

Reconciling *Lobolo* with the Equality Principle: The need to realign official customary law with living customary law of South Africa

Shammah Boterere

LLB; LLM; LLD (UP)

Assistant Lecturer, Department of Private Law, University of Pretoria

Charles Maimela

LLB; LLM; LLD (UNISA)

Associate Professor, Department of Private Law, University of Pretoria

SUMMARY

Much scrutiny has recently been directed towards African customary law mostly because of its traditionally patriarchal nature, which conflicts with the inalienable constitutional principle of equality. The landmark decision of *Mabena v Letsoalo* 1998 2 SA 1068 (T) comes to the fore wherein the High Court fostered constitutional values and championed living customary standards in respect of a *lobolo* dispute. This paper builds on this decision and undertakes desktop research on the potentially unfair discrimination of women in respect of the *lobolo* practice under official customary law. In this respect, gender validates *lobolo* under the Recognition of Customary Marriages Act 120 of 1998 (the Recognition Act) in that only the prospective husband or the head of his family has a duty to furnish *lobolo* while only the bride's family head may receive the *lobolo*, at the exclusion of all others. In consideration of this, the paper sets out to evaluate whether the statutory gender requirement can survive constitutional scrutiny because it potentially marginalises women. The overarching aim of this paper is to analyse the obstacle that section 1 of the Recognition Act places on prospective brides by hindering them from furnishing *lobolo* to the family head of a prospective husband in consideration of a customary marriage. Furthermore, the paper also explores whether this prohibition aligns with the needs of contemporary society and whether the prohibition amounts to unfair discrimination. This being said the paper concludes that the Recognition Act's *lobolo* gender requirement is unjustifiable and violates women's human rights, and law reform is necessary to align official customary law with living customary law and constitutional values.

1 Introduction

The South African Law Reform Commission has recently taken steps to modernise the fragmented approach to family law in South Africa by proposing the introduction of a consolidated statute regulating marriages.¹ Once it comes into operation, the statute will regulate customary marriages, civil marriages, civil unions and religious marriages.² In respect of the Single Marriage Statute, it provides that *lobolo* distinguishes customary marriages from civil unions and civil marriages.³ Although *lobolo* is not the only distinction, it is the only factor outlined therein. This, among others, points to the importance of *lobolo* to customary marriages and indigenous communities in general. The Recognition Act, which currently regulates customary marriages, refer to *lobolo* as property in cash or kind, which a prospective husband or the head of his family undertakes to give to the head of the prospective wife's family in consideration of a customary marriage.⁴ It is therefore deductible that gender plays an important role in validating *lobolo* in that only the prospective husband or his family head has a duty to furnish *lobolo* while only the prospective wife's family head may,⁵ receive the *lobolo*, at the exclusion of all others. This is hereinafter regarded as a statutory gender requirement of *lobolo* in that the Recognition Act prescribes a gender requirement that must be followed during the *lobolo* practice.

This discussion evaluates whether the statutory gender requirement can withstand constitutional scrutiny to the extent that it potentially

-
- 1 See, in general, South African Law Reform Commission – Project 144 Single Marriage Statute Issue Paper 35 (hereinafter the Single Marriage Statute). The South African Law Reform Commission was previously referred to as the South African Law Commission and its main objective is to do research concerning all branches of the law to make recommendations to the government for the development, improvement, modernisation or reform of the law (hereinafter the Law Commission). At present three different pieces of legislation regulate family law in South Africa. Customary marriages are regulated by the Recognition of Customary Marriages Act 120 of 1998, (the Recognition Act), while civil marriages and civil unions are respectively regulated by the Marriages Act 25 of 1961 and the Civil Unions Act 17 of 2006. See *Bwanya v Master of the High Court, Cape Town* 2021 ZACC 51 regarding permanent life partnerships.
 - 2 The proposed introduction of a consolidated statute regulating family law is in line with international trends. Zimbabwe has recently introduced the consolidated Marriages Act [ch 5:15] which commenced on 16 September 2022, which regulates customary marriages and civil marriages, and introduced civil partnerships – a novel feature in Zimbabwe's legal system.
 - 3 See Single Marriage Statute 17.
 - 4 See s 1 of the Recognition Act. *Lobolo* can also be referred to as *bogadi*, *bohali*, *xuma*, *lumalo*, *thaka*, *ikhazi*, *magadi*, *emabheka* or by any other name.
 - 5 Acceptance of the *lobolo* is considered consent for customary marriages. Therefore, if the bride's parents/guardians do not consent to the marriage, they may refuse to accept the *lobolo*. See Himonga and Nhlapo (eds) *African customary law in South Africa: post-apartheid and living law perspectives* (2014) 189.

