

## A Critical Analysis of the Constitutionality of the Custom of Lobolo

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### Abstract

The main objective of this study is to critique the continued existence and practice of the custom of Lobolo in a Constitutional dispensation. This study is aimed at investigating whether the latter custom violates the right to human dignity. In addition, this study is also aimed at providing an acceptable answer as to whether the custom of Lobolo should be practiced in a Constitutional era or not.

**Keywords:** Lobolo; Cultural-Legal Implications; Human dignity; Constitutional dispensation; Support of the custom

### Introduction

The continued existence of the custom of Lobolo in a new Constitutional era forms the basis of this mini dissertation. Virginity, level of education, employment, number of children, and marital status are some of the pivotal factors taken into consideration when calculating the Lobolo price. With this research I intend on weighing up these factors used to calculate Lobolo against the right to human dignity, investigating whether the practise of this custom can be justified when tested against the Constitution (right to human dignity). The right to freedom of religion, as well as the right to cultural practices provided for in the Constitution promote the existence of this custom. However, with this research I will investigate whether the internal limitations contained by these specific rights can be used to limit the practice of this custom .

### Research question

Can the custom of Lobolo withstand Constitutional scrutiny?

### Secondary questions

Is the adherence to the custom of Lobolo more specifically the factors used to establish the Lobolo price infringe upon the right to human dignity?

Can the practice of Lobolo be limited by the Constitution or any other legislation?

### Motivation for the study

Lobolo is an old age custom based on African traditional customs dating back to a period before 1878 [1]. It was however first codified when the first version of the Natal Code of Zulu law was promulgated in 1878 . The latter indicates that the custom dates back to a period where the Constitution did not exist as the supreme law of the country [2].

Courts have regarded Lobolo not to be a requirement of a valid customary marriage. Subsequent to court decisions, section 3 of the Recognition of customary marriages also does not recognize Lobolo as a requirement for a valid customary marriage. In addition to the latter two instruments, the South African Law Commission recommended that

Lobolo should not be deemed essential for the validity of customary marriages. If parties wish to give Lobolo, they should be free to do so, but payment or non-payment will have no effect on the spouse's relationship or on their rights to any children born of the marriage [3].

Despite the latter mentioned developments in our legal system, the custom of Lobolo still finds preference in this day and age. In fact, most

ethnic groups fail to regard a union as a union without the payment of Lobolo.

The Constitution has been influential in bringing well established African customs in line with the provisions entrenched in it. Bhe v Magistrate, Khayelitsha 2005 (1) BCLR 1(CC) provides a clear illustration of this. In this case, the Constitutional court had to determine whether the custom of male primogeniture was Constitutional. The court in this case declared the custom of male primogeniture unconstitutional on the basis that it violated the right to equality and the right to human dignity to women because the rule only enabled first born male to inherent in exclusion of females and other children [4].

Mabena v Letsoalo 1998 (2) SA 1068 (T) is another case that shows Constitutional influence. In this case the constitutional court confirmed the living customary law and held that it is acceptable for female family-heads to negotiate and receive Lobolo. Prior to this judgement females were not allowed as a rule in customary law to negotiate Lobolo which indicated inequality among genders [5].

The relevancy of the above mentioned cases to this study is to indicate how courts are not reluctant to align well-established African customary practices to conform to the values entrenched in the Constitution. This then brings us to a position where we question whether should the factors used to calculate Lobolo be allowed to be used as a criterion in a Constitutional dispensation.

### Literature review

This investigation will be conducted by way of a critical (theoretical) analysis and a Constitutional analysis of the custom of Lobolo. These methods of research are suitable for this investigation because the research problem questions whether the custom of Lobolo should be allowed to continue in a Constitutional dispensation. The abovementioned methods will enable this investigation to address the research question critically and objectively. In reaching an acceptable answer to the question posed, I will make use of the Constitution as a point of departure, the Recognition of Customary Marriages Act 120 of 1998, academic articles, case law as well as academic reports.

