of the bride and the bridegroom is still required just as it was prior to the Recognition Act. The handing over of the wife is still an essential requirement of a customary marriage even though it may be waived according to *siSwati* customary law.[21] An agreement that *ilobolo* will be delivered remains one of the components of a customary marriage.[22]

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[18] NJJ Olivier et al Indigenous Law (1995) Butterworths at 17-21.
[19] *Mabena v Letsoalo* 1998 (2) SA 1068 (T) (hereinafter referred to as *Mabena*'s case).
[20] See Le Roux J in *Mabena*'s case ibid.
[21] See *Hlophe* JP in *Mabuza v Mbatha* 2003 (4) SA 218 (C) at 9 http://www.saflii.org/za/cases/ZAWCHC/2002/11.html (accessed 27-09-2012).
[22] Bekker et al Introduction to Legal Pluralism in South Africa (2010) 3rd edition LexisNexis Butterworths at 36; see also *Dlodlo* J in *Fanti v Boto* and others 2008 (5) SA 405 (C).

3. REQUIREMENTS OF A CUSTOMARY MARRIAGE AFTER 15 NOVEMBER 2000

For a customary marriage concluded after the commencement of the Recognition Act to be valid the following requirements have to be complied with:

- The prospective spouses:
  - Must both be above 18 years of age; and
  - Must both consent to be married to each other under customary law; and
- The marriage must be negotiated and entered into or celebrated in accordance with customary law.

It appears that an agreement to pay *ilobolo* seems to be retained as a requirement of a customary marriage in South Africa even though it is not expressly stipulated in the Recognition Act. The Recognition Act refers to it directly by defining it as:

> Property in cash or in kind, whether known as [i]*lobolo*, *bogadi*, *bohali*, *xuma*, *lumalo*, *thaka*, *magadi*, *amabheka* or by any other name, which a prospective husband or the head of his family undertakes to give to the head of the prospective wife's family in consideration of a customary marriage.[23]

The Recognition Act further refers directly to *ilobolo* by providing that:

> A registering officer must, if satisfied that the spouses concluded a valid customary marriage, register the marriage by recording the identity of the spouses, the date of the marriage, any [i]*lobolo* agreed to and any other particulars prescribed.[24]

The Recognition Act also refers to *ilobolo* indirectly by stipulating that the marriage must be 'negotiated and entered into or celebrated in accordance with customary law.'[25] This direct and indirect reference mentioned above led Van Rensburg to conclude that *ilobolo* it was still retained as a requirement for a valid customary marriage.[26] Yet Dlamini[27] is of the differing opinion that *ilobolo* is not a requirement of a customary marriage because it is not expressly stipulated in the Recognition Act.

[23] S 1 (4), see also the quotation in n 5.
[24] S 4 (4) (a).
[25] S 3 (1) (b).
[26] AM Janse van Rensburg "Non-Recognition?: Lobolo as a Requirement for a Valid Customary Marriage" 2002 (27) JJS 170 at 173-178.
[27] The SALC chapter 4.

4. THE IMPORTANCE OF *ILOBOLO*

Various reasons can be given that signify the importance of *ilobolo* and the need for its continuation despite numerous attempts made to eliminate it.[28] Dlamini's[29] discussion of *ilobolo,* was comprehensive and included its historical background, its advantages and disadvantages. It has been argued that blacks in general are unable to recognise a relationship as a valid marriage if there was no agreement that *ilobolo* or part of it will be delivered.

