

A JURIDICAL ANALYSIS AND CRITICAL
EVALUATION OF ILOBOLO IN A CHANGING
ZULU SOCIETY

by

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KWA-DIANGEZWA
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PREFACE

Four years ago I had the rare honour of being requested to be an umkhongi in three separate marriage negotiations. In the course of these negotiations I was particularly struck by the zeal with which ilobolo was demanded and by the disparity in the amounts demanded. Although I was no stranger to ilobolo, this set me thinking as to what is the significance of ilobolo in both the traditional and modern Zulu society. Here was sown the seeds that gave rise to the present research. It is a modest attempt at examining the position of ilobolo today in its historical perspective and in a society that is in transition. Although various contributions on ilobolo have been made by eminent authors, it is a contribution from one who has not only studied the institution but who is also part of the community that practises it. It is hoped that it will add another dimension to the existing literature on this eminent institution. The approach followed here is eminently jural and comparative although recourse is also had to the popular views owing to the limitations of the jural approach.

To deviate a little: there are two mistaken assumptions which are often held in relation to a person who shows interest in the scientific study of customary law: one is that customary law is either dead or should be allowed to die natural death. Concern with it is regarded as merely an academic exercise of little or no value; the other assumption is that interest in the systematic study of customary law lends inadvertent support to the government's policy of entrenching tribalism and of wanting the "Natives" to live according to "Native law".

In answer to this the words of Ramolefe (AMR Ramolefe "Sesotho marriage, guardianship and the customary heir" in M Gluckman (ed) Ideas and procedures in African customary law (1969) 197) are particularly appropriate:

"Customary law is now my devoted study, not because I willed it so, nor because I am one with those who bleat: 'Let the natives develop along their own lines; but because up in the Maluti Mountains, and in several pockets of lowland-dwellers custom is very much still the law and no amount of contempt for it by others can alter this fact".

Customary law is still very much alive. Even blacks who are westernized are in varying degrees subject to customary law. The institution of ilobolo is ample evidence of this. Even if a black marries by civil rites that marriage will not in all respects produce consequences similar to those for a marriage of a white person. On all these blacks need legal advice. History has proved that a legal system of a people does not become extinguished by acculturation. Although many institutions may die and decay, others are resilient and the society can only build its legal system on them. The present Roman-Dutch law which is the common law of South Africa is a classic example. It is a synthesis of two legal systems: Roman law and Germanic customary law. Their synthesis was precipitated by the hard labours of the jurists of the Middle Ages, the Glossators and Post-Glossators. It is the duty of lawyers to facilitate a new legal dispensation for Southern Africa. What is more, customary law is changing. It is the duty of the lawyers to give effect in the law to these changes by giving decisions that will update customary law and by drafting legislation to modify the existing law. This obviously requires a scientific study of customary law. It was in this spirit that the present research was undertaken.

It now remains for me to express my sincere thanks and indebtedness to persons and institutions that helped in making this research a success. They are, however, not responsible for its imperfections for which the author claims sole responsibility.

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- My wife Buyi and children who had to bear the cross of being estranged from husband and father respectively during the course of this research, and for my wife's loyalty and unfailing support in its execution;
- Above all, I thank my Lord and Saviour Jesus Christ for inspiration and encouragement during hours of doubt and despair and for the strength He so richly supplied. Without Him I could do nothing (John 15:5) Glory and honour be to Him alone.

It is hereby declared that this is my own work, both in conception and execution and that the opinions expressed or conclusions reached are not to be regarded as reflecting the views of the above-mentioned persons or institutions.


CRM DLAMINI

MARCH 1983

To my mother INTOMBI
YAKWAMADELA for her
sacrificial love in
bringing me up and
sending me to school
despite great odds.

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SUMMARY

Ilobolo, an institution fashioned in the traditional black society, remains popular despite socio-economic and religious changes in the modern black society. The continued popularity of this institution is attributable to the fact that blacks in general and Zulus in particular, regard it as a unique cultural heritage from the African past which should be maintained at all costs. Yet there is ample evidence that this institution is not unique as there have been analogous institutions in other legal systems of non-African stock. This, however, has not affected the popularity of this institution.

The main reason for the persistence of ilobolo, which is demanded not only in the context of a customary marriage, but also in anticipation of a civil marriage, is the inability of blacks to conceive a relationship as a valid marriage without the delivery of ilobolo. In the early customary law, ilobolo validated a customary marriage, was concrete evidence that the father had given his consent to the marriage, and transferred the guardianship over the woman, and consequently over her children, from her father to the bridegroom. Moreover, in the process of adaptation and development ilobolo has acquired new functions. Although these functions are of a social and economic rather than of a legal nature, they are nonetheless legally relevant. They express the black community's legal views of what is a valid marriage.

Although ilobolo has even been incorporated into a civil marriage, it is not an essential requirement for the latter. The courts are, however, prohibited from declaring it contra bonos mores. Consequently, if it is attached to a civil marriage, it is regarded as valid and enforceable. The conflicts that exist between a civil marriage and ilobolo by virtue of its being an institution of customary law, and

because of the ideological dichotomy between the two legal systems, has been settled by the courts by their considering ilobolo as ancillary to a civil marriage. Although it is regarded as essentially a customary law institution, if it conflicts with the fundamental principles of a civil marriage, it is modified by the latter. This view, however, smacks of a makeshift solution. The problem could only have been solved by an express recognition of a customary marriage as a legal marriage. In that event ilobolo in respect of a civil marriage would not be allowed, and if claimed would not be actionable in court. Yet the view that ilobolo is ancillary to a civil marriage has become entrenched by judicial decisions that no amount of argument will alter it.

Although ilobolo has changed owing to the practice of the people, and although the courts have accommodated it within a civil marriage, they have maintained that it is essentially a customary law institution which must be governed by customary law principles. By customary law they have apparently meant traditional law. Although ilobolo has been modified by legislation and although it has also been modified by the imperceptible incorporation of western legal principles and legal reasoning by the courts, the courts on the other hand have shown reluctance to adapt it to changed social and economic conditions. This has created a mistaken impression that customary law is static and immutable. Customary law, on the contrary, has as much potential for change as any other legal system. This should be taken into account by the courts in settling ilobolo demands. This does not imply a uniform application of the modified rules to the society in general, but it means that the court has to take into account the relative circumstances of the parties.

Although ilobolo was once the anchor of a customary marriage, it is today no longer a legal essential thereof. By legislative innovation it has been removed from the

essentials of a customary marriage. Yet this has not changed the continued popularity of ilobolo. Legally, however, it has no effect on the validity of a customary marriage. As a result it is legally a separate stipulation which occupies a position analogous to that which ilobolo occupies in a civil marriage. Because practice differs from the letter of the law, it is obvious that the legislator must have imposed on the society his own ideas which the society does not hold.

The change of ilobolo will undoubtedly be accelerated, particularly by the elevation of the status of Zulu women. There is, however, no evidence that it will disappear in the near future. Although it will continue to be practised, it will eventually become a settlement in favour of the bride and the father will receive a symbolical gift. Its modification to facilitate rather than to discourage marriage is therefore recommended. This will not detract from the fact that it is a customary law institution, but it will mean that customary law is a living law able to adapt itself to the changed circumstances.

OPSOMMING

Alhoewel ilobolo 'n instelling van die tradisionele swart samelewing was, is dit steeds 'n populêre instelling in die moderne swart samelewing ten spyte van sosio-ekonomiese en godsdienstige veranderinge. Die populariteit van hierdie instelling kan toegeskryf word aan die feit dat die swartes in die algemeen en die Zoeloes in die besonder dit aanvaar as 'n unieke kulturele erflating vanuit die swarte se verlede. Daarom moet dit as instelling behoue bly. Daar is egter gewigtige bewys dat hierdie instelling in werklikheid nie uniek is nie aangesien daar analoë instellings is in ander nie-swart regstelsels. Hierdie feit affekteer egter nie die populariteit van hierdie instelling nie.

Die hoofrede vir die voortbestaan van ilobolo, wat nie slegs in die konteks van die gewoonteregtlike huwelik bestaan nie, maar ook in gevalle van 'n siviele huwelik nog gesluit moet word, is die onvermoë van die swartes om totstandkoming van 'n regs-geldige huweliksverhouding sonder die oorgee van ilobolo, te begryp. In die vroeër gewoontereg het ilobolo 'n gewoonteregtlike huwelik geldig gemaak; dit was 'n konkrete bewys dat die vader sy toestemming tot huweliksluiting gegee het en gevolglik die voogdyskap so oor die vrou en haar kinders aan die bruidegom oorgedra het. Ilobolo het egter in die veranderings- en ontwikkelingsproses verdere nuwe funksies begin vervul. Alhoewel hierdie funksies eerder van 'n sosio-ekonomiese as regs-geaardheid is, bly hulle nogtans juridies relevant; hulle druk die swart gemeenskap se regsdees omtrent wat 'n geldige huwelik daarstel, uit.

Alhoewel ilobolo selfs in die siviele huwelik geïnkorporeer is, is dit nie 'n noodwendige vereiste vir sodanige huwelik nie. Die howe word egter verbied om dit contra bonos mores te verklaar. Indien dit gevolglik met 'n siviele huwelik gepaardgaan, word dit as geldig en afdwingbaar aanvaar. Die konflikte wat tussen ilobolo en 'n siviele huwelik bestaan, juis omrede dit 'n instelling van die gewoontereg is en omrede die dichotomie tussen die twee regstelsels, is deur die howe opgelos deur ilobolo diensbaar te stel aan die siviele huwelik. Alhoewel dit aanvaar word as 'n essensieel gewoonteregtlike instelling, word dit gemodifiseer indien dit met fundamentele beginsels van die siviele huwelik bots. Dit blyk egter 'n bloot surrogaat-oplossing te wees. Die probleem kan slegs opgelos gewees het deur die uitdruklike erkenning van 'n gebruiklike huwelik as 'n geldige huwelik. In so 'n geval sou ilobolo nie toegelaat word om met 'n siviele huwelik gepaard te gaan nie en sou dus, indien opgeëis, nie in 'n hof afdwingbaar wees nie. Die siening egter dat ilobolo aan 'n siviele huwelik diensbaar is tot so 'n mate in regsbeslissings beskerm dat dit nie maklik deur argument-

voering verander sal word nie.