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## Chapter outline

**Chapter 2: Overview of the custom of Lobolo:** In this chapter I will investigate what the custom of Lobolo entails and also investigate the factors used to calculate Lobolo and their justifications.

**Chapter 3: Factors used to calculate Lobolo viewed against the right to human dignity:** In this chapter I will use the factors discussed in the previous chapter to investigate whether do they possibly violate upon the right to human dignity.

**Chapter 4: The limitations imposed on the right to religion, culture and cultural practices:** In this chapter I will investigate the commentary on the support and rejection of the custom of Lobolo. In addition, I will investigate the internal limitations clauses that may limit the custom of Lobolo.

**Chapter 5:** In this chapter I will summarize the contents of the investigation and also provide an acceptable answer to the research question posed in this investigation.

**Chapter two: Overview of the Custom of Lobolo:** The previous chapter highlighted that the custom of Lobolo still forms an integral part in the South African customary law. This is despite court rulings, the Recognition of Customary Marriages Act and the South African Law Commission declaring the custom not to be a valid requirement of a customary marriage. Thus, the purpose of this chapter is to give a detailed explanation of,

- The meaning of Lobolo,
- What does the custom of Lobolo entails?
- Factors used to determine the Lobolo price,
- Cultural significance of Lobolo,
- Cultural implications if the custom of Lobolo is not followed, and
- finally, the legal implications of the custom of Lobolo.

In satisfying the purpose of this chapter an overview of the custom of Lobolo will be fully discussed. The following section discusses what Lobolo is.

## Discussion

**Defining the custom of Lobolo:** The Recognition of customary marriages Act in section 1 defines Lobolo as, The property in cash or in kind, which a prospective husband or the head of the family undertakes to give to the head of the prospective wife's family in consideration of a customary marriage [6].

According to Ngema the custom of Lobolo varies among various cultural groups or tribes in South Africa. Each tribe or group have their own set of rules that they follow in order to facilitate and manage the whole Lobolo negotiations. Ngema further points out that some communities have fixed amount of Lobolo, and some do not.

It is argued that the custom originates to a period before the 18<sup>th</sup> century. In fact, the first codified version of the Natal Code of Zulu law was promulgated in 1878 and this piece of legislation had reference of the custom of Lobolo. This indicates that the custom has been widely practiced for a long time which is why it still finds preference in the Constitutional era.

What follows next is a discussion of what the custom of Lobolo entails.

**What does the custom of Lobolo entails?:** Some communities view Lobolo as a form of token of appreciation that the prospective husband gives to the prospective wife's family for raising their child, for educating her and teaching her manners. Lobolo is seen as a way that allows two families to combine their worth into one big estate [7].

It serves as means to redistribute scarce resources for example meat or cash and rights over productive resources for example land and labour. It is regarded as compensation for the expense of a girl's upbringing which includes educating her and the loss of her services.

It is seen as a custom that creates an exchange of lineage from the woman's family to the man's family. A woman is seen as a nexus that creates and seals relationships between the two families through her receiving Lobolo. The importance of this is to ensure the continuation of the husband's family name. This is achieved by the woman giving birth to children that will carry on the legacy of the man.

**Factors used to determine the Lobolo price:** Different communities rely on different methods to determine the amount of Lobolo: However, given the vast differences between these communities, certain factors serve as common ground for most communities. These factors include but not limited to the level of education, employ-ability, marital status, virginity, number of children, and the ability to cook, clean and take care of the children.

A prospective wife having all of these traits or a combination of any of the above is regarded as important because her Lobolo price is often high. These factors highlighted are not imposed on men, his marital status, virginity and so on do not play a role in Lobolo negotiations which may be an indicator of inequality among males and females.

The level of education is regarded as one of the most important attributes for a woman to have as this in the modern times talks to her employability. A woman who can provide for herself without the necessary help from her husband obtains a substantially high Lobolo price as compared to woman who cannot [8]. Secondly, a woman who is a virgin, has never been married before and has no children also has a substantially high Lobolo price as this reflects how well her parents raised her and how good she has taken care of herself.