Ilobolo therefore holds a considerable appeal as a symbol of African cultural identity and religion.[30] It "is the framework that people use to express and to bring about complicated changes in terms of relationships and deep changes in terms of emotional realities, values, attitudes and concepts. It also embodies the language that the ancestors understand and bless."[31]

The manner in which the process of negotiations of marriage is conducted makes it difficult to evade the payment of *ilobolo* even if a person may want to. During marriage negotiations it is usually not possible to determine whether a prospective marriage will be a civil or customary marriage because the agreement to pay *ilobolo* is a norm in negotiations of both civil and customary marriages.[32]

It has also been argued that payment of *ilobolo* guarantees good treatment of the wife by her husband and contributes to a positive psychological feeling on both the husband and wife that they have concluded a true and valid marriage.[33] However, it must be noted that it is not necessarily true that the payment of *ilobolo* will automatically ensure good treatment of the wife by her husband. At the very least what can be said for it is that it may serve as evidence that the husband really loves and values his wife.[34]

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[28] D Taylor "Converting Attitudes of Church, State and Courts to *Lobolo*, Polygyny, Succession and Labour in 19th Century South Africa 2005 (11-2) Fundamina 114.
[29] CRM *Dlamini* "A Juridical Analysis and Critical Evaluation of *Ilobolo* in a Changing Zulu Society" Unpublished LLD thesis 1983 University of Zululand, CRM Dlamini "The modern legal significance of ilobolo in Zulu society" 1984 De Jure 148-166.
[30] The SALC chapter 4.
[31] The SALC chapter 4.
[32] Dlamini (n 29 above) at 150.
[33] Dlamini (n 29 above) at 160.
[34] Dlamini (n 29 above) at 151.

According to Dlamini *Ilobolo* is viewed as 'compensation of the girl's parents for the loss of their daughter, her earning capacity, her children's *ilobolo* and the money spent on her education and upbringing'.[35] However Dlamini concedes that it is impossible to adequately compensate the parents for the loss of their daughter's earning capacity and all the expenses incurred by them in raising their daughter. At best therefore the compensation is merely psychological.[36]

The preponderance of learned opinion is that the payment of *ilobolo* is a way of determining the honesty and seriousness of the intentions of the bridegroom and his commitment to become a financial provider in the prospective marriage.[37]

Ilobolo symbolises that the parties truly love each other.[38] As a result the idea that a woman should feel that *ilobolo* lowers her human dignity, is a European impression, which does not reflect the views of the blacks themselves.[39] In fact *ilobolo* is the opposite of CEDAW's position on payment of *ilobolo*, already referred to earlier. The writer's central argument is that *ilobolo* does not violate the right of women to human dignity. To the contrary, it places premium on a woman's value and dignity, by tacit acknowledgement that it is only symbolic of but not equivalent to the dignity of the woman. Moreover, it is in the popular moral conviction of the majority of African people that failure to pay it is tantamount to degrading the woman.[40]

In the following section the writer examines whether the custom of *ilobolo* infringes the right of women to equality before the law and at the same time to reply to some of the concluding observations of CEDAW that labelled the custom of *ilobolo* as a harmful cultural practice that ought to be abolished.[41]

[35] Dlamini (n 29 above) at 152; M Brandel "Urban Lobolo Attitudes: a Preliminary Report" 1958 (17) African Studies 34; see also TW Bennett A Sourcebook of African Customary Law for Southern Africa 1st edition (1991) Juta & CO, Ltd at 201.
[36] Dlamini (n 29 above) at 152.
[37] Dlamini (n 29 above) at 153.
[38] Dlamini (n 29 above) at 154.
[39] Dlamini (n 29 above) at 156; see also MW Prinsloo, JG Van Niekerk and LP Vorster "Current Research on Lobolo by Means of a Questionnaire (Part1)" 1997 De Jure at 99; MW Van Niekerk, JG Van Niekerk, and LP Vorster "Perceptions of the Law Regarding, and Attitudes Towards, Lobolo in Mamelodi and Atteridgeville" 1998 (31) De Jure 314.
[40] Dlamini (n 29 above) at 154 - 156.
[41] See (n 6 above).