Alhoewel ilobolo as gevolg van gemeenskapsgebruike verander het, en alhoewel die houe dit in 'n siviele huwelik geakkomodeer het, hou die houe steeds dat dit 'n gewoonte=regtelike instelling is wat deur gewoontereg telike beginsels beheer word. Blykbaar verstaan die houe onder gewoontereg tradisionele reg. Alhoewel ilobolo deur wetgewing gemodifiseer is en alhoewel dit verander het deur die feitlike onmerkbaare bytrekking van westerse regsbeginsele en regsberedenering, het die houe steeds teenstand getoon om dit by veranderde sosiale en ekonomiese toestande aan te pas. Dit laat die verkeerde indruk egter dat gewoontereg staties en onveranderbaar is. Gewoontereg het in werklikheid net so 'n potensiaal tot verandering soos ander regstelsels. Dit moet in gedagte gehou word deur houe in gevalle waar ilobolo eise bereg word. Dit impliseer nie 'n uniforme toepassing van die veranderde reëls aan elke individu in die gemeenskap nie, maar dit beteken dat die houe die relatief veranderde omstandighede van die partye in berekening moet bring.

Alhoewel ilobolo voorheen die anker van 'n gewoontereg telike huwelik was, is dit vandag nie meer 'n regsvereiste daarvan nie. As gevolg van wetgewende innovasie is dit vandag nie meer 'n vereiste vir 'n gebruiklike huwelik nie. Dit het egter geen afbreuk gedoen aan die populariteit daarvan nie. Regtens het dit egter geen effek op die geldigheid van 'n gebruiklike huwelik nie. Gevolglik is dit juridies 'n aparte stipulasie wat 'n rol vervul analoog aan die rol wat ilobolo in 'n siviele huwelik speel. Omrede die praktyk van die "letter van die wet" verskil, is dit duidelik dat die wetgewer op die samelewing idees, afgedruk het wat in werklikheid nie deur die samelewing aanvaar word nie.

Die verandering in ilobolo sal ongetwyfeld versnel word veral betreffende die statusverhoging van die Zoeloe-vrou. Daar is egter geen aanduiding dat dit in die nabye toekoms

sal verdwyn nie. Alhoewel dit steeds in gebruik sal bly, sal dit uiteindelik 'n skikking ten gunste van die bruid wees en die vader sal 'n simboliese geskenk bly behou. Dit word dus voorgestel dat die veranderinge aangebring in ilobolo eerder die aangaan van huwelik moet versterk as ontmoedig. Dit sal nie afbreuk doen aan die feit dat dit 'n gewoonte=regtelike instelling is nie, maar dit sal beteken dat gewoontereg as 'n lewende reg gesien word wat die vermoë het om sigself by veranderde omstandighede aan te pas.

CHAPTER 1

PROBLEM FORMULATION, RESEARCH AND CONCEPTUAL FRAMEWORK

1.1 INTRODUCTION

In the recent past an in depth study of an aspect of African customary law would have been regarded by many lawyers as idle speculation.¹ Sir Kenneth Roberts-Wray expressed the following sentiments with regard to this fallacy:

"One occasionally meets people, even among those who have lived or served in Africa, who speak light-heartedly about the study of Native law and native courts and seem to imply that it is an esoteric exercise of little more practical importance than say, archeology; but it is safe to say that these people cannot have had occasion to give much serious thought to the matter."²

Moreover, African customary law was not even taught at university. And this despite the fact that this law governed the lives of millions of black people. It was only in relatively recent times that the study and restatement of African law began to attract the attention of the trained lawyer.³ This led to more discussion and serious consideration of this neglected discipline,⁴ bringing about a realisation that the future in Southern Africa does not lie solely with Roman-Dutch law, but with a synthesis between Roman-Dutch law and African customary law.⁵ This is the lesson to be learned from the experience of Africa, both Francophone and Anglophone.⁶ The whole picture of the study of African customary law has therefore changed. More research is required with the aim of systematising and analysing certain branches of customary law in order to produce a more rational and systematic law.

The Zulu people, like all blacks in South Africa, are undergoing a process of cultural change. Change in this respect is not confined to the social, economic and religious spheres, but it also extends to legal aspects.⁸ Cultural change must

be distinguished from acculturation. Whereas cultural change involves the transformation of the existing order of society,⁹ acculturation involves the translocation of cultural elements from one culture to another.¹⁰ The process of acculturation therefore overrides cultural change. As is well-known, a process of social and cultural change is not necessarily cataclysmic. It is, however, a long and painful process that involves innovation, selection and integration.¹¹ Legal acculturation in particular presents many problems. In essence these problems flow from the ideological dichotomy between South African law and customary law,¹² as acculturation does not mean a complete supplanting of customary law by South African law. What is more, the change of culture is largely a psychological process that is both propagated by individuals and dependent on individual acceptance. Because individuals differ in their receptivity to change, some accepting it more readily than others, a society that is undergoing change will not do so uniformly.¹³

Although many aspects of customary law still need systematic treatment, ilobolo was, for pragmatic and other reasons, a natural choice. Ilobolo is the core of the African marriage system. Van der Vyver¹⁴ has correctly referred to it as "die kern van die naturellereg". History has shown that family law and succession are the most resistant to change or reception of foreign influences because they are so closely connected with the emotions of the people. Despite the extensive reception of Roman law in Germanic law, family law and law of succession were the two branches that most strongly resisted Roman legal institutions.¹⁵ As ilobolo is one of the main features of an African marriage that distinguish it from a civil marriage, and one that has been incorporated into a civil marriage, it is necessary to re-evaluate it because it is believed that it will not disappear in the near future. It can confidently be predicted that this institution may undergo change, as in fact it has already done, but disappear immediately it will not. Ilobolo is a socio-cultural institution which is

regulated by law. By an institution is meant a cultural stereotype. Because the culture of the people changes, it is obvious that ilobolo as a cultural entity must change as well. This necessitates a change in the law that regulates it.

Ilobolo has been defined by the Code as

"cattle or other property which in consideration of an intended customary union the intended husband, his parent or guardian or other person agrees to deliver to the parent or guardian of the intended wife".¹⁶

Attempts to establish the original root meaning of the word ukulobola were not entirely successful. According to Samuelson this word is a reduplication of "loba" which means to write or make a mark or register.¹⁷ If this explanation is correct, it means that ukulobola is essentially to mark a woman as someone who is passing from a stage of being unmarried to that of being a married one. Ilobolo is therefore the means by which marriage is registered.¹⁸

The word ilobolo is often used incorrectly. Lobola is the imperative singular of the word ukulobola, and its use as a noun is consequently incorrect.¹⁹ The noun is ilobolo, and not simply lobolo, and the verbal noun is ukulobola. The omission of the prefix "i" in lobolo is incorrect. The prefix "i" in Zulu stands for the article "a" or "the" in English.²⁰ This is the form that will be used in this research. Thus when the article is used the prefix "i" will be omitted. To use both the article and the prefix "i" is tautologous. The Xhosa noun equivalent is ikhazi; the Sotho-Tswana bogadi; the Pedi mahadi; the Venda thakha; the Shangaan lovolo; the Shona rovoro and the Arabic mahr.

Many English equivalents of the vernacular term ilobolo have been suggested and used, none of which correctly conveys the correct meaning of the traditional term and none of which is above criticism. These include dowry, dower,

earnest cattle, indemnity cattle, settlement, bride-price, child-price, bridewealth, sponsalia and espousal fee.²¹ The vernacular terms will be used here to avoid any misunderstanding. When reference is made to the custom of giving property or money in exchange of a woman in contemplation of marriage in general, use may be made of terms like "marriage consideration" or "marriage payments", but these will be used in a special sense which does not imply a sale,²² and such references will be kept to the absolute minimum.

1.2 AIM OF INVESTIGATION

"It is often conducive to sound reasoning if one knows what one is talking about".²³

Equally, nothing is more conducive to clarity than to know what one sets out to investigate. A failure to determine exactly the aim of the investigation leads to confusion, incoherence and lack of direction.

The aim of this inquiry is to establish the legal role of ilobolo in the modern Zulu society, and to determine whether the law regulating ilobolo has been able to keep abreast with the changes ilobolo has, as a socio-economic institution, undergone. It is also essential to inquire whether ilobolo has been properly adjusted to institutions brought about by legal acculturation, especially a civil marriage. If not, guidelines on how these changes should be accommodated or adjustments made will be suggested. Suggestions for reform will be made not only in relation to ilobolo, but also in respect of customary law in general as the need for such reform is clear.²⁴ The legal implications of ilobolo, however, cannot be considered in isolation, but have to be examined in the light of the cultural background and socio-economic changes among the Zulu people in general. Suggestions for reform that will be made at the end will be aimed at making ilobolo accord with modern conditions and not

to constitute an obstacle to marriage. This is because it is a fundamental principle that marriage as an organised institution in the society should not be discouraged. Obviously marriage as an institution is of more importance than ilobolo which is merely its traditional ingredient. While the customary institution continues to exist, and while its psychological and cultural significance continues, it must at the same time be accommodated to the needs of a changing community. Although ilobolo is a customary law institution, customary law is not immutable, but does change and must change and keep track of other changes in the socio-economic structure of the society. It is in this light that ilobolo will justify its continued existence.

Although to predict the precise future of this institution needs a person endowed with prophetic vision, which is undoubtedly a rare gift, it will be necessary in the study of this nature to forecast in broad outline the possible future development of ilobolo.