Subjecting some of these factors to females may infringe upon their right to human dignity especially to females who do not possess any of the prerequisite attributes.

**Cultural significance of Lobolo:** Ngema is of the view that Lobolo holds a considerable appeal as a symbol of African cultural identity and religion. It is regarded by some communities as the rite of passage to an ancestrally recognized union between two individuals. The latter indicates that people who adhere to the custom of Lobolo view it as a significant custom that connects them with their ancestral spirits. Thus, payment of Lobolo embodies the language the ancestors understand and bless.

Ngema points out that some communities regard the failure to pay Lobolo as symbol of bad luck which may result in the bridegroom facing difficulties if he resists the payment of Lobolo. In addition, he highlights that there is a belief among traditionalists as well as non-traditionalists that a woman for whom Lobolo was not delivered will not have children. This goes without saying that the payment of Lobolo has nothing to do with fertility, but it is believed that the ancestors will not allow the bride to conceive.

The South African Law commission has acknowledged that: "The payment of Lobolo serves as a 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 is also the language that the ancestors understand and bless. According to Ngema, payment of Lobolo also grants the father parental rights with regards to the children. Failure to pay takes away the father's parental rights with regards to the child or children" [9].

It is further argued that the payment of Lobolo by the husband guarantees that the husband will treat his wife well. It is also submitted that payment of Lobolo also symbolizes the love the husband has for his love and how he is prepared to take care of the wife and the children. They further argue that non-payment of Lobolo degrades the dignity of the woman.

The following section discusses the cultural implications if the custom of Lobolo is not paid.

#### **Cultural implications if the custom of Lobolo is not followed:**

Some communities are of the view that men who do not pay Lobolo do not consider themselves married and are more likely to abandon their woman. This implies that a man has more to lose if he abandons his wife after payment of Lobolo because he would have lost all his money.

Those who believe in the custom see it as a mechanism that reduces divorces among people who paid Lobolo in consideration to a customary marriage. As highlighted above, the payment of Lobolo by the prospective husband to the prospective wife grants him status in the community.

Thus, a failure to pay Lobolo may render that prospective husband disrespected by the community for failing to pay Lobolo. Some communities are of the opinion that failure to pay Lobolo might also bring bad luck to the union and the bridegroom may encounter difficulties if he resists the payment of Lobolo [10].

In addition to the lack of recognition by the community, some communities are of the view that ancestors will not regard that union as a marriage and may not bless the couple or bring fortunes to their union. Thus meaning, they might have difficulties having children or having a stable home.

**Legal implications of the custom of Lobolo:** Here a brief explanation of how courts have interpreted the custom of Lobolo will be discussed. As previously mentioned, Ngema rightly points out that the payment of Lobolo determines parental rights of the father. If a prospective husband or his family fails to pay Lobolo, he and his family are denied parental rights to the child. This notion was of course rejected by the court in the case of *Hlophe v Mahlalela* 1998 1 SA 449 (TPD).

In this case, the father of minor children applied for custody of his minor children after the death of his wife. Upon inspection it was found that the applicant had not fully paid the Lobolo price. The family of the deceased argued that custody should not be awarded to the applicant by virtue that he had not paid the full Lobolo price.

The court in deciding this matter held that, "The principle of best interest of the child takes precedence over the basic principles regulating custody in customary law".

This judgment indicates that the Constitutional principle of the best interests of the child trumps the customary practice of Lobolo regarding the interests of children. The significance of this case in this study shows how courts interpret the custom.

There is a belief among followers of the custom of Lobolo that failure to pay the Lobolo price invalidates the marriage.

This notion according to our courts remains unclear. What follows next is a discussion of court decisions where the court declared that Lobolo is not a requirement and a discussion of where the court held in the opposite.

In the case of *Cheche v Nondabula* 1962 NAC 23 (S), the court held that "Payment of Lobolo is not essential for to the validity of a civil or Christian marriage" [11].

The court further held that "Should Lobolo be paid in a civil marriage, the Lobolo contract is ancillary to the marriage contract and must be subject to a special agreement and cannot be implied".