5. ARGUMENTS FOR THE ABOLITION OF *ILOBOLO*

Some authors view *ilobolo* as evidence that the culture in which it is practiced objectifies women. As far as these authors are concerned the payment of *ilobolo* indicates that the worth of a woman is measured in accordance with the sum of money paid for her *ilobolo*. This has been the perception of outside observers. They viewed it as a purchase and sale of a woman and thus as an immoral custom that ought to be abolished.[42] Colonisers continued to view *ilobolo* negatively despite the evidence established or discovered to the contrary. The evidence to the contrary about its practice appears in the words of Howell when he stated: "I do not consider that the natives giving 10 cows more or less for a wife should be deemed to constitute slavery in the sense of the word. I have always understood and believed that the cattle are given as a kind of deposit or pledge for the mutual good behavior of man and wife".[43] In a similar vein, Peppercome, a magistrate, also testified that an African marriage is by mutual consent and pointed out that *ilobolo* was not a purchase but rather a pledge or security similar to the custom described in the Biblical book of Ruth.[44] This perception of the objectifying of women has been strengthened by the fact that a woman's education and status influences the amount of *ilobolo* in some families during marriage negotiations.[45]

Another criticism that is levelled against the practice of *ilobolo* is that it promotes ownership of women. According to the latter view, if a man pays *ilobolo* he acquires productive rights over her and that the death of the husband does not dissolve the marriage.[46]

However, the above argument that *ilobolo* amounts to ownership of a woman is discredited by the view that those who practice it do not perceive *ilobolo* as a sale transaction. By the same

[42] Mbono v Manoxowendi (6 EDC 62) 1891, 72; Ngqobela v Sihele (10 SC 346) 1893, 354; D Taylor "Converting Attitudes of Church, State and Courts to Lobolo, Polygyny, Succession and Labour in 19th Century South Africa 2005 (11-2) Fundamina 114.

[43] Natal Commission to Enquire into the past and present state of the kafir proceedings of the commission appointed to enquire into the past present state of Kafirs in the District of Natal 1852 vol 3 25 (hereinafter referred to as the Natal Commission).

[44] Natal Commission vol 3, 63-64.

[45] J Bekker & C Boonzaaier 'How equal is equal? A legal-anthropological note on the status of African women in South Africa' 2007 De Jure 284.

[46] Excellent Chireshe and Regis Chireshe "Lobola: The Perceptions of Great Zimbabwe University Students" 2010 (3) The Journal of Pan African Studies 212.

token, on this view, *ilobolo* does not give the man rights of ownership over his wife. As Bekker[47] aptly puts it:

> It is fairer, as some writers state, to view the contract in all its aspects, before condemning it as sale. No matter what motive in a father's mind when he gives his daughter in exchange for a price […] the main effect of the contract is to transfer the reproductive capacity of the woman and her ability to perform domestic services, from her guardian to her husband; if the matter stopped there, the contract would be a sale, for the plight of the woman would be no better than that of an animal, which ceases to have any relationship with the seller after delivery, and is entirely subject to the will of the new owner. But this is not the case, for the wife's guardian retains the role of her protector for the remainder of her life.

It is important to note that there are different viewpoints as to what the purpose of *ilobolo* is. One viewpoint is that *ilobolo* is transferred in exchange for the reproductive capacity of a woman and the attendant capacity to perform domestic services.[48] This does not necessarily mean that subsequent inability of a woman to bear children would automatically lead to a marriage being dissolved as the family can resort to other options for procreation of children. *Dlamini* indicated that it is crucial to take note that *ilobolo* and marriage reflected two different institutions and the purpose of marriage is procreation of children, and that is not the purpose of *ilobolo.*[49] However, it may be argued that in our new constitutional dispensation procreation of children cannot be regarded as the purpose of marriage in general. The writer takes this view because a childless heterosexual marriage can subsist in spite of the non-production of offspring and same sex couples are allowed to marry even though they cannot reproduce.