1.3 FORMULATION OF THE PROBLEM

Although blacks still continue to marry by customary law,²⁵ such marriages are definitely on the decrease.²⁶ More and more blacks marry by civil rites,²⁷ a marriage that is in many respects different from a customary one.²⁸ Whereas a customary marriage belongs to the joint family of agrarian communities, a civil marriage belongs to the nuclear family of industrial society.²⁹ That Africans marry by civil rites does not imply that they embrace the whole of the related culture, nor that they have severed all ties with their own traditional culture.³⁰ This in itself is not surprising. The movement from one culture to another is not sporadic. It is a gradual process. Even Christian blacks who marry in church as a matter of conscience, still adhere to their own traditional customs.³¹ The institution of ilobolo attests to this. Ilobolo is an institution that

properly belongs to a customary marriage.³² Yet even when blacks marry by civil rites, they still demand and receive ilobolo, and although it is by no means an essential of a civil marriage, it figures prominently in matrimonial disputes. This institution is extremely tenacious, so much so that it has survived many changes in black society. Blacks of all classes, walks of life and degrees of acculturation demand and deliver it irrespective of the type of marriage.³³

In respect of Christian blacks Soga graphically portrays the position as follows:

"The Christianized Native is at present in a transition stage, old things are passing away, but all things have not yet become new. Stretching out towards the future he has not completely severed himself from the past. The transition stage is accompanied, as is always the case with change, especially when it involves departure from old time practices which formed a great part of the life of the past to the acceptance of new practices which had no part in that life, by misunderstanding, exaggeration and a want of proportion, until the life has been fully adjusted to move along with new conditions."³⁴

If the above describes the position about fifty years ago this, it is submitted, has not completely changed today. Ilobolo attached to a civil marriage is bound to present problems owing to the ideological differences between institutions of customary law and those of South African law. In the light of this anomaly, it is necessary to investigate the reasons behind the persistence of ilobolo and the role it plays in a civil marriage as well as the question whether it should still be retained.³⁵ No doubt the function of ilobolo is not the same in a civil marriage as in a customary marriage.³⁶ In order to find out the significance of ilobolo in a civil marriage it is imperative to determine the original significance thereof in a customary marriage. Even in a customary marriage the exact significance and position of ilobolo are of dubious account.³⁷ It is therefore important to analyse the legal position of ilobolo in a

customary marriage. This necessitates investigating the importance of ilobolo to all other customary institutions connected with a customary marriage, that is, whether they are responsible for or dependent on ilobolo, and what the effect of cultural change has been on these and ilobolo. Changes which ilobolo has undergone will be investigated as well as their legal implications.

Isolating the agents of such change is also important. Besides ilobolo, there are other demands which are not part of, but are related to ilobolo. It is necessary to investigate their influence on ilobolo. Ilobolo has also been regarded as impinging upon the status of a woman.³⁸ It is therefore essential to look at this as well in the light of the increasing liberation of women in the world in general. In this investigation the central question is whether ilobolo institution accords with the modern society.

1.4 THE SCOPE OF RESEARCH

The aim of this research is to investigate the present legal status of ilobolo in the Zulu society. The investigation of the legal position thereof will be done in its social and cultural context. It has been said that the development of customary law must take cognizance of the past, present and future.³⁹ Although it is difficult to find out the starting point of an institution,⁴⁰ an attempt will be made to trace the historical development of this institution. This investigation is primarily confined to the Zulu ethnic group.⁴¹

Although ilobolo among the Zulus is the institution to be investigated, it will increase one's understanding to draw a comparison between ilobolo in Zulu law and its counterpart in other black tribes in Southern Africa and even in Africa as a whole. Where need be it will also be compared with some other analogous institutions of non-African legal systems.

This is because it has been said that "the more one takes cognizance of the laws of others, the less problems one experiences in understanding one's own law",⁴² and acquires a better grasp not only of one's own legal system, but also of the concept "law" in general.⁴³

1.5 DEFINITION OF TERMS

It is necessary, in legislative fashion, to define certain terms. These are not definitions in the true sense of the word, but are explanations of the sense in which the terms are used here. These include the following:

African law or customary law or African customary law: This refers to the indigenous system of customary law which exists among the various black tribes in South Africa. These terms are used interchangeably. Many other terms have been suggested for this,⁴⁴ none of which is above criticism, but the use of the above is a matter of taste rather than of logic.

Customary marriage: This refers to the marriage of blacks concluded according to customary law. Its official designation is a customary union. But the view taken here is that it is a marriage although a marriage concluded in accordance with customary law.⁴⁵ Moreover, the recent trend in Southern Africa has been to designate this a customary marriage rather than a customary union, an appellation that smacks of colonial prejudice. Consequently, except in exceptional circumstances, it will be referred to as a customary marriage and not as a customary union.

Africans or blacks: This refers to the people of the aboriginal race of Africa. The official appellation is now "black", but the names blacks and Africans will be used interchangeably.

Homestead: This expression denotes the traditional establishment otherwise frequently referred to as a kraal. It is felt that it is better to reserve the word kraal to denote a cattle kraal and to use homestead when referring to the traditional umuzi.

Family head: This denotes the head of the homestead. It is felt that the word kraalhead may be misleading since the word kraal as describing a traditional umuzi has been discarded in this inquiry. These terms will be used when quoting a section from a statute.

Settlement of ilobolo: The view taken here is that ilobolo is not a purchase and sale of the woman. Consequently the word settlement of ilobolo will mostly be used instead of "payment of ilobolo" in order to eschew any connotation of sale.

Traditionalists and non-traditionalists: These terms will be used to distinguish between persons who preponderably follow the Western way of life and those who to a large extent follow the traditional way of life. Traditionalists are therefore those who still lead the traditional way of life. Non-traditionalists are those who emulate the Western style of living. These terms, it is admitted, may be misleading because there may be those who are in the middle, those in a stage of transistion. But the question of preponderance will determine whether a person is a traditionalist or a non-traditionalist.

1.6 RESEARCH

Research consists of literature study and field work.

1.6.1 Literature study

There are various written sources of African law which were studied.⁴⁶ Much of the existing information on customary

law is derived from anthropological works. Provided they are used carefully, these form a valuable secondary source of information.⁴⁷ Phillips⁴⁸ comments as follows on this:

"The main source of indigenous law is custom; and it hardly needs to be emphasized that customary law - and in particular the customary law of a pre-literate people - does not lend itself readily to conventional methods of legal study. Not having developed to a stage at which it can be isolated (to the extent possible in more advanced legal systems) from its social context, it calls for a technique of investigation which does not usually form part of the equipment of the modern lawyer. It constitutes a field of research lying on the frontiers of law and anthropology. In consequence the student of African customary law is at present largely dependent for his raw material on the work of anthropologists. At the same time there is a marked difference between the aim and the perspective of the anthropologist and those of the lawyer; and for this reason anthropological data even when purporting to deal specifically with indigenous legal systems, will usually require, for the lawyer's purpose to be subjected to a process of specialized analysis and restatement".

The earliest of these anthropological monographs is that of Schapera.⁴⁹ Although it is not a legal treatise, it has been used profitably by those dealing with Tswana law. Many other anthropological contributions have been made to fill up gaps in the existing knowledge of customary law.⁵⁰ Although they give an accurate description of the traditional institutions of the tribes to which they relate, these works have been criticised for ignoring the law as applied by the present courts and concentrating on the traditional law or the law as applied only by the customary courts, and also for disregarding the effect of westernization on customary law.⁵¹

Other sources of customary law are the reports of the early commissions appointed to inquire into specific problems.⁵² Then there are also the writings of administrators written especially in the nineteenth century.⁵³ These describe customary law as it was observed or perceived to be by the

said administrators. Some of these conclusions have been discredited as superficial by later social anthropologists. In other respects they give an accurate picture of customary law.⁵⁴

Besides these, there are legal textbooks by legal practitioners and magistrates wherein they describe customary law as applied by the courts, that is based on case law.⁵⁵ These should also be treated with caution as some may be outdated. They have also been criticised for recording law as if it is immutable, and for ignoring the changes that have taken place in it as well as for their often uncritical approach to judicial decisions.⁵⁶ But there is also a breed of lawyers whose approach to customary law has been distinctive in that they viewed the application of African law against the needs of a changing society.⁵⁷

Because of the inherent deficiencies in the approaches of both anthropologists and lawyers, the interdisciplinary co-operation of lawyers and anthropologists has been strongly recommended.⁵⁸

Another source of customary law is the reports of the courts. These include the reports of the supreme court of South Africa and the reports of the appeal court for commissioners' courts. The supreme court primarily applies South African law and not customary law, but occasionally cases involving customary law come before the supreme court, and the court takes judicial notice of customary law.⁵⁹ Appeal courts for commissioners' courts apply customary law.⁶⁰ These reports should also be treated with care as they may be imperfect in that bias or perversion of justice may intrude into a decision, and some members of the court are not trained in customary law and must inevitably see it through western eyes.⁶¹

The most important source of African law today is legislation.

The earliest is the Code.⁶² This Code was promulgated in 1878 by a board of Native Administration. It was initially not meant to be binding law, but as a guide for magistrates. This board relied on existing unpublished material, and on the knowledge of experienced administrators. The Code has undergone several amendments. It contains the greatest substance of Zulu law, and there is also a tendency to extend its application to the Transvaal.⁶³ Although it was aimed at recording customary law, it is not in all respects a true reflection of customary law. Some of the provisions are purely administrative, and others alter customary law.⁶⁴

The main criticism of the Code is that it places greater emphasis on one type of law only and ignores the others and that the one chosen may not necessarily be the most appropriate.⁶⁵ Alternatively, it is said that if it is too detailed it introduces the element of rigidity.⁶⁶ As an example is given the fixing of the lobolo value per beast in the 1891 Code.

As to the interpretation of the codified law Stafford M said in Dhlamini v Kuluse⁶⁷:

"In dealing with the matter at issue we are bound by the provisions of the Code ... At the same time the Court must not forget that it is dealing with Native law and custom and that the provisions of the Code must be interpreted in the light of such law and custom".

It must also be borne in mind that the provisions of the Code are not exhaustive. Unwritten customary law remains in force in a subsidiary position.⁶⁸

In Mcunu v Mcunu⁶⁹ Innes C J. said:

"The provisions of the Code are not all definite and peremptory; they sometimes relate to custom which though generally, were not invariably observed. But

where they embody rules of law in distinct terms, then those rules must be operative in all cases not expressly or impliedly excluded".

In addition to the Code other legislation has limited or recognized the application of customary law.⁷⁰ A perusal of the reports shows that the courts regard many of the above-mentioned sources as authoritative.