Of course, the latter case deals with civil marriages regulated by the Marriages Act 25 of 1961. This study is mainly focused with the validity of customary marriages regulated by the Recognition of Customary Marriages Act.

In the case of *M v K* (2017/2016), the court was faced with the question of whether was a valid customary marriage concluded between the parties. The defendant had argued amongst other things that a valid marriage occurred because he had paid the full Lobolo price.

The court in this case held that, "Even if payment of lobola is properly alleged and proved, that alone could not render a relationship a valid customary marriage in the absence of the other essential requirements".

The court in this case concluded that, "Despite the payment of lobola in full by the Plaintiff, no valid customary marriage exists between the Plaintiff and the Defendant".

In the case of *ND v MM* 2020 ZAGPJHC 113 it was held that, "Lobolo should not be deemed essential for the validity of a customary marriage. If parties wish to give Lobolo, they should be free to do so, but payment or non-payment should have no effect on the spouses' relationship or on their rights to any children born of the marriage".

Despite the above-mentioned cases all agreeing that Lobolo is not a requirement of a valid customary marriage, the court case of *Tsambo v Sengadi* [2020] ZASCA 46 reached a different conclusion. In this case, there was a dispute as to whether did a valid customary marriage occur between the plaintiff and the deceased.

The plaintiff argued that a valid customary marriage occurred because, there was a payment of Lobolo and the handing over of the bride to the husband's family. The court in this case held that a valid customary marriage had occurred and that all requirements set in section 3 of the Recognition of Customary Marriages Act were met. The court further held that, There was no basis for the high court to declare that the handing over custom was unconstitutional.

**Conclusion :** The courts are not unanimous about whether or not Lobolo is a requirement or not. Thus, it remains open to debate. What this does is to leave the question whether is the custom of Lobolo indispensable in a Constitutional era considering the potential it has in the violation of the human dignity of women.

### **Chapter three: Factors used to calculate Lobolo viewed against the right to human dignity**

The previous chapter focused on the factors used to calculate the Lobolo price. The aim of this chapter is to investigate whether those factors used to calculate Lobolo infringe upon the right to human dignity. In reaching an acceptable answer to the latter question the following will be done in this chapter:

- a. Firstly, human dignity will be defined,

b. Thirdly, the practice of Lobolo in a Constitutional dispensation will be explored,

c. Finally, an analysis of whether the factors used to calculate Lobolo meet the standard set for human dignity will be discussed.

What follows next is a discussion of the right to human dignity.

**The right to human dignity:** Human dignity has no specific definition attached to it. The meaning of it defers for everyone but it may be described as the belief that all people hold a special value that is tied to their humanity. This right is expressly mentioned in sections 1, 7, 10, 36, 39 of the Constitution.

Section 1 of the Constitution provides that “South Africa is a democratic state founded on the values of human dignity, equality and freedom”. Section 7 of the Constitution also emphasizes on the premise that the rights contained in the Bill of Rights are subject to the values of human dignity, equality, and freedom.

Section 10 of the Constitution provides that “everyone has inherent dignity and the right to have their dignity respected and protected”. Steinman is of the opinion that the words “everyone has an inherent dignity” means that the right to human dignity cannot be subjected to limitation and proportionality in terms of section 36 of the Constitution (limitation clause).

Section 36 provides that: “The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom including a list of factors” [12].

Section 39 contains a mandatory clause that directs the courts, tribunals, or any forum to promote the values of human dignity, equality and freedom whenever interpreting the Bill of Rights.

The above provisions highlight that the right to human dignity is a highly regarded right that must be protected and promoted in all legislation, customs or conduct of the state or individuals.

According to Kant, “Dignity designates a value that has no equivalent that is that which is beyond price”. He famously stated that “each person must always be an end in himself.” This implies self-worth of all human beings regardless of their gender or role in society. Schachter expresses his view on dignity by stating that dignity is the “respect for the intrinsic worth of a person requires that the person is entitled to have his or her own beliefs, attitudes, ideas and feelings.”