If a wife is ill-treated or neglected by her husband she has a right to return to her guardian who is obliged to support her until reconciliation has been reached.[50]

A man's dignity can be infringed if he is expected to pay an exorbitant amount of *ilobolo*, which would make it difficult for him to get married.[51] Research indicates that in some families more marriage goods are expected for a woman who is educated or a professional such as a teacher,

[47] JC Bekker Seymour's Customary Law in Southern Africa 1989 5th ed at 150; see also NJJ Olivier et al Indigenous law 1995 at 33; Schapera Handbook of Tswana law and custom (1995) at 138-139.
[48] Dlamini (n 29) at 162.
[49] Dlamini (n 29) at 162.
[50] Bekker (n 17) at 150.
[51] D Posel & S Rudwick 'Marriage and ilobolo [Bride wealth] in contemporary Zulu Society' Working Paper No. 60 December 2011.

nurse or attorney, or a business woman, medicine woman or a woman of royal descent, than a woman has no no formal school education or who has a matric certificate.[52]

6. *ILOBOLO* AND THE ISSUE OF GENDER EQUALITY AND DIGNITY

On the face of it, it may be argued that *ilobolo* is repressive in nature, violates a woman's bodily integrity, compromises a woman's personhood by treating her as a commodity and that it also legalises violence against women.[53] It is therefore necessary to examine whether or not *ilobolo* violates the woman's right to equality and human dignity.

As already indicated, views expressed against *ilobolo* have not found majority support amongst those practicing the custom. It also does not violate the right of women to equality and dignity. This observation is aptly summed up by Bekker and Boonzaaier[54] as follows:

> Research that has been done among the different ethnic groups in rural parts of South Africa, has found that the transfer of marriage goods is not a sale transaction and it also does not give the man rights of ownership over his wife. As such [it] does not acquire the right to sell her or to mistreat her. In fact, one of the most important functions of marriage goods is to provide [a] guarantee that the woman will be well treated by her husband and her relatives-in-law.

The above observation affirms the argument that *ilobolo* does not infringe the rights of women to equality and dignity. In furthering this argument it would be necessary to make an analysis of the equality provision. The equality clause provides that:[55]

> 9 (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
>
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.
>
> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or

[52] J Bekker & Boonzaaier (n 42) at 284.
[53] Excellent Chireshe and Regis Chireshe "Lobola: The Perceptions of Great Zimbabwe University Students" 2010 (3) The Journal of Pan African Studies 212.
[54] Bekker JC and Boonzaaier (n 42) 283.
[55] Section 9 of The Constitution of South Africa, 1996.

> social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
>
> (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
>
> (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

The reading of the equality clause indicates clearly that the Constitution does not necessarily prohibit all forms of differentiation or discrimination but it prohibits merely unfair discrimination. The prohibition of unfair discrimination is divided into two ways, that is, the prohibition of discrimination on listed grounds[56] and the prohibition of discrimination on unlisted grounds. The equality clause does not explicitly refer to unlisted grounds but in the case of Prinsloo it was held that unlisted or analogous grounds also exist.[57]

The question is whether the custom of *ilobolo* constitutes an infringement of the right of women to equality. It would infringe the right to equality if it unfairly discriminated against women. However, *ilobolo* does not infringe the right of women to equality because women are not treated as a commodity as may be argued by some writers and observers. In fact women are not treated as their husbands' property and according to the law have equal rights alongside their husbands.[58]

The Constitutional Court held that discrimination in South Africa means 'treating people differently in a way which impairs their fundamental dignity as human beings'.[59] The custom of *ilobolo* constitutes a differentiation on a specified ground of discrimination (i.e. discrimination based on sex and gender) because *ilobolo* is only paid for the bride to be and not the groom. This

[56] See those listed in s 9 (3).
[57] Prinsloo v Van Der Linde and another 1997 (3) SA 1012 (CC) (hereinafter referred to as Prinsloo) paras 28 -29.
[58] S 6 of the Recognition Act guaranteed equal status for both men and women in a marital relationship by providing that: 'A wife in a customary marriage has, on the basis of equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity, including the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that she might have at customary law'.
[59] Prinsloo para 31.