marginalises women in South Africa. This inquiry is guided by the landmark decision of *Mabena v Letsoalo*,⁶ and it answers whether the official customary law permits *lobolo* to be transferred to a prospective husband or his family head by a prospective bride or her family head in consideration of a customary marriage.⁷ The *Mabena* decision is important for this discussion because the court relied on living customary law in a matter relating to *lobolo*, which forms the subject of this paper. Because a comprehensive analysis of the *Mabena* decision has already been undertaken by several scholars, this discussion only focuses on the impact that this decision may have on the statutory gender requirement and makes necessary recommendations.⁸ This inquiry is important because it is set in the background of an active reform initiative by the Law Commission, which necessitates an overhaul of family law practices to ensure that they are suited to the needs of contemporary society before incorporation into legislation.

In respect of *lobolo*, it plays an important social role in civil marriages,⁹ and it is fundamental in the formulation of customary marriages.¹⁰ Over the years, *lobolo* has survived an onslaught of colonial overreach; however, empirical evidence indicates that it continues to be valued and practised in many indigenous communities across South Africa.¹¹ The continued significance of *lobolo* was to some extent propelled by the exclusion of *lobolo* from the repugnancy clause during the pre-democratic era.¹² It is however noteworthy that some researchers argue that the *lobolo* practice is insignificant and has no value in modern societies.¹³

Another aspect of contestation regarding *lobolo* is whether its conclusion is essential in validating customary marriages. To this end, some commentators argue that *lobolo* negotiations constitute a validity requirement and failure, which invalidates the customary marriage.¹⁴

6 *Mabena v Letsoalo* 1998 2 SA 1068 (T).

7 Although this analysis may be extended to same-sex couples, civil unions are not discussed here because no firm empirical research has been undertaken regarding the significance of *lobolo* to such marriages.

8 See, i.e., Bennett "Re-introducing African customary law to the South African legal system" 2009 *American Journal of Comparative Law* 13; and Mwambene "The essence vindicated? Courts and customary marriages in South Africa" 2017 *African Human Rights Law Journal* 35–54.

9 Prinsloo, Van Niekerk and Vorster "Perceptions of the law regarding, and attitudes towards, 'lobolo' in Mamelodi and Atteridgeville" 1998 *De Jure* 89.

10 *Fanti v Boto* 2008 5 SA 405 (C) para 20.

11 See, among others, Prinsloo, van Niekerk and Voster 1998 *De Jure* 77–8 where an overwhelming majority of the respondents in a survey indicated that a customary marriage cannot come into existence without *lobolo* being delivered. Also see Shope "'Lobola is here to stay': Rural black women and the contradictory meanings of lobolo in post-apartheid South Africa" 2006 *Agenda: Empowering Women for Gender Equity* 69.

12 See s 11(1) of the Black Administration Act 38 of 1927. Also see s 1(1) of the Law of Evidence Amendment Act 45 of 1988.

13 See Knoetze "The modern significance of lobolo" 2000 *Journal of South African Law* 523 and all references made therein.

However, other commentators dispute this assertion and argue that *lobolo* merely has a social significance and non-conclusion thereof does not affect the validity of the marriage.¹⁵ The former is not preferred because it has far-reaching consequences, which is not the intention of the legislature. It is however noteworthy that a perception exists in some indigenous communities that a customary marriage is not valid if *lobolo* negotiations are not concluded.¹⁶

In respect of the main aim of this discussion, it proposes law reform by, *inter alia*, repealing the potentially unconstitutional statutory provisions of the Recognition Act that result in the differential treatment of women. To this end, the Recognition Act unjustifiably inhibit women from validly transferring *lobolo* to a prospective husband's family in consideration of a customary marriage, which, as shall be seen below, is a violation of women's human rights. In pursuit of this goal, this discussion is structured as follows. First, an introductory overview is provided in paragraph one. This is followed by a brief discussion of the *Mabena* decision in paragraph two. This discussion is important because it guides the analysis that follows. Thereafter, an evaluation of the main functions of *lobolo* is undertaken in paragraph three. This paragraph is fundamental because it highlights the *nexus*, or lack thereof, between the statutory gender requirement and the functions of *lobolo*. After this discussion, an evaluation of the impact of constitutional principles is undertaken in paragraph four. Lastly, a conclusion is drawn in paragraph five and a summary of recommendations provided throughout this paper is provided.