1.6.2 Fieldwork

It has been pointed out that the written sources of customary law are both incomplete and imperfect. It is thus also necessary to make use of unwritten sources. As a result one has to rely on oral information obtained from experts in customary law and also from ordinary men's views for purposes of verifying the authenticity of the experts' views.⁷¹ In this area the investigator has to depend on the tools of an anthropologist. Yet the aims of the lawyer and the anthropologist differ. Whereas the anthropologist is interested in intensive research over a small area, the lawyer is interested in extensive research over a wider area. This facilitates cross-checking and increases the possibility of finding the rule in action. The best results may be obtained by the combination of the two methods to confirm the results of extensive enquiry by intensive investigation in one or more selected areas.⁷²

1.6.3 Research methodology

1.6.3.1 Theoretical background

Various methods for researching customary law have been propounded.⁷³ There is no unanimity as to which is best suited to lawyers and anthropologists investigating African customary law. The two most important are the ideological or the rule-directed method and the trouble-case method, which are outgrowths of positivism and legal realism

respectively.⁷⁴

The end-product of one's investigation often largely depends on one's method of research.⁷⁵ The latter is in turn influenced by one's general philosophy of law. This is because the theory of law provides criteria with which to identify and distinguish legal from non-legal norms, and it delimits one's view of law. One who is a positivist is concerned with what are legal rules irrespective of their sources. But the realists reject the positivistic approach as being too narrow.⁷⁶

The rule-directed interview is concerned with rules against which conduct may be measured.⁷⁷ This method has been criticised on the ground that it merely elicits rules devoid of content. It reveals broad generalizations of what the law is, but fails to include procedural aspects of the law and ignores completely the judicial process as a source of law.⁷⁸

The trouble-case method views the law not as a system of rules, but rather as a complicated and elaborate system of social phenomena. It searches for "instances of hitch, dispute, grievance, trouble or inquiry into what the trouble was and what was done about it".⁷⁹ There is the problem of motivation and the outcome of what was done.⁸⁰ The criticism levelled against this approach is that it is susceptible to distortion. Preoccupation by a researcher with a few cases may not result in a truly representative view. Moreover, it completely disregards those rules which never come to court, but which nevertheless exist by virtue of custom.⁸¹

Although both these approaches contain important elements of truth, they are to some extent defective.⁸² By a synthesis they can correct each other.⁸³ In fact it has been said that these approaches flow into each other. "For," as Llewelyn and Hoebel⁸⁴ put it, "it is rare in a simple group

or society that the 'norms' which are felt or known as the proper ones to control behaviour are not made in the image of at least some of the actually prevalent behaviour, and it is rare, on the other hand, that they do not to some extent become active in their turn and aid in patterning behaviour further". Used cumulatively, these methods then supplement each other. They further reveal which rules of conduct are law and which not. Deviation from legal rules is met by rebuke and therefore recognized as imperative.⁸⁵

It has also been said that the anthropological investigations have not had a coherent theoretical and methodological orientation. These can come about by an integration of legal theory with legal science. An integration of legal theory with research on customary law, can provide a "theoretically coherent, more uniform methodological approach" to the study and understanding of customary law.⁸⁶

1.6.3.2 Execution of research

It has been pointed out above that a successful investigation of customary law must be based on the blending of the two approaches. Before the oral investigation was embarked upon, the available literature on customary law was closely studied. Both anthropological and legal literature were investigated with the purpose of getting a complete picture of the institution under investigation. In addition to this, some reports of the early commissions as well as the works of the administrators were studied. The literature study also involved the study of decided cases. As most of the early decisions of the Native appeal court were not readily available, use was made of a digest of the cases by Warner.⁸⁷ Not only were cases on Zulu law studied, but cases on the law of other tribes were included where they throw light on a problem on which there is no direct Zulu authority. Other decisions were perused for comparative purposes.

General works on the history and customs of the Zulu people were also consulted. As this is no historical research use was only made of secondary sources. As some publications were not readily obtainable, this necessitated a visit to the State Archives in Pietermaritzburg where a lot of information on rarely accessible sources was obtained. In addition a visit was made to the State Library in Pretoria to read a publication that is not allowed to be taken from the library. Various other libraries in Pretoria were visited.

As is obvious great reliance was placed on written sources. This is because both lawyers and anthropologists have written extensively on ilobolo. As a result the main task was to read and evaluate the available literature and to test its authenticity and current validity in the light of changing conditions by oral interrogation.

It has been said that when an investigator does oral investigation it is important to have a clear idea of points to be investigated. As a result a questionnaire which assists in interviews should be drawn in such a way that it asks specific rather than general questions, starting with easy questions designed to put the informants at ease.⁸⁸ Fieldwork was done in two phases.

The interviewing of expert witnesses was done in 1980 among abakwaMkhwanazi of Mpukunyoni in Mtubatuba district. The choice of this area was dictated by convenience. Expert witnesses on customary law were available. In addition members from the Department of Anthropology of the University of Zululand were also busy with some research projects there. It was therefore advantageous to combine forces. The area was apposite in that people there still follow the traditional way of life. The chief of the area was also amenable to investigations being made into his tribe. Three expert witnesses on customary law were interrogated. They

were izinduna and have therefore dealt with practical cases. They were not speaking from theoretical knowledge.

A questionnaire had been prepared. The interviews were taped and transcribed later on. For the technique of investigation reliance was placed on Coertze's Handleiding.⁸⁹ As there was no problem of communication there was no need for an interpreter. This had an added advantage in that the meaning of statements made could not be lost in the interpretative process. The rules stated were tested by requesting the informants to relate real cases from their own experience. Some other informants from Mahlabatini were also interviewed on certain aspects of ilobolo with the purpose of cross-checking the views of the informants from KwaMpukunyoni. In certain instances differences of opinion emerged, and in others there was unanimity. Local variations were also identified although these were minimal owing no doubt to the influence of the Code.

Besides the interrogation of expert witnesses, a number of ordinary people were interviewed around Kwa-Dlangezwa area. The main thrust of this investigation was to obtain the present attitude of the informants towards ilobolo and what they thought the future of this institution to be. Those interviewed included University students, professional people, and even labourers. Most of the people interviewed were non-traditionalists. This was also aimed at revealing the discrepancy between the law as represented by experts and the law as it is applied by people in various stages of acculturation. Their views as to possible reforms of the institution were also recorded.

1.6.4 Conceptual framework

One of the problems that confronts a lawyer schooled in the western legal tradition when he investigates customary law is the problem of description. The question is whether he

should when dealing with African customary law, use the conceptual framework and theorizing of western jurisprudence or whether he should express them in terms of the "folk system" of the blacks themselves. The use of the "folk system" was propagated by Bohannan⁹⁰ as he felt that it was ethnocentric to force customary law into the conceptual categories of western jurisprudence. As justification for this he says:

"Events that occur within a social field (however defined) can only be perceived in company of an interpretation. Obviously, the human beings who participate in social events interpret them: they create meaningful systems out of the social relationship in which they are involved. Such a system I am going to call a 'folk system' of interpretation, by analogy with 'folk etymology'". 91

He further asserts:

"'Law', in the lawyer's sense, is a systematization of ethnographic fact for purposes of social action. It is thus, in the present terminology, the 'folk system' of the English-speaking countries for dealing with their own institutions and ideas of social control. The 'law' of comparative jurists is an analytical system. It concerns principles and idioms for understanding social control of the 'law' type wherever found. The use of the same vocabulary for these two distinct purposes, however necessary, is confusing".92

The view of Bohannan has been debated by both lawyers and ethnologists.⁹³ Although there is merit in his argument, Bohannan's approach has been criticised on the ground that it limits or even stultifies comparative analysis.⁹⁴ Although there are objections to arbitrarily forcing customary legal phenomena into wrong or inappropriate western legal concepts, this cannot be solved by rejecting the latter completely because that approach amounts to throwing out the baby with the bath water. As a result many lawyers favour the view that terminology used in western legal systems should be used consistently even in non-western ones to indicate legal

phenomena of the same kind whatever forms these may take in different legal systems whether specialized or non-specialized.⁹⁵ This has been done fruitfully in the field of linguistics.⁹⁶ This holds true as well for legal theory. Thus it has been held that multivocal terms like "property", "ownership", "contract", "marriage", "law", "justice", "right", "crime", "court" and "duty" are innocuous when properly used in customary law to translate terms of African law that are equivalent to them.⁹⁷ Furthermore, it has been argued, rightly it is submitted, that a stable union between people of the opposite sex should be regarded as a marriage irrespective of the law by which it is governed.⁹⁸

Although both approaches are open to criticism, there are more advantages attached to the use of the western conceptual framework and legal theory. In fact this has been done to Roman law. The legal systems that belong to the civil law family are grouped together as a legal family not because they are altogether Roman, but because they are based on the Roman legal science. As Sanders⁹⁹ puts it:

"Whatever it borrowed from other systems of law was duly romanized. It is this infusion of Roman technique which is of crucial importance and has become a distinguishing feature of the Civil law tradition... The Roman law influence is essentially a matter of style, terminology, divisions and concepts".

What is more, the Roman law approach was adopted not only by those legal systems which belong to the civil law family, but even by the English common law, although the latter system to a large extent resisted the wholesale reception of Roman law.¹⁰⁰

The solution to the above-mentioned dichotomy therefore lies not in the wholesale rejection of the western legal theory and legal terminology,¹⁰¹ as that would lead to an impoverishment of the African customary law and prevent the

cross-cultural comparative analysis, but in the correct and judicious application thereof to customary law.¹⁰² This is the approach that will be followed in this investigation. What is objectionable is the incorrect and often arbitrary application of western legal concepts to African customary legal phenomena a process which not only does them violence, but is also confusing. Where, however, certain customary law terms have become accepted, use will be made thereof in order to avoid confusion. Thus instead of using controversial terms like "marriage consideration" or "bride-price" use will be made here of the term "ilobolo" and other African equivalents. Although the approach that will be pursued here is eminently jural, use will also be made of the popular approach to customary law, namely what the views and attitude of the people are to certain aspects of customary law.

The juridical analysis of ilobolo that will be followed here involves the descriptive, historical, analytical comparative and projective. The descriptive approach is aimed at determining and describing the positive law rules; the historical approach describes the said rules in their historical development; the analytical analyses and systematises those rules of positive law; the comparative approach compares a customary institution with other comparable institutions; and the projective aims at determining whether a customary rule is as it ought to be and if not why not.¹⁰³ The analysis and critical evaluation of the institution under investigation will also be done in its ethnological and sociological context.