Justice Chaskalson expressed his opinion on human dignity by stating that “in a broad and general sense, respect for dignity implies respect for the autonomy of each person, and the right of everyone not to be devalued as a human being or treated in a degrading or humiliating manner”. Professor Catharine Mackinnon asserts that “deprivation of dignity is often a powerful dimension of the substance of inequality.”

What the above-mentioned authors seem to suggest is that the right to human dignity is a right that is fundamental to all and may not be unjustifiably limited.

What follows next is the discussion of the practice of Lobolo in a Constitutional dispensation.

**The practice of Lobolo in a constitutional dispensation:** It goes without saying that the custom of Lobolo is an old age custom which originates from a period where the Constitution existed as the supreme law of the country. Since its promulgation, the Constitution has been influential in abolishing and aligning customary law practices to

conform to the provisions contained in the Constitution.

An example of this can be found in the court case of *Bhe v Magistrate Khayelitsha* 2005 (1) BCLR 1 (CC). In this case, the court declared the practice of male primogeniture unconstitutional on the basis that it violated upon the right to equality and human dignity.

In the case of *Mabena v Letsoalo* 1998 (2) SA 1068 (T), the court developed the customary law practice that did not allow women to negotiate Lobolo negotiations to permit this. This is because the custom initially unfairly discriminated against women.

In the case of *Shilubana and Others v Nwamitwa* (2008) 9 BCLR 914 (CC), the court had to determine whether the decision of the Royal family of amending their customary laws so that they could permit Ms Shilubana to inherit was correct.

The court in this held that the decision of the Royal family to permit Ms Shilubana was correct because section 211(2) permitted the Royal family to amend their laws to allow a female to inherit. The court further held that the Royal family acted within the ambit of the rights contained in the Constitution because they permitted a female to inherit who are often subjected to discrimination.

Again, in the court case of *Mayelane v Ngwenyama and Another* (CCT 57/12) [2013] ZACC 14 the court held that:

“The consent of the first wife in a polygamous marriage is a requirement for a subsequent marriage of her husband to be valid, even though the Recognition of Customary Marriages Act is silent on the issue”.

The latter decision shows how the court was able to bring a customary law tradition to be in line with the Constitution as it to have it permit women to be consulted with regards to polygamous marriages.

The above case law highlights the Constitutional duty courts have to develop the customary law in order for it to meet the provisions contained in the Bill of Rights. The latter cases also display how the Constitutional court is able to align, limit or abolish well established customary practices to conform with the Constitution.

Below is a discussion of the critical analysis of whether the factors used to calculate Lobolo meet the standard set for human dignity

**Critical analysis of whether the factors used to calculate Lobolo meet the standard set for human dignity:** Chapter two explored the factors used to calculate Lobolo. It was established that those factors include but not limited to royalty, virginity, marital status, level of education and the ability to cook, clean and take care of the children.

Subjecting women to a custom that focuses on their virginity as a deciding factor determining how high or low the Lobolo price is may infringe upon her right to human dignity. Consider the following examples:

If a woman has lost her virginity her Lobolo price subsequently decreases as a direct consequence to this. What this does is to devalue her worth as a woman because she becomes a victim of humiliation and degrading names from her family for losing her virginity before marriage.

This may lead to the subsequent violation of her human dignity because Justice O’Regan in the case of *S v Makwanyane* 1995 (6) BCLR 665 (CC) asserted that:

“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 degradation and humiliation of females who are not virgins does not meet the standard set for human dignity.

A woman who was previously married or has children and wishes to re-marry is susceptible to receiving a lower Lobolo price when compared to woman who is not married and has no children. This is discrimination on the grounds of marital status which is a listed ground in section 9 of the Constitution.

This factor poses the ability to lead to the violation of human dignity. To support this premise, I will make use of the Hoffman v South African Airways 2001 1 SA 1 (CC). The court in this held that:

“The interests of the community lie in the recognition of the inherent dignity of every human being and the elimination of all forms of discrimination”.