2 *Mabena v Letsoalo*

The facts of the *Mabena* case are briefly as follows. The deceased, Mr Joseph Mabena, who passed away on 23 April 1994 had along with his two delegates concluded *lobolo* negotiations with the respondent; The respondent's mother and the respondent's uncle.¹⁷ During the

14 Posel and Rudwick "Marriage and bridewealth (*ilobolo*) in contemporary Zulu society" 2014 *African Studies Review* 51–72; Mwamwenda and Monyooe "Status of bridewealth in an African culture" 1997 *Journal of Social Psychology* 270.

15 See Horn and Janse van Rensburg "Non-recognition?: Lobolo as a requirement for a valid customary marriage" 2002 *Journal for Juridical Science* 170–9. Also see Koyana *Customary law in a changing society* (1980) 5 where it was pointed out that: "*Ikhazi* has been correctly described as the rock on which the Africans' marriage is founded, and thus an essential feature of the marriage. Without transfer thereof the existence of a marriage is under a big question mark even if the parties are living together and beget children. It goes without saying, therefore, that in our law, as in other legal systems, marriage is a matter of family law. But marriage is also a matter of obligations. There must be agreement between the woman's guardian and her intending husband. The woman's guardian renders performance by transferring the bride to the man. The husband makes a counter-performance by delivering *ikhazi*."

16 Prinsloo, van Niekerk and Voster 1998 *De Jure* 77–8.

negotiations, an amount of R600 was agreed upon as *lobolo*. The deceased had also in 1988 paid R200 towards “damages”¹⁸ for the pregnancy of the respondent.¹⁹ During the time of his death, Mr Mabena lived with the respondent along with their child in the house he had purchased in Mamelodi, a township in Pretoria.²⁰

Upon the death of Mr Mabena, the magistrate determined, according to the provisions of the Black Administration Act,²¹ that a valid customary marriage existed between the respondent and the deceased, Mr Mabena. The deceased’s father lodged an appeal against the magistrate’s findings on the basis that he had not consented to the customary marriage, therefore the marriage did not satisfy the necessary validity requirements.²² Furthermore, he challenged the *lobolo* negotiations, which were concluded in the absence of the respondent’s father. In respect of the latter issue, the respondent presented before the court that her father had deserted his family. In light of this, she argued that living customary law recognises *lobolo* negotiations concluded in the absence of a male family head.²³

Because the marriage was concluded before the Recognition Act came into force,²⁴ the marriage should have complied with the requirements that applied before this statute came into operation.²⁵ As a result, consent from the deceased’s parents regarding the marriage was essential to validate the marriage.²⁶ In respect of this requirement, the court held that there is no reason to hold that an independent adult man is not entitled to negotiate for the payment of *lobolo* in respect of his chosen bride. Furthermore, the court held that there is no reason to hold that such an independent man requires the consent of his parents to marry. In respect of the second matter, namely, the absence of the respondent’s father during the *lobolo* negotiations; the court held that the rule that a woman who is head of her family may negotiate for and receive *lobolo* is not repugnant to the customary law of marriage.²⁷ Consequently, the court determined that it must be accepted that there are instances where mothers negotiate and receive *lobolo* and consent to the marriage of their daughters.²⁸ As a result, the court dismissed the appeal with costs.

17 *Mabena v Letsoalo* para 1073.

18 See Himonga and Nhlapo (2014) 203–6.

19 *Mabena v Letsoalo* para 1070.

20 As above.

21 38 of 1927.

22 *Mabena v Letsoalo* para 1073.

23 *Mabena v Letsoalo* para 1074.

24 The Recognition Act came into operation on 15 November 2000.

25 See ss 2(1)–(3) of the Recognition Act. Also see South African Law Commission 1998 *Report on Customary Marriages* 18–20.