1.6.5 African law and custom

Another aspect of African customary law which has been considerably controverted is the question of whether African law is really law. It is not intended here to discuss this in detail, but to make a brief comment. It has been pointed out above that in the past little interest was shown by lawyers in African customary law because this was

largely regarded as an exclusive sphere of the odd anthropologist in his concern with "primitive" peoples and their cultures. This attitude owes its origin, no doubt, to Austinian positivism¹⁰⁴ according to which law is a command by a sovereign to a subject accompanied by a sanction.¹⁰⁵ Customary law was therefore not regarded as falling within the category of "law properly so-called" owing to the lack of organized sanctions or state institutions for the enforcement thereof.¹⁰⁶ In fact it has later on been pointed out that this approach is misguided.¹⁰⁷ In African societies there are legislators as well as judges.¹⁰⁸ As a result the whole question has been based on a misunderstanding of the African set-up. Allott explains this in the following words:

"Maybe; but if by 'legislature' one substitutes 'approved and recognized emitter of legal norms'; and for 'court' one substitutes 'approved or recognised persons or institutions with authority to settle cases'; and for 'officials' one substitutes 'persons having a socially approved and defined role in the administration of a society', then every society empirically known has every one of these. Without them the society could not function. We are playing, then, with definitions rather than with substance".¹⁰⁹

Further on he says:

"In all African societies except the smallest, there can be no doubt about the matter. There are judges, if by that we mean persons who specialise in deciding disputes which concern legal norms and their implementation. There are legislators, even though the role of overt legislation is more reduced in such societies than in modern western societies."¹¹⁰

This argument of Allott cannot be faulted. In Zulu society for example there are chiefs who are both legislators and judicial officers. No doubt their role in legislation was and is limited owing to the strength of customary law. But the fact is that a chief could change a customary rule.¹¹¹

The whole question revolves around the background of the person evaluating African law. A definition of law is an abstraction from particular laws, and as a result is idiosyncratic.¹¹² Allott explains this in the following terms:

"Because LAW is an abstraction from particular Laws, it is useless to attempt to define it or elucidate its abstract and general meaning before looking at the particular on which it rests ... There is an analogy here with LANGUAGE, which is an abstraction from natural or actual Languages. Linguistic studies must start with and be anchored in the actual languages used".¹¹³

As an illustration of how one's background understanding of law limits one's view as to the legality of other legal systems, Allott¹¹⁴ uses the example of a "virginal" or unsophisticated person "the noble savage", one who has never allowed his mind "to be sullied or infected by abstract thoughts about LAW". He lives in a traditional, customary, non-literate peasant society and is therefore naturally subject to its Law. Although he may be aware of its laws which guide his conduct, he may not have bothered himself about the theoretical reasoning about law. If, as Allott further explains, you were to tell this man that his society has no law, he would not accept that. But if you were to take and plunge him in a country with a sophisticated legal system, he might think that such a country has no law because it would be too much for him to conceive of that legal system as being really law. This is indeed what happened when western jurists came into contact with African customary legal systems.

As has been pointed out above the idea that African law is not law has been justly discarded. The days of the "noble savage" who "slavishly", "spontaneously", "unwittingly" or through "mental inertia" obeyed custom¹¹⁵ have ended. Almost all jurisprudential schools have come to recognize

customary law as law.¹¹⁶ Although their attitude towards customary law may differ, and although it may be difficult to give an all-embrasive definition of law, it may be accepted as axiomatic that in every society a body of law which is backed by a machinery of enforcement does exist.¹¹⁷ It is perhaps the historical school which has considerably contributed towards a better understanding of customary law.¹¹⁸ Brookes¹¹⁹ says in this respect:

"If we adopt the sound and philosophical view of Savigny and deduce all law as springing from the Volksgeist, the spirit of the people, undoubtedly African customary law is worthy of the name".

No doubt the sociological¹²⁰ and the ethnological¹²¹ schools have enhanced this understanding.

From the interviews it appeared that the Zulus do distinguish between umthetho (law) and isiko (custom) although at times these words are used interchangeably.¹²² This shows that to deny that African law is law is absurd.¹²³ To say that law exists in traditional African society is not to say that there are no difficulties in disentangling these from other tribal customs,¹²⁴ but what is emphasised is that there is law although a law of a specific type, namely customary law, a law that is derived from custom.¹²⁵ Nor should this be interpreted to mean that this law is similar in all respects with western or specialized legal systems.¹²⁶ Allott points out that besides those who deny African law as law there are those who "seek to show (a) that African law is 'essentially the same' as English or any other system of 'civilized' law (that is, they must prove that African law is 'just as good as' or 'reasonable' or 'civilized' as other, advanced, legal systems), or (b) - going even further - that African law is better than western systems, because justice is easier, cheaper, more humane, intelligible to the people, or what not."¹²⁷ As he further points out, these views are actuated by disillusionment with the

western system and also by a desire to "possess a valued cultural and historical heritage" which leads to exaggeration. But the best view is to evaluate fairly African law as a whole. This will unavoidably show that there are merits on both sides.¹²⁸

African law is indeed a law of its own type, a law exhibiting certain features.¹²⁹ It is in particular its emphasis of social solidarity¹³⁰ and its humanistic basis¹³¹ that may be mentioned.

The general features of African law coupled with the appellation "African law" itself prompt the question whether there is a general African law.¹³² There are both protagonists and antagonists of the unity of African law.¹³²

According to Brookes¹³⁴ it is appropriate to use the expression African customary law because although there are "differences of detail from tribe to tribe, but the broad principles of law involved are the same. The various tribal systems are very much closer than the systems of common law of those countries which build on the Code of Justinian".

Although this family of legal systems shares no traceable common ancestor,¹³⁵ African law exhibits enough similarity in "procedure, principles and techniques for a common account to be given of them". Although there are variations "some minimal, some major, which may be detected between African systems", these do not obscure, "but rather illuminate, the reasons for and the advantages of each system in its own environment".¹³⁶ Allott further postulates that "African legal systems are as much united by what they are not as by what they are".¹³⁷ But as he points out:

"Out of the thesis of the unity of African law (sometimes founded, as we have seen on lack of

intensive knowledge of African legal systems) and the antithesis of the disunity of African laws (sometimes founded on such intensive knowledge), may emerge a synthesis, the Aristotelian mean - between extremes".¹³⁸

This he calls "unity in diversity".¹³⁹ But he points out that the common features of African law do not necessarily reveal any distinctive Africanness but that all unwritten customary laws tend to resemble each other more than written legal systems.¹⁴⁰ A comparative reading of customary "primitive" law "shows that, in the absence of legislatures, courts, and jurists of an advanced type, the response of man to the stimulus of his environment tends to follow a relatively few, well-marked patterns. Often one notices similarities not merely of rule but of general structure and approach between the customary laws of peoples at opposite ends of the earth, which cannot be explained away on any diffusionist or historical theory".¹⁴¹ A comparison of these has shown some similarity between African law and other non-African legal systems.¹⁴²

Because of this Allott concludes as follows:

"African laws therefore resemble each other; but, in that wherein they resemble each other, they also resemble the laws of non-African peoples. Not only is the brotherhood of Africans exemplified thereby, but - and this is never too trite to need restatement - the brotherhood of the whole human race. Man, wherever he is and whatever his race, tends to react in similar ways to similar circumstances. On the African continent the resemblances of customary law do not suddenly cease as one crosses a particular linguistic, ethnic, or racial boundary...".¹⁴³

This view is to be accepted. Although African law cannot be regarded as a uniform legal system, its basic principles and institutions are similar. The basic similarities do not exclude dissimilarities of detail. It is also accepted that African law is comparable with other non-African legal systems. It is perhaps for this reason

among others that a comparison will be drawn between Zulu law and other African and even non-African legal systems.¹⁴⁴

The main criticism which has been levelled against customary law is that "it is not fixed, and certain, it is not sharp and precise in its application; it is not adaptable; it is not effectively complied with because there are no effective sanctions".¹⁴⁵ Allott,¹⁴⁶ however, correctly points out that this criticism could be counter balanced "by a mirror-image alleged weakness in the opposite sense". Thus he mentions that foreign observers of customary law have complained in the past that it was too fixed in its formulation; it was too mechanical and rigid in its application; it was so flexible and adaptable to different social circumstances and problems that it could not be said to have fixed rules; that it was effectively complied with because it relied on social sanctions which were more effective than modern western sanctions.¹⁴⁷

The truth of the matter is that each of these charges exaggerates. Indeed similar charges could be made against modern western law.¹⁴⁸

Customary law is not static, but is subject to change.¹⁴⁹ As Pound puts it: "Law must be stable, yet it cannot stand still".¹⁵⁰ It has been correctly stated that every legal system contains within itself a seed for change. Even the proverbial laws of the Medes and the Persians do change. Thus the old idea of customary law as an immutable or changeless system has been discarded as being empirically incorrect. In fact customary law has shown a tendency to change faster than statutory law.¹⁵¹ Not only is customary law changing today, but even in the era before the white encounter it did change.¹⁵² The greatest single factor which has facilitated the change of customary law, however, is contact between blacks and whites.¹⁵³

The problem has been the attitude to be adopted towards African customary law in a changing society.¹⁵⁴ It is now clear that law must reflect the values of the society it serves.¹⁵⁵ To put it differently, "it must be firmly planted in the soil if it is not to be largely irrelevant to the lives of the people and thus ignored".¹⁵⁶ Law, however, cannot merely accommodate social changes after they have occurred, but it must be "a creative response to contemporary problems".¹⁵⁷ It must help to create conditions where desirable social developments can take place.¹⁵⁸ An empirical study of the society will facilitate this. If any law has to be changed such a change must take place after an empirical investigation of the effect of such law in the society.¹⁵⁹

Such an approach to law is eminently sociological. It was the sociological school which heralded a decisive break from mere formal analysis of law.¹⁶⁰ It was in particular Pound, the leading American sociological jurist who taught that law is not only to be found in textbooks, but also in the attitudes and customs of the people it serves. As a result legal rules should be adapted to changing economic conditions and sociological thinking.¹⁶¹ It is not the intention in this investigation to make a comprehensive critical analysis of the whole philosophy of law propounded by Pound.¹⁶² What is emphasised is the relevance of taking into account the social implications of law in a society. Obviously this is not the only approach to be adopted here. Other jurisprudential approaches will be followed, for it is believed that they are not mutually exclusive, but rather complement each other.