raises the question whether South African equality jurisprudence is based on the liberal perception of equality that is based on sameness and similar treatment. In discarding that perception, Goldstone J stated that 'although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting on identical treatment in all circumstances before the goal is achieved'.[60] The court held that there must be an examination of an impact of an alleged infringement of the right to equality in relation to the prevailing economic, cultural and social circumstances in the country.[61]

As already mentioned, although *ilobolo* constitutes a differentiation on one of the specified grounds of discrimination, this shows that discrimination has been established.[62] However, this form of discrimination ensuing from the practice of *ilobolo* is not unfair because it does not infringe human dignity of women.

The argument of indirect discrimination, which is prohibited by section 9 (3) of the Constitution, is also unlikely to succeed.[63] Indirect discrimination suggests that, although a practice seemed to be neutral, the way it is operated over time worked to the detriment of women. It would not be justified "to demonstrate that the payment of *ilobolo* was the condition precedent to the unfavorable treatment of wives, especially in view of the substantial literature claiming that *ilobolo* functions to benefit women."[64]

Therefore if the discrimination is on a specified ground, then it will be presumed to be unfair.[65] The onus of proof rests upon the respondent to rebut this presumption of unfairness. It is argued in this article that even though *ilobolo* constitute discrimination on a specified ground, it is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. However, if it is on an unlisted ground, the onus will be on the complainant to

[60] President of the Republic of South Africa and Another v Hugo 1997 (6) BCLR 708 (CC) para 729 (hereinafter referred to as Hugo case).
[61] Brink v Kitshoff NO 1996 (6) BCLR 752 (CC) para 768 (hereinafter referred to as Brink case); Hugo case para 729.
[62] Prinsloo para 31.
[63] The SALC (chapter 4).
[64] The SALC (Chapter 4).
[65] S 9 (5) of the Constitution.

prove unfairness. The Harksen's case[66] provided some guidelines of assessing what constitutes unfair discrimination. The court held that the impact of discrimination on the complainant or the victim is a determining factor. Goldstone J held that in assessing the impact of the discrimination on the complainant, the following factors must be considered:

a) The position of the complainant in the society and whether they have suffered from past patterns of discrimination;
b) The nature of the provision or power and purpose sought to be achieved by it. An important consideration would be whether the primary purpose is to achieve a worthy and important societal goal and an attendant consequence of that was an infringement of the applicant's rights; and
c) The context to which the rights of the complainant have been impaired and whether there has been an impairment of his or her fundamental dignity.

It has been argued that *ilobolo* does not violate the right to human dignity of women because women do not treat *ilobolo* as such but as a practice that enhances their dignity.

The above equality test in Harksen's case shows that the South African equality jurisprudence is centered on the value of human dignity and this appears in some constitutional provisions[67] and other decisions of the Constitutional Court.[68] In the case of *S v Makwanyane*[69] the Court, through O'Regan J, held that:

> The importance of dignity as a founding value of the new Constitution cannot be overemphasized. Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. The right is therefore a foundation of many of the other rights that are specifically entrenched in chapter 3.

In a similar vein, O'Regan J held that:

> The value of dignity in our constitutional framework cannot therefore be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it to inform the future, to invest in our democracy respect for the intrinsic worth of all

[66] Harksen v Lane NO and others 1997 (11) BCLR 1489 (CC) para 50-51 (hereinafter referred to as Harksen's case).
[67] S 1 (founding provisions), s 7 (in chapter 2), s 36 (the limitation clause), and s 39 (the interpretation clause).
[68] Prinsloo para 31; Dawood and Others v Minister of Home Affairs and Others 2000 (8) BCLR 387 (CC) at para 35 (hereinafter referred to as Dawood's case);
[69] 1995 (3) SA 391 (CC) para 328.