26 See Jansen “Customary family law” in Rautenbach (ed) *Introduction to legal pluralism in South Africa* (2010) 51.

27 *Mabena v Letsoalo* para 1074.

28 As above.

The main implication of the *Mabena* decision, which is of interest in this discussion, is that the court recognised living customary law standards by validating *lobolo* negotiations concluded by the mother of the bride. This decision is also important because the court developed customary law in accordance with the spirit, purport and objects of the Bill of Rights.²⁹

However, some commentators have argued that any empirical evidence indicating the actual position under living customary law does not support the living customary law principle applied by the High Court. To this end, Bennett points out that the court recognised the purported living customary law principle because it “was consonant with the requirement of gender equality in section 9 of the Constitution”.³⁰ Although this warrants further discussion, we do not explore this further because this might derail the purpose of this paper. It is nonetheless noteworthy that this decision set an important precedent that the judiciary must recognise and apply living customary law whenever it is called upon to do so and that the judiciary must develop customary law in line with constitutional values.

In light of the foundation laid by the High Court in the *Mabena* decision, this paper evaluates the Recognition Act’s gender requirement in the definition of *lobolo*, which side-lines women in South Africa. To this end, official customary dictates that *lobolo* may only be statutorily recognised if it is transferred by a prospective husband or his family head to the family head of a prospective bride. This marginalises women in that a prospective bride is inhibited from transferring *lobolo* to the family of a prospective husband in consideration of a customary marriage even in circumstances where the bride is better positioned than her prospective husband. This includes where the prospective bride is in a better financial position allowing her to furnish the *lobolo*.

This however starkly contrasts the position under living customary law where several cases have been recorded wherein brides or their families have successfully transferred *lobolo* to families of prospective husbands in consideration of a customary marriage. Because of this differential treatment, there is a glaring *lacuna* in official customary law and the discussion that follows argues for law reform in respect of the definition of *lobolo* by the Recognition Act. To achieve this, an analysis of the functions of *lobolo* is undertaken hereinunder aiming to determine whether gender plays any role in fulfilling these functions. To this end, this discussion highlights the *nexus*, or lack thereof, between *lobolo* and the statutory gender requirement. Suppose that this discussion concludes that there is no link between the functions of *lobolo* and the statutory gender requirement, recommendation is provided, which aims to eradicate the discrimination. This is achieved by proposing a gender-

29 *Mabena v Letsoalo* para 1069. Also see s 39(2) of the Constitution of the Republic of South Africa, 1996.

30 Bennett 2009 *American Journal of Comparative Law* 13.

neutral definition of *lobolo* in section 1 of the Recognition Act. Although a gender-neutral definition is preferred, this should not be read to accommodate same-sex unions because no firm empirical evidence exists regarding the significance of *lobolo* to such unions.³¹

3 The purpose and function of *lobolo*

Knoetze, correctly summarises the functions of *lobolo* as mainly: (1) contract of sale; (2) counter-performance for the transfer of guardianship over the wife; (3) seeking approval from the ancestral gods; (4) legalising the marriage and legitimising the children; and (5) providing stability to the marriage and to ensure maintenance for the wife after the dissolution of the marriage.³² Olivier, also provides that *lobolo* serves to

legalise the marriage, to legitimate the children born of the women, to act as a form of compensation in a general sense, to place the responsibility upon her father to support her if it should become necessary, to stabilise the marriage, and to ensure the proper treatment of the wife by the husband and his family. It is clear, however, that the primary function of the *lobolo* is to transfer the reproductive capacity of the woman to the family of her husband; in other words, there is a direct correlation between (a) the transfer of the *lobolo*, and (b) the reproductive potential of the woman.³³

These main functions are discussed below. It should be noted at the onset that the discussion that follows aims to position the main focus of this paper in its proper context. This discussion crucially highlights the link, or lack thereof, between the functions of *lobolo* and the statutory gender requirement. The overarching questions that this discussion answers are as follows: (i) Is the statutory gender requirement important in fulfilling the functions of *lobolo*? and (ii) Do the traditional functions of *lobolo* suit the needs of contemporary indigenous communities?