1.7 SUMMARY AND CONCLUSION

African customary law has undergone a lot of change. Yet its systematisation and reform are not complete. Although the various tribal legal systems differ in some respects,

they share certain common features to be studied as one family of laws and in particular as law. Although African customary law is really law, it is a law of a specific type. The study and analysis of this legal system requires the interdisciplinary approach which involves law, anthropology, sociology and linguistics.¹⁶³

Although a lot has already been written on the customary law of marriage, it is essential to rationalise this aspect of customary law and to place it on a sound juristic footing for future development and adaptation. In making a juridical analysis and critical evaluation of the law relating to ilobolo the following trend will be followed: a historical and comparative survey of ilobolo will be made with the purpose of determining the development of this institution and of ascertaining whether it is peculiarly African; and analysis of the legal rules regulating ilobolo will be made. The relationship between ilobolo and a customary and civil marriages will be also analysed. This will also require an analysis of institutions related to ilobolo and their influence on ilobolo. These will also involve a critical evaluation of the rules regulating ilobolo. Finally recommendations for reform will be made.

FOOTNOTES

1. This is so because African customary law was largely not regarded as law in the true sense of the word. This view has been shown to be wrong. On this see below in this chapter.
2. "The need for the study of Native law" 1957 Journal of African law 82.
3. J L W de Clercq Die familie- erf- en opvolgingsreg van die abakwaMzimela, met verwysing na prosesregtelike aspekte unpublished D Phil thesis U P (1975) 1 et seq. This was caused by a number of factors. He points out that this was inter alia the result of the realisation by both anthropologists and lawyers that guidance had to be given to the (mergent) developing states so as to provide them with a solid foundation from which to build their legal systems. This was so not only in

South Africa but also in the whole of Africa. In South Africa the emancipation of national states increased this need. As to the advantages of the restatement of customary law see also PP Jacobs "Die volkekunde en regsoptekening" 1980 Obiter 129-132.

4. On this see, among others, Anonymous "African customary law 1858-1958" 1948 Journal of African law 139-140; HJ Simons "The study of Native law in South Africa" 1938 Bantu Studies 237 et seq; AJ Kerr "African legal education - educating lawyers in Bantu law" 1963 Journal of African law 207-8; AC Myburgh "University training in South African Bantu and Native law" 1963 Codicillus vol 7 61 et seq; AC Myburgh "Perspectives on South African Bantu law" 1965 Codicillus vol 6 no 2 6 et seq; BJ van Niekerk "Bantu law - the present and future" 1966 Bantu 184-6; M Gluckman The ideas in Barotse jurisprudence (1965) M Gluckman (ed) Ideas and procedures in African customary law (1969); R Verloren van Themaat "Die bepaling van rigting by die regsopleiding van die Bantoe" 1968 THRHR 40 et seq; R Verloren van Themaat "Bantoe-ontwikkeling - wat kan juriste daaraan doen?" 1971 THRHR 223 et seq; AC Myburgh "The place of Bantu law in a law curriculum" 1975 Conference papers of Society of University Teachers of Law 142 et seq; R Verloren van Themaat "Die verfyning van die reg vir swartes in Suid-Afrika" 1980 THRHR 237 et seq. African customary law has also become a course at universities in South Africa. At some it is optional, and at others it is compulsory, especially the black universities.
6. FA de Villiers "Die regsposisie van in owerspel verwerkte Bantoe" Huldigingsbundel Daniel Pont (1970) 28; Myburgh (1965) 12; see also FA de Villiers "Southern African legal systems in transition" Unpublished inaugural lecture 1 et seq.
6. AN Allott "The future of African law" in H Kuper & L Kuper (eds) African law: adaptation and development (1965) 216 et seq.
7. On culture and culture change see A0 Jackson 'n Onderzoek na ontwikkelingsprosesse en probleme by die Xolo van Suid Natal 1976 Unpublished D Litt et Phil thesis RAU 2 et seq; A0 Jackson "Xolo cultural change and development" 1978 Suid-Afrikaanse Tydskrif vir Etnologie 7 et seq; see also B Malinowski The dynamics of culture change: an inquiry into race relations in Africa (1945) et seq; This change is not confined to blacks, but is world wide, see MJ Goode World revolution and family patterns (1963) 1 seq.
8. DP Visser Die Suid-Afrikaanse interne aanwysingsreg unpublished LLD these UP (1979) 9 et seq.

9. Malinowski (1945) 1.
10. Visser 10.
11. Encyclopaedia Britannica "Social and cultural change" 1972-4 vol 16 920 et seq.
12. Customary law has the tendency of being communal, concrete, emotional-religious and less articulated as well as less formalistic. This is in marked contrast with South African common law that is individualistic, abstract, rational, articulated and formalistic in nature - Visser (1979) 3-8; see also A J G M Sanders "The characteristic features of Southern African law" 1981 CILSA 333.
13. Jackson (1978) 16.
14. J D van der Vyver "Die rol van Bantoe en naturellereg in die opleiding van regstudente" in Verslag van 'n Noordelike streekskonferensie van die Vereeniging van Universiteitsdosente in Regte in Suid-Afrika 1962 THRHR 297; see also A N Allott "Family property in West Africa : its juristic basis control and enjoyment" in J N D Anderson (ed) Family law in Asia and Africa. (1968) 121.
15. H R Hahlo & E Kahn The South African legal system and its background (1973) 503.
16. S.1(1) of the Code of Zulu law Proc R195 of 1967; see also the definition of the 1883 Commission Report 30.
17. R C A Samuelson 1903-5 Commission S.N.A. 11/4/1 Minutes of evidence 13.
18. This obviously means that ilobolo is an essential requirement of a customary marriage.
19. M D W Jeffreys "Lobolo is child-price" 1951 African Studies 145.
20. Some writers have not concerned themselves with the correct form of the word as they hold the view that the Zulu spelling is derived from English.
21. E E Evans-Pritchard "An alternative term for 'bride price'" 1931 Man 36 et seq. He rejects the use of the term bride-price because it only emphasises one aspect of the transaction, namely the economic one to the exclusion of the social aspect. Moreover, it creates the impression that a woman was bought. He prefers the use of the term bridewealth; G W B Huntingford "'Bride-price' in antiquity: further alternatives for this term" 1931 Man 190; J R Wilson-Haffenden "'Espousal-fee: an alternative term for 'Bride-price'"

1931 Man 163; E Torday "'Bride-price', dower or settlement" 1929 Man 6; Jeffreys op cit passim.

22. E A Reuter Native marriages in South Africa (1963) passim.
23. Runcible v Weed 1976 SAQC 220 226.
24. See in general A J G M Sanders (ed) Southern Africa in need of law reform (1981).
25. All the informants we interviewed from kwaMpukunyoni were married according to customary law and they intimated that their children were marrying according to customary law.
26. It is difficult to obtain precise statistics on this, but this is confirmed by the facts. A customary marriage belongs to a particular type of society and is unsuited to a modern situation in many respects; see also H J Simons African women: their legal status in South Africa (1968) 150.
27. The fact that they marry by civil rites does not necessarily mean that all of them understand the legal implications of this marriage.
28. H J Simons "Marriage and succession among Africans" 1960 Acta Juridica 312. E. Cotran "The changing nature of African marriage" in J N D. Anderson (ed) Family law in Asia and Africa (1968) 16 et seq.
29. (1968) 16 et seq.
30. Simons ibid; Cotran ibid.
31. T W Bennett "The application of common law and customary law in commissioners' courts" 1979 SALJ 400.
32. The Code does not, however, list it as one of the essential requirements of a valid customary marriage. See chapter VII below on this.
33. Simons (1968) 87; D S Koyana Customary law in a changing society (1980) 3; J Church "Legal position of African women" 1975 Codicillus vol 16 no 2 25; see also Maloyi v Mlalandle 2 NAC 82 (1910); Fuzile v Ntloko 1944 NAC (C&O) 2.
34. J H Soga. The Ama-Xosa: life and customs (1932) 25.
35. This is one of the questions posed twelve years ago by De Villiers (1970) 33.
36. See De Villiers (1970) 33 and authorities referred to in footnote 124.

37. This is because of its exclusion in the Code from the essentials of a customary marriage.
38. See chapter II below.
39. Verloren van Themaat (1968) 45.
40. Malinowski (1945) 27 et seq.
41. Anthropologists who have done intensive studies of the various groups do reveal that there is not one Zulu group, but a number of Zulu tribes whose customs differ, De Clercq (1975) 5 et seq. For purposes of this investigation any differences which may exist will be pointed out, but the Zulus will be taken as one group.
42. A J G M Sanders "The characteristic features of Southern African law" 1981 CILSA 196 199; see also L J Pospisil The ethnology of law (1978) 2; D P Visser "Die betekenis van regsvergelykende studie vir Bantoegewoontereg in Suid-Afrika" 1977 De Jure 327 et seq.
43. Sanders 199.
44. These include the much criticised "Bantu law"; "indigenous law", "unofficial law" and "autochthonous law".
45. See the discussion of this in chapter III below.
46. For a discussion of this see: A N. Allott "Methods of legal research into customary law" 1953 Journal of African Administration 172 et seq.; J. Lewin Studies in African Native law (1947) 1 et seq.; R S. Suttner "The study of 'Bantu law' in South Africa: a review article" 1968 Acta Juridica 147 et seq.
47. Allott (1953) 172.
48. A Phillips (ed) Marriage laws in Africa (1971) 69.
49. I Schapera A handbook of Tswana law and custom (1938).
50. These include the following: J L W de Clercq Die politieke en judisiële organisasie van die AbakwaNzuzua van Mtunzini M A Dissertation (1969), De Clercq (1975), R D Coertze Die familie- erf- en opvolgingsreg van die Bafokeng van Rustenburg (1971); M J Breytenbach Die familiereg van die Usuthu - Zulu van Nongoma 1971 M A dissertation U.P ; J B Hartman Die samehang in die privaatreë van die Changana - Tsonga van Mhala met verwysing na die administratiefregtelike en prosesregtelike funksionering D Phil thesis (1978) UP.