> human beings. Human dignity therefore informs constitutional adjudications and interpretations at a range of levels. It is a value that informs the interpretation of many, possibly all other rights. The court has acknowledged the importance of the constitutional value of human dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman and degrading way, and the right to life.[70]

The significance of human dignity also appears in the words of the former Chief Justice of the Constitutional Court, Arthur Chaskalson. When delivering the third Bram Fischer Memorial Lecture[71] he asserted that:

> As an abstract value, common to the core values of our Constitution, dignity informs the content of all the concrete rights and plays a role in the balancing process necessary to bring different rights and values into harmony. It too, however, must find its place in the constitutional order. Nowhere is this more apparent than in the application of the social and economic rights entrenched in the Constitution. These rights are rooted in respect for human dignity, for how can there be dignity in a life lived without access to housing, health care, food, water or in the case of persons unable to support themselves, without appropriate assistance. In the light of our history the recognition and realization of the evolving demands of human dignity in our society- a society under transformation – is of particular importance for the type of society we have in the future.

The above excerpt supports the Constitutional Court's equality jurisprudence which views equality as a right that should be informed by another value and that it does not stand independently as a value. If equality stands alone it is not easy to explain exactly what it is that we seek to protect or achieve.[72] It appears that so far the court's response is that we seek to protect human dignity.[73]

The response to CEDAW's position and argument is that the custom of *ilobolo* does not perpetuate discrimination against women because it does not infringe the right of women to human dignity. It is important that we allow necessary diversity and tolerance to permeate and flourish in our modern society so that we can attain peace and live in harmony.[74] If there is tolerance and promotion of human dignity for all, then it will not be difficult to achieve the value

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[70] Dawood's case para 35.
[71] A Chaskalson "Human Dignity as a Foundational Value of Our Constitutional Order" 2000 (16) SAJHR 193.
[72] Susie Cowen "Can 'dignity' guide South Africa's equality jurisprudence?" 2001 SAJHR 40, accessed on http://products.jutalaw.co.za on 04/06/2011.
[73] Ibid.
[74] See generally The UNESCO's 1995 Declaration on the Principles of Tolerance adopted by UNESCO Member States in Paris on 16 November 1995.

of equality that "seeks to promote a democratic society that recognizes and promotes difference and individual as well as group diversity and thereby exhibits a commitment to ensuring that all within society enjoy the means and conditions to participate significantly as citizens"[75]

7. CONCLUSION

The aim of this article was to explore whether or not the custom of *ilobolo* perpetuates discrimination against women. It has been argued that *ilobolo* does not perpetuate unfair discrimination against women as the South African legal system proscribes merely unfair discrimination where it tempers with the right to human dignity. The article argued that the concluding observations of CEDAW's advocay for abolition of the custom of *ilobolo* have no justifiable grounds. This is because even international human rights instruments regard human dignity as inherent to the rights of individuals and groups.[76] Therefore even at international level it appears that the right to equality is not interpreted or applied in a vacuum and it is informed by the value of human dignity and it must be noted that when protecting other rights we seek to achieve the protection of human dignity.

From the sources that were studied there is no justifiable argument that shows *ilobolo* as a custom that perpetuates unfair discrimination against women or as a custom that violates the dignity of women. In summary therefore, perceptions and argument of CEDAW are unlikely to change the current recognition and popularity of *ilobolo* in South Africa. On the contrary the abolition of *ilobolo* is most likely to result in a paper law that the public will largely ignore.

[75] D Davis "Equality: the majesty of Legoland Jurisprudence" 1999 (116) SALJ 398 at 413-414.

[76] See the Declaration on the Elimination of all Forms of Racial Discrimination, proclaimed by UN General Assembly Resolution 1904 (iviii) on 20 November 1963; see also The Second Optional Protocol to the International Covenant on Civil and Political Rights on the Abolition of Death Penalty, adopted by the UN General Assembly on 15 December 1983.