First, this analysis focuses on the economic function of *lobolo*. In the main, this function holds that *lobolo* is generally intended to compensate the wife's family head and to place the responsibility of support upon him in case of dissolution of the marriage. It is plausible that the economic function of *lobolo* is rooted in the traditional socio-economic and political incapacitation of women in indigenous communities. This incapacitation emanates from the patriarchal nature of African

Customary law, which only recognised male family heads.³⁴ This was concretised in legislation, which relegated women to perpetual minors.³⁵ As a result, male family heads were obliged to support their immediate and, at times, extended family members. Therefore, *lobolo* was

31 See Osman and Baase "The recognition of same-sex customary marriages under South African customary law" 2022 *South African Journal on Human Rights* 13–5 for a discussion of the non-recognition of same-sex marriages and the potential role of *lobolo* in such unions.

32 Knoetze 2000 *Journal of South African Law* 532–3.

33 Olivier, Bekker and Olivier *Indigenous Law* (1995) 33.

important because it transferred the family head's financial responsibility over a female dependent to the prospective husband. Additionally, *lobolo* compensated the family head for the expenses he incurred while taking care of the bride while under his care. Lastly, *lobolo* was also security enabling a family head to support the bride if the marriage was dissolved.

In light of the above, it may be surmised that the statutory gender requirement of *lobolo* was justifiable because of the *nexus* between *lobolo* and gender. In summary, *lobolo* facilitated the protection of women's interests by ensuring their sustenance during the existence of the customary marriage as well as after its dissolution.³⁶ However, it is debatable whether this function applies in contemporary societies because of the recent shift in the socio-economic and political status of women in South Africa.

The recent effort towards financial literacy has been pivotal in emancipating women.³⁷ Although the socio-economic and political inequality between men and women continues to exist in some indigenous communities, it is noteworthy that women are presently better positioned in some respects.³⁸ This is also set to improve further because of measures such as affirmative action, which promotes the interests of women and other previously disadvantaged groups.³⁹ Because of the shift in respect of the socio-economic and political status of women, we argue that the economic function of *lobolo* has thus become obsolete. Women are no longer dependent on their male counterparts; therefore, the economic function of *lobolo* that justified the statutory gender requirement no longer aligns with the needs of a changed society.

Secondly, it is widely held that *lobolo* serves a legal function. Many debates have arisen regarding this function with some commentators arguing that *lobolo* constitutes an essential feature of customary marriages, which validates the marriage.⁴⁰ However, other

34 It should be noted that some indigenous communities are matrilineal such as the Balobedu community. However, this community has recently changed to resemble a patrilineal community. See, in general, Motasa and Nortje-Meyer "Patriarchal usurpation of the Modjadji dynasty: A gender-critical reading of the history and reign of the Modjadji Rain Queens" 2021 *Pharos Journal of Theology* 1–14.

35 See Samuel "Women married in customary law: No longer permanent minors" 1999 *Agenda: Empowering Women for Gender Equity* 23–31.

36 At the dissolution of the customary marriage by death or divorce the bride may continue to belong to her marital family or she may traditionally return to her paternal family. If she returns to her paternal family, the family head reassumes his duty of care over her.

37 See, among others, South African History Online "History of women's struggle in South Africa" <https://bit.ly/3xf9Ke5> (last accessed 2021-07-04).

38 See Kollamparambil and Razak "Trends in gender wage gap and discrimination in South Africa: a comparative analysis across races" 2016 *Indian Journal of Human Development* 49.

39 See ch III of the Employment Equity Act 55 of 1998.

commentators reject this assertion and argue that *lobolo* does not affect the validity of customary marriages.⁴¹ The divergence of views is largely fuelled by the legislature's silence on this matter along with the seemingly contradictory decisions by the judiciary regarding this area of indigenous law. Much of the debate regarding the legal function of *lobolo* is developed from the open-ended requirement that customary marriages must be "negotiated and entered into or celebrated in accordance with customary law".⁴² In respect of this debate, the Law Commission has 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 spouses' relationship or on their rights to any children born of the marriage.⁴³

Thirdly, *lobolo* also serves a spiritual function. To this end, it is put forward that *lobolo* facilitates approval from ancestors in the marriage process and unites the two kinship groups. Customary marriages starkly contrast civil unions and civil marriages in that customary marriages involve two kinship groups from the period of formation until the dissolution of the marriage.⁴⁴ *Lobolo* unites the living and dead members of the two kinship groups. This also gives rise to the belief in the indissoluble nature of customary marriages either through death or divorce.⁴⁵