51. Lewin (1947) 8-9; A.F. Holleman "Law and anthropology: a necessary partnership for the study of legal change in plural systems" 1979 Journal of African law 128; The books by anthropologists often deal with marriage customs or tribal courts or law of inheritance. They are useful to lawyers because they portray the background against which customary law has to be understood. They, however, do not make the distinctions necessary for legal purposes - Lewin (1947) 5. This is because anthropologists deal with law as part of culture - see Jacobs (1980) 131; Verloren van Themaat (1968) 47; Myburgh (1963) 61; Pospisil (1978) 2.
52. These include the Natal Native Commission of 1852 and the famous Cape Commission of 1883.
53. Among these may be mentioned Maclean's Compendium of Kaffir laws and customs (1858). He reduced to writing customary law for the use and guidance of those who had to administer justice according to customary law.
54. Suttner (1968) 147.
55. Among these may be included G M B Whitfield Native law and custom, J C Bekker & J J J Coertze Seymour's customary law in Southern Africa (1982);
56. Allott (1953) 172; Lewin (1947) 8-9; Suttner (1968) 148.
57. These include Simons (1968) op cit; Lewin (1947) op cit; J Lewin An outline of native law 3 ed (1960).
58. Hartman 2-4, 7; Holleman (1979) 129; Verloren van Themaat (1971) 234-5.
59. See on this J C Bekker "Judisiële kennisname van Bantoereg en gewoonte" 1976 THRHR 228; A J Kerr "The application of Native law in the Supreme Court" 1957 SALJ 313; on the position elsewhere in Africa see Allott (1960) 72 et seq.
60. S11(1) of the Black Administration Act 38 of 1927 grants the discretion to commissioners to apply customary law. The application of customary law by the appel court for commissioners' courts is granted in terms of s13 of the Act.
61. See Allott (1953) 173.
62. The Code of Zulu law Proc R195 of 1967.
63. Lewin (1947) 3.

64. E Kahn "Recognition of Native law and creation of Native Courts" in H R Hahlo and E Kahn (eds) The Union of South Africa: the development of its laws and constitution (1960) 323.
65. A J Kerr "The reception and codification of systems of law in Southern Africa" 1958 Journal of African law 96.
66. Kahn (1960) 323.
67. 1937 NAC (N&T) 147 at 152.
68. Kahn (1960) 323.
69. 1918 AD 323 at 328.
70. Here may be mentioned the 1927 Act.
71. Allott (1953) 173.
72. Allott (1953) 175.
73. For a detailed evaluation of these see De Clercq 17 et seq.
74. J G Hund "The roles of theory and method in investigating primitive law" 1974 CILSA 208. According to K N Llewelyn and E A Hoebel The Cheyenne Way: conflict and case law in primitive jurisprudence (1961) 20-21 there are three but strictly speaking they can be reduced to two. The ideological and descriptive can be regarded as one method - J.G. Hund "Jurisprudence and legal anthropology: the roles of theory and method" 1979 CILSA 196.
75. Hund (1974) 208.
76. Hund (1974) 209.
77. Llewelyn & Hoebel (1961) 20-21.
78. Hund (1974) 211.
79. Hund (1974) 210.
80. E A Hoebel The law of primitive man: a study in comparative legal dynamics (1961) 29; Llewelyn & Hoebel (1961) 21.
81. Hund (1974) 212.
82. Hund (1974) ibid.
83. Hund (1974) 213; Llewelyn & Hoebel 21-22.

84. Llewelyn and Hoebel 21.
85. Llewelyn and Hoebel 23.
86. Hund (1979) 198.
87. H W Warner A digest of South African Native civil case law 1894-1957 (1961) and the Supplements 1958-1962 (1965); 1963-1968 (1970).
88. Allott (1953) 175.
89. R.D Coertze Handleiding by die optekening van inheemse reg (1977) Unpublished Manuscript 3 et seq.
90. P Bohannan Justice and judgment among the Tiv (1957) 4-6.
91. 4.
92. 5; see also Pospisil (1978) 4.
93. Schiller (1965) 169; Allott et al (1969) 16 et seq; Pospisil (1978) 3-7; Myburgh (1963) 61-62; A C Myburgh "Inheemse reg as reg" 1981 THRHR 229 et seq.
94. Allott et al (1969) 17-18; Pospisil (1978) 4-5.
95. Myburgh (1963) 61-62; Myburgh (1981) 230.
96. When this view was raised at a conference of South African Teachers of Law at Pietermaritzburg in June 1981 some black lawyers expressed a different view because they held that there is a difference between language and law. Law is according to them based on an ideology. It is doubtful whether this approach of theirs is correct.
97. Allott et al (1969) 18.
98. B J van Niekerk "Struikelblokke in Bantoeregtelike veldwerk" 1965 Codicillus vol 6 no 1 34; Verloren van Themaat (1968) 48.
99. op cit (1981) 199.
100. Hahlo & Kahn (1973) 505-508.
101. Myburgh (1981) 231.
102. Allott et al (1969) 20-21.
103. J M T Labuschagne "Bantoereg: 'n Vakwetenskaplike terreinverkenning" 1973 Publikasies van die Universiteit van Pretoria 7.

104. J Austin Lectures on Jurisprudence or The philosophy of positiv law 5 ed (1885) vol 1 316-7.
105. This has become known as the imperative theory of law. Later followers of Austin's theory like Salmond have realised the untenability of regarding law as a command from a sovereign, and have shifted emphasis from enactment of the law to judicial enforcement thereof - see T O Elias The nature of African customary law (1956) 38-39.
106. Austin 316-7. Austin denied the name law to all forms of customary law known to him and thus impliedly African customary law.
107. Elias 38; Visser (1979) 27-28; Allott (1980) 51.
108. Allott (1980) 52.
109. ibid.
110. ibid.
111. As an example may be mentioned the rule enunciated by Shaka prohibiting marriage before persons had been given permission thereto by the king.
112. Allott (1980) 2.
113. Allott (1980) 3.
114. idem 3-4.
115. B Malinowski Crime and custom in savage society (1961) 10.
116. For a brief and general discussion see W J Hosten et al Introduction to South African law and legal theory (1977) 24 et seq; Visser (1979) 24 et seq for a brief critical evaluation of these schools of thought. Despite the demerits of Hart's theory of law and despite him being a positivist, he does recognize customary law as law - see HLA Hart The concept of law (1978) 44 et seq; H Kelsen The pure theory of law (1967) translated by M. Knight describes a legal norm as "a coercive order" derived from the Grundnorm or basic norm and so does recognize customary law.
117. Visser (1979) 41; Allott (1980) 52-54; Phillips (1971) 69.
118. The chief exponents of this school are H S Maine Ancient law (1894) and Von Savigny - see Hosten et al (1977) 68.

119. E H Brookes White rule in South Africa 1830-1910 (1974) 115.
120. See in general A. Hunt The sociological movement in law (1978). R Pound Jurisprudence in 5 vols (1959) has contributed immensely to this school of thought. On the views of E Ehrlich see Hosten et al 80.
121. Elias (1956) 48-52; Pospisil (1978) 1 et seq; see also H. Cairns Law and the social sciences (1969) 7 et seq.
122. De Clercq (1975) 14.
123. Visser (1979) 41.
124. Phillips (1971) 69; Cairns (1969) 13.
125. On custom as a source of law see inter alia the following: Maine (1894) 113 et seq; E Westermarck The history of human marriage (1921) 26; W Seagle The quest for law (1941) 27 et seq; C K Allen Law in the making (1964) 67 et seq; Lloyd (1964) 226 et seq; E A Reuter Native marriages in South Africa (1963) 22 et seq; P J Fitzgerald Salmond on jurisprudence 12 ed (1966) 189 et seq; G A Brand Die Regspleging van die Bantoe in Suid-Afrika 1965 Unpublished LLD thesis U P 25 et seq.
126. Lloyd 226-227.
127. Allott (1960) 55-56.
128. idem 56.
129. A N Allott "African law" in J D.M. Derret (ed) An introduction to legal systems (1968) 13 et seq; Allott et al (1969) 1 et seq; Allott (1960) 63 et seq; A A Schiller "Legal pluralism" in R A Lystadt (ed) The African World; a survey of social research (1965) 167 et seq; Elias (1956) 25 et seq; Visser (1979) 3 et seq; Sanders (1981) 328 et seq.
130. Sanders (1981) 333; Schiller 167; Visser (1979) 3 et seq; A J G.M. Sanders "African socialism and natural law thinking" 1978 CILSA 68 et seq.
131. Schiller 168.
132. See Allott (1960) 55 et seq.
133. ibid.
134. 112; see also AA Schiller "Introduction" in TW Hutchison et al (ed) Africa and law (1968) viii.
135. Allott (1968) 13.

136. ibid.
137. (1960) 61.
138. (1960) 63.
139. ibid. An expression which is in vogue in political circles in South Africa.
140. (1969) 62.
141. ibid; Allott (1968) 131 et seq.
142. idem 63.
143. ibid.
144. Pospisil (1978) 2 points out that a comparative approach to law removes ethnic bias.
145. Allott (1980) 55.
146. ibid.
147. ibid; see also R W M Dias Jurisprudence 3 ed (1970) 445-446.
148. For a critical analysis of these charges see Allott (1980) 55.
149. Allott (1980) 15; Allott et al (1969) 9; H J Simons "The study of Native law in South Africa" 1938 Bantu Studies 239; Schiller (1965) 173; Van Niekerk 185.
150. Roscoe Pound Interpretations of legal history (1930) 1; also quoted J H Farrar Introduction to the legal method (1977) 10.
151. Allott (1980) 15.
152. Allott et al (1969) 9.
153. Van Niekerk 185; J Lewin "English law and African justice" 1968 African Studies 157.
154. Lewin (1968) 158; W Friedmann Law in a changing society 2 ed (1972) 19 et seq.
155. Koyana (1980) 156; G F A Sawyer "Introduction in G F A Sayer (ed) East African law and social change (1967) 7.
156. Sawyer 8.
157. Lewin (1968) 159.