The latter factor places importance on a prohibited ground in the Constitution. Section 9 of the Constitution stipulates that discrimination on any listed ground leads to unfair discrimination.

All these factors mentioned above are not imposed on men. His marital status, level of education and virginity do not play any role during Lobolo negotiations which indicates the ever-increasing inequality between men and women. Vengasai is of the view that Lobolo leads to power shifts which result to a system of patriarchy and gender-based violence. This apparent inequality infringes upon the right to human dignity and equality of females.

Courts have the duty to align, limit or abolish any form of conduct or law that is inconsistent with the Bill of Rights. The continued practice of Lobolo poses the risk of violating the right to human dignity. Thus, it still remains open to debate as to whether the custom of Lobolo is justifiable in a Constitutional era. The answer to the latter question can only be provided by the Constitutional court.

#### **Chapter four: The limitations imposed on the right to religion, culture and cultural practices:**

In the previous chapter we dealt with the right to human dignity and how the practice of Lobolo may infringe upon this right. This chapter intends on building on the premise raised in the latter chapter however, the main focus in this chapter will be placed on the internal limitations imposed by sections 15, 30 and 31 of the Constitution. The arguments for the custom of Lobolo will also be explored. To conclude this chapter section 36 of the Constitution will also be discussed regarding the general limitation of rights.

What follows next is a discussion of the rights contained in sections 15, 30 and 31 of the Constitution.

**Rights contained in the constitution: Section 15 - The right to freedom of religion, belief, and opinion:** According to this section everyone has the right to freedom of conscience, religion, thought, belief, and opinion. Section 30 – The right to language and culture. This section stipulates that “Everyone has the right to participate in the cultural life of their choice.” Section 31 – The right to cultural, religious, and linguistic communities

This section provides that Persons belonging to a cultural, religious, or linguistic community may not be denied the right, with other members of that community-

a. To enjoy their culture, practice their religion and use their language.

b. To form, join and maintain cultural, religious, and linguistic associations and other organs of civil society.

Below is a discussion of how the latter mentioned rights were interpreted in the case of MEC for Education: Kwazulu-Natal and Others v Pillay (CCT 51/06) [2007] ZACC 21.

This case involved a pupil who was denied by the school’s code of conduct to wear a nose stud because it was against the code. The student of course did not take kindly to this because wearing of a nose stud formed part of her Hindu tradition. On appeal, the Constitutional court had to confirm whether the decision taken by the High Court was indeed correct. The High Court had held that the code adopted by the school unfairly discriminated against the pupil.

The court in this case held that the code violated the learners rights contained in sections 15, 30 and 31 because the code unfairly discriminated against her right to tradition, religion, and cultural practice which are prohibited grounds listed in section 9(3) of the Constitution. The court ordered the school to adopt a code that provided for reasonable accommodation for students in the same circumstances as the learner.

The significance of this case in this study is to show how courts protect and promote the rights mentioned. This case is also of significance because it supplements the argument brought forth by the people who practice the custom of Lobolo.

Below is a brief discussion of the support of the custom of Lobolo

**Arguments for the support of the custom of Lobolo:** People who practice the custom of Lobolo argue in the same light as the case mentioned above. They argue that the custom forms an integral part to their right to religion, tradition, cultural practice. They argue that the practice of Lobolo does not discriminate, nor does it violate the dignity of woman. They argue that the non-payment of Lobolo rather is a factor that degrades the woman and impairs her dignity.

They further argue that custom enables girls to preserve their virginity and not fall victim to gruesome statistics of teenage pregnancy. They further argue that the payment of Lobolo shows how much the man loves his wife and how ready he is to support his family.

## **Conclusion**

It is important to mention that the purpose of this study is not to call for the abolition of the custom of Lobolo but a call for the custom to be aligned with the values entrenched in the Constitution. The same rights that enable the custom to be practiced contain internal limitations that prohibit these rights to be practiced if they violate other provisions contained in the Constitution.

## **Acknowledgement**

None

## **Conflict of Interest**

None

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