Lastly, it is also held that one of the main functions of *lobolo* is in relation to reproduction. To this end, it is argued that *lobolo* transfers the reproductive capability of the bride to the family of her husband.⁴⁶ However, as pointed out above, the recent socio-economic and political reforms have freed women from societal expectations that relegated them to childbearing and child-rearing roles.⁴⁷ This has led to a growing number of young adults opting not to reproduce.⁴⁸ Because of these

40 See, among others, Muller-Van der Westhuizen "Family law" in Rautenbach (ed) *Introduction to legal pluralism* (2018) 93.

41 As above.

42 See s 3(a) of the RCMA, which outlines the requirements of a customary marriage as follows: "(a) the prospective spouses – (i) must both be above the age of 18 years; and (ii) must both consent to be married to each other under customary law; and (b) the marriage must be *negotiated* and entered into or celebrated in accordance with customary law [own emphasis]."

43 The South African Law Commission Project 90 *The harmonisation of the common law and the indigenous law: Report on customary marriages* para 4.3.3.14.

44 See Himonga and Nhlapo (2014) 92.

45 Himonga and Nhlapo (2014) 48.

46 Mkhize "This is ours ... why should [we] be exempt?": Black South African lesbian couples' experiences of identity in the lobola practice (PhD thesis 2019 Wits) 22; Posel and Rudwick 2014 *African Studies Review* 54.

47 See South African History Online "History of women's struggle in South Africa" <https://bit.ly/3xf9Ke5> (last accessed 2021-07-04).

48 Parker "Childlessness has been increasing in SA – by women's choice" <https://bit.ly/2UrySjy> (last accessed 2021-07-04).

developments in society, the paper then questions the current applicability of the reproductive function of *lobolo* in contemporary society. In this regard, we inquire whether the reproductive function applies where the bride and/or her husband do not desire to procreate or where either (or both) of the prospective spouses is barren. In such instances, the paper thus posits that the archaic reproductive function of *lobolo* no longer applies in a contemporary society where reproduction no longer constitutes the main aim of marriage.

In summary, it has been highlighted that traditionally there was a rational link between *lobolo* and gender. This link was most pronounced in the reproductive and economic functions of *lobolo*; the latter of which ensured the protection of women's interests. However, of late society has undergone seismic change, which has culminated in the elevation of the socio-economic and political status of women in indigenous communities. This change in status no longer warrants the specific protection of women through practices such as *lobolo*. In some instances, women are now better positioned than men and in a certain respect, some women have acquired the family head role.

Despite the reforms in indigenous communities, empirical evidence indicates that *lobolo* continues to be sacrosanct in most indigenous communities. To this end, a belief exists in some communities that marriage is not valid if *lobolo* negotiations are not concluded. Some researchers postulate that *lobolo* no longer serves the traditional functions and it continues to be practised because it is regarded as an essential feature of the culture of indigenous people across Southern Africa. It is in this context that the paper now questions the barrier imposed by the definition of *lobolo* by the Recognition Act on women and the impact of the inhibition on the right to practice one's culture.

4 Constitutional consideration

The Constitution is the supreme law of South Africa and every law, including customary law, inconsistent with it is invalid.⁴⁹ One of the principles that it safeguards is the right to equality and non-discrimination.⁵⁰ Discrimination is also prohibited by the Promotion of Equality and Prevention of Unfair Discrimination Act,⁵¹ which was enacted to give effect to the Constitution's prohibition of unfair discrimination. Although this statute has been instrumental in ensuring the protection of human rights for all South Africans, challenges have been experienced concerning customary law, which the judiciary has on several occasions been called to pronounce.⁵²

49 See s 2 of the Constitution.

50 Ss 9(1)–(3) of the Constitution.

51 4 of 2000.

52 See *Bhe v Khayelitsha Magistrate* 2005 1 BCLR 1 (CC). Also see *Shilubane v Nwamitwa* 2008 9 BCLR 914 (CC).

It should be pointed out that customary law is distinguished between living and official customary law. Living customary law is preferred over official customary law because it represents the lived experiences of indigenous people.⁵³ On the one hand, living customary law constantly evolves to meet the needs of the respective community, which it regulates. On the other hand, official customary law, which is the written customary law found in textbooks, statutes and other sources, is divorced from the needs of indigenous people and it requires a drawn-out legislative process to reform.⁵⁴ Therefore, when interpreting and applying the rigid rules of official customary law, it is important to take note of the political, judiciary and administrative context in which it was developed and applied.⁵⁵

In respect of the differences between living and official customary law, the *Mabena* decision was instrumental in pronouncing the need to rely on living customary law in so far as it reflects the lived experiences of indigenous people.⁵⁶ This decision is important for this discussion because of the glaring lacuna in official customary law. It has been highlighted that the Recognition Act inhibit a bride or her family from transferring *lobolo* to the family of a prospective husband in consideration of a customary marriage. This starkly contrasts the position under living customary law where several instances have been publicised where women have validly transferred *lobolo* to the families of prospective husbands in consideration of customary marriages.⁵⁷

The widely publicised case of Zodwa “Zodwa Wabantu” Libram, is an example.⁵⁸ In this case, Libram paid *lobolo* to the family of her ex-fiancé Ntobeko Linda in 2019 in consideration of a customary marriage. Although the parties did not end up concluding the customary marriage, the *lobolo* negotiations were widely reported as reflecting the reform of living customary law that has substantially evolved to meet the needs of a changed society.⁵⁹

The aforementioned example is not an isolated phenomenon, it represents a wider shift in perception towards *lobolo* in indigenous communities in South Africa and across various other Southern African countries.⁶⁰ This shift is propelled by, among others, the changed perception of *lobolo* by customary law practitioners who have pointed out that *lobolo* is patriarchal,⁶¹ and it perpetuates gender-based violence among married couples.⁶² These challenges regarding *lobolo* may be

53 See Himonga and Nhlapo (2014) 27.

54 Himonga and Nhlapo (2014) 33–4.

55 See *Alexkor Ltd v Richtersveld Community* 2004 5 SA 460 (CC) fn 51.

56 *Mabena v Letsoalo* 1073–4.

57 See Jama “I paid my own lobola because my husband couldn’t afford it. I’m not the first woman to do it” <https://bit.ly/42IITaF> (last accessed 2023-03-22).

58 See Boshoff “Breaking the rules: Zodwa Wabantu and postfeminism in South Africa” 2021 *Gender and Media: Related Trends in Theory, Methodology and Research Subjects* 52–61.

59 As above.

eradicated by aligning official customary with living customary law, which represents a forward-looking position that balances culture and the socioeconomic and political demands of the prevailing society.

4 1 The right to equality and culture

Because of the changes in living customary law relating to the *lobolo* practice, we argue that law reform is necessary to ensure that official customary law reflects the lived experiences in indigenous communities and the constitutional prescripts that guide law in South Africa. However, like the *Mabena* decision, one might argue that the purported reforms under living customary law do not reflect the position in most indigenous communities; therefore, an inaccurate representation of living customary law. Although further analysis may reveal that this assertion may largely be true; we hold that the definition of *lobolo* under section 1 of the Recognition Act is inconsistent with the Constitution, thus null and void. As a result, the extent of application of the purported living customary law practice is moot because of the inconsistency of the official customary law position with the Constitution. The definition of *lobolo* in section 1 of the Recognition Act is inconsistent with the Constitution in that it maintains the differential treatment between men and women in respect of *lobolo*.

In relation to this discussion, the Constitution guarantees equal protection and equal benefit of the law for all persons who find themselves in the same or similar positions. Section 9 of the Constitution provides that:

- (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 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.

60 See, in general, Heeren, Jemmott, Tyler, Tshabe and Ngwane “Cattle for wives and extramarital trysts for husbands? Lobola, men and HIV/STD risk behaviour in Southern Africa” 2012 *Journal of Human Behaviour in the Social Environment* 73–81 for an overview of the changes in the perception of *lobolo* in select Southern African countries.

61 Chiweshe “Wives at the market place: Commercialisation of lobola and commodification of women’s bodies in Zimbabwe” 2019 *The Oriental Anthropologist* 231.

62 Yarborough “Very long engagements: The persistent authority of bridewealth in post-apartheid South Africa community” 2018 *Law and Social Inquiry* 653.

- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

As indicated above, the Recognition Act only recognises *lobolo* transferred by a prospective husband or his family head to the family head of a prospective bride. Therefore, gender is important in validating *lobolo* because of this statutory gender requirement. This has the unintended consequence of differentiating between men and women who are currently generally similarly positioned, which starkly contrasts living customary law and contradicts the values of the Constitution.

In relation to the inequality inquiry at hand, the first test to determine a violation of section 9 of the Constitution is to establish whether a rule differentiates between people or groups of people.⁶³ Differential treatment has already been established above; therefore, the inquiry then shifts to establish whether there is a rational connection between the differentiation and whether a legitimate government purpose is achieved by the differentiation.⁶⁴

In respect of the issue under consideration, the differential treatment by the Recognition Act is a violation of the human rights of women and this arguably amounts to unfair discrimination. To this end, it must be noted at the onset that the Constitution permits fair discrimination while unfair discrimination is impermissible. Regarding this distinction, unfairness is presumed if the discrimination is on a specified ground.⁶⁵

In relation to *lobolo*, section 1 of the Recognition Act differentiates on the listed ground of gender; therefore, it is presumed that the discrimination is unfair. The court in *Prinsloo v Van der Linde* defined unfair discrimination as “treating persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity”.⁶⁶ We hold that the differential treatment between women and men under the official customary law outlined above is unfair and it serves no government purpose because this reflects the patriarchal nature of customary law, which impairs the fundamental dignity of women.

Lastly, it is also noteworthy that the Constitution also guarantees the right to culture.⁶⁷ This entails the right of individuals to enjoy their culture, practise their religion, use their language, and form and maintain cultural, religious and linguistic associations.⁶⁸ It has been pointed out above that the continued significance of *lobolo* in Southern African countries generally emanates from the belief that *lobolo* forms part of the

63 *Harksen v Lane* 1997 ZACC 12 para 52(a).

64 As above. Also see Currie and De Waal *The bill of rights handbook* (2013) 216.

65 *Harksen v Lane* para 52; De Vos and Freedman *South African constitutional law in context* (2014) 450.

66 1997 3 SA 1012 (CC) 1026 para 33.

67 See ss 30 and 31 of the Constitution.

68 As above.

culture of the people in those communities. Therefore, official customary law is inconsistent with the Constitution to the extent that section 1 of the Recognition Act unjustly inhibits women's right to practice the culture of their choice. This differential treatment between men and women further necessitates law reform, which this paper proposes, without compromising culture and belief.

5 Recommendations and conclusion

The article has highlighted the shift in the socio-economic and political position of women in indigenous communities in South Africa and select Southern African countries. This shift has led to law reform in respect of living customary law specifically in respect of the *lobolo* practice to accommodate the changed circumstances of women. In this regard, living customary law has on several occasions validated *lobolo* transferred by a bride to the family of a prospective husband in consideration of a customary marriage. This change has however not been reflected by official customary law where the Recognition Act prescribes a gender requirement, which entails that a prospective husband's family has a duty to transfer *lobolo* while the prospective bride's family may receive the *lobolo*, at the exclusion of all others.

This position under official customary law does not reflect the needs of a changed society and has been argued to amount to unfair discrimination of women because of the differential treatment. To remedy this discrimination, the paper proposes that the legislature amend section 1 of the Recognition Act by introducing a gender-neutral definition of *lobolo*, which will align official customary law with living customary law and meet the constitutional muster.

Because of the unique position of customary law, a distinction exists between living and official customary law. On the one hand, living customary law is always undergoing development because it continually changes to suit the changing needs of society. On the other hand, official customary law reflects ossified rigid rules of law that are detached from the realities of indigenous people. Regarding the latter, law reform requires, in most instances, a long-drawn-out legislative process. In light of this, the paper proposes that the legislature amend the definition of *lobolo* in section 1 of the Recognition Act to read as follows: *Lobolo* means the property in cash or kind, whether known as *lobolo*, *bogadi*, *bohadi*, *xuma*, *lumalo*, *thaka*, *ikhazi*, *magadi*, *emabheka* or by any other name, which a prospective spouse or the head of his or her family undertakes to give to the head of his or her prospective spouse's family in consideration of a customary marriage. This reform exercise must be finalised before the consolidation proposal by the Law Commission is incorporated into law.