158. Sawyer 8.
159. Hosten et al 78 et seq.
160. Dias 480.
161. Dias 495-503; see also J van der Westhuizen "Legal philosophers (11): Roscoe Pound (1870-1964) - the sociological approach and the American realists" 1982 De Rebus 534.
162. For this see Dias 499-503.
163. Myburgh (1965) 6.

CHAPTER II

A COMPARATIVE SURVEY AND THE HISTORICAL DEVELOPMENT OF INSTITUTIONS ANALOGOUS TO ILOBOLO

2.1 INTRCDUCTION

No other institution of African customary law has been as controversial and as subject to misconception as ilobolo.¹ It is an institution that is prevalent throughout the whole of Africa although its form, practice and significance differ geographically.² This prevalence has induced some writers to consider this institution as peculiarly African.³ Yet there is evidence that this institution is not necessarily unique to Africans. Traces of it can be found in some ancient and even modern legal systems⁴ which cannot be regarded as African. If one accepts the sound principle stated above that the customary laws of whatever nation share some similarities even though these nations share no common ancestry, this is not surprising.

Koyana⁵, however, disputes that ilobolo is similar to non-African institutions. He regards the views of the 1883 Commission to this effect as simplistic. According to him ilobolo "is purely African and is quite different from the dowry system of the Romans, Greeks or Norwegians for that matter ..."⁶

If the author bases his argument on the fact that ilobolo differs from the dos of the Romans as regards its source purpose and function, one may not join issues with him. What makes his view untenable is that he says: "The lobola system goes like a thread through all the Black nations of Southern Africa, and it is remarkable that the name used is more or less the same".⁷ If his criterion is based on whether differences exist in distinguishing ilobolo from analogous institutions, then he cannot make a generalisation about ilobolo as being "purely

African" because even among the Southern African blacks ilobolo differs in some respects from tribe to tribe. Moreover, it is only among a few tribes that the name for this institution is almost similar.⁸

Bryant, on the other hand, is emphatic that ilobolo is not an invention of the Zulu or African people, but that it was a common heritage from the premordial times among almost the whole of mankind.⁹ According to him the root cause of this is the universal human instinct for gain and the exchange of valuables.¹⁰

One may well take issue with Bryant's premise that ilobolo and analogous institutions were originally based on mercenary motives. Indeed it is fallacious to attribute a common basis to such an institution among different peoples unless there is sufficient evidence to justify that conclusion. The chief defect in Bryant's view is that he summarily equates ilobolo with all other institutions sharing similar features with it. The point that this institution is not peculiarly African, nor is it confined to Africa, is, however, well taken.

To say that ilobolo is similar to some African or even non-African institutions is not to say that ilobolo is identical with them in all respects. What is indicated is that they share similar features. A comparison of these institutions is therefore warranted, and it will illuminate ilobolo.

It is already obvious that ilobolo has been subject to misapprehension. It has been misunderstood by missionaries, lawyers and administrators.¹¹ Even blacks themselves did not have a clear perspective of the whole institution. Misunderstanding of ilobolo among the early missionaries led to its characterisation as an archaic, barbaric, and in essence unchristian custom.¹² But, mirabile dictu, the bible does refer to a similar ancient practice among the Hebrews,¹³ and there is no direct word of scripture which condemns it. The new testament, and in particular the Pauline letters are

silent on it, no doubt because it did not present any problems during the period of the early church. One may pardon the early missionaries for misunderstanding the social or even legal implications of ilobolo, but for not knowing their scripture, there is simply no justification. It is also interesting to note that the early Germanic peoples, of whom some of the early missionaries were obviously descendants, observed a similar custom.¹⁴ The missionaries most probably, were oblivious of the practices of their own forbears. Thus not only did they not know their scripture, but also their history. No wonder they did not understand ilobolo.

It is for these reasons that an historical and comparative survey, albeit cursory, of some analogous institutions in both the ancient and modern world becomes necessary. Although this survey is confined to the broad outlines,¹⁵ it is of considerable significance. The aim is to obtain an objective assessment of ilobolo by evaluating the harsh criticism by westerners, and the rather tentative defence Africans have presented, against this background. In this manner it may be revealed to both poles that the institution is neither so barbaric nor so African. The following sentiments expressed by Simons are particularly appropriate:

"It is a pity that South Africans generally are unaware of the historical parallels. A knowledge of them might assist non-Africans to correct the wrong notions that they hold about the significance of lobolo. Africans too would benefit from a deeper insight into the antecedents of European marriage customs. The recognition that it is not a peculiarly African practice should enable them to be less sensitive and on the defensive when discussing the institution. If they were to see it in its historical perspective, they might the more readily realize that lobolo belongs to an archaic type of marriage and is unsuited to the needs of a progressive community". 16

Although one may be constrained to differ from some of these views, the author correctly points out that one may benefit from the study of other institutions similar to ilobolo. This may also give guidance to possible reforms of ilobolo.

The comparative study of African and ancient laws increases one's understanding of both. It is of interest to a historical jurist, interested in "the processes by which legal systems, and legal institutions and ideas, evolve over time, and change from one form to another in response to new demands or new influences".¹⁷ This is because legal institutions have developed more or less along similar lines. They have developed from a small society based on "kinship, technologically backward, and dominated by the hopes and fears of the other world just as much as by the rigours of the present, to one which is large, complex, equipped with an advanced technology, and controlled by secular or materialistic preoccupations".¹⁸ According to Allott, laws have developed correspondingly, "unwritten customary laws based on religious belief and sanctioned by religious practices give way, it is said, to legislated laws administered and studied by professional lawyers, where the sanctions now rest on the enhanced power of the state machine rather than on fear of the supernatural or the strong arm of the complainant".¹⁹

Although a comparative study of the ancient customary laws may illuminate some African legal institutions, the converse may not necessarily be true because as Allott puts it, "the study of contemporary African laws can supplement, on the role of customary laws in the evolution of law, the deficiencies or challenge the presumptions of Maine, Vinogradoff, and Diamond (none of whom wrote with any personal or reliable secondary knowledge of the legal institutions of Africa). But there is a real risk in this procedure. Modern Bushmen, and a fortiori modern or recent Baganda, Ashanti, or Barotse, are not ancient Britons, Germans, or Greeks; still less are they representative of palaeolithic or neolithic man in historical times. So to argue backwards from African laws of the last two centuries to what law was like before the Indo-Europeans colonised Europe is a suspect undertaking".²⁰ In line with this warning, it is always important to bear in mind when studying ancient legal systems that they are not the

laws of African peoples, but of the Germanic, Roman or even Greek people. This will assist in preventing the drawing of quick conclusions based on superficial analogies.

Arguing by analogy is useful, but it should be used with great caution because although "it can add wonderful life and light" to a statement it cannot really establish the truth thereof, and although it may be used "to suggest a conclusion, it cannot establish one". There is a need for careful testing to ascertain that there is a "relevant likeness between the things compared".^{20(a)}

There is no doubt that there are institutions in other legal systems that are comparable with ilobolo. Drawing attention to certain similarities between these institutions and ilobolo will obviously do a lot of good. But it is equally important to point out essential differences if there be any. It is also essential to point out certain background cultural factors which could have influenced the development of these institutions which may perhaps have been absent in the case of ilobolo. This will ensure that the analogy drawn is appropriate.

2.2 THE CUSTOM OF MARRIAGE PAYMENTS AMONG SEMITIC PEOPLES

2.2.1 The Hebrew practice

It has already been said above that the bible refers to an ancient custom of the Hebrews similar to ilobolo. It is therefore essential to make a deeper analysis of this institution. In doing this it must constantly be borne in mind that the early missionaries condemned ilobolo as an unchristian institution.

In Hebrew law a married woman fell under her husband's marital power like a single woman who was subject to her father's power.²¹ The ten commandments lists a wife, together with her servants, maids, ox and ass, among a man's

possessions.²² The husband is called "the master" of his wife.²³ A woman is therefore the "possession" of her master.²⁴

The terminology used creates the impression that the Israelites of biblical times practised a form of "marriage by purchase". This impression is further strengthened by the custom of mohar.²⁵ The question is therefore whether the woman was indeed bought and so became the husband's chattel.

The mohar was a sum of money or property given by a prospective bridegroom to the prospective bride's father.²⁶ The word appears only thrice in the bible.²⁷ This property was delivered as a result of an agreement between the prospective bridegroom and his father or guardian on the one hand, and the bride's father on the other. In this type of marriage, the engagement together with the mutual presentation of gifts and the payment of mohar were essential stages. The payment of mohar lent validity to the marriage.²⁸

Although the marriage was inchoate until the tradio puellae, and subsequent consummation, the payment of mohar was an important preliminary step towards the completion of the marriage transaction.²⁹ The amount depended on the girl's father,³⁰ and the social status of the family.³¹

The payment of mohar was closely connected with virginity and has been regarded as the pretium pudicitiae.³² When a virgin had been raped, the law provided for a compulsory marriage and the payment of fifty shekels of silver.³³ This was, however, a penalty and mohar might have been lower.³⁴

A fiance could provide his services as mohar and this is what Jacob did for both of his wives.³⁵ Alternatively, he could do an appointed task, just as David did for Michal³⁶ and Othniel for Caleb's daughter.³⁷

There is considerable controversy as to the real significance of the mohar. Although it outwardly resembles a sale, there is agreement that it was not a price for the woman.³⁸ The distinction between mohar and sale is brought out when one compares mohar marriage with another type of union which was actually a purchase. In this one a girl was sold as a slave by her father to another man as the latter's concubine or as his son's concubine. In this latter case the woman could be resold.³⁹

The view has also been expressed that mohar secured the transfer of the father's rights over his daughter, and that it was the price for the possible issue of the marriage.⁴⁰ Yet there is evidence that the husband did not secure absolute power over the wife unlike the patria potestas of Roman law which was unlimited. Consequently, the relationship between father and daughter was very much dissimilar from that between husband and wife.⁴¹

The theory that mohar represents the price for the possible issue of the marriage has some substance in it, but it does not cover the whole significance of mohar. Primarily the value of a woman was in her capacity to bear children. Yet to pin down mohar only to this is to ignore, among other things, the fact that the man desired the woman he had chosen. Moreover, there is no evidence that mohar had to be repaid should there be a failure of issue of the marriage.⁴² In fact instances are known when the spouses were childless, but still lived together.⁴³ As a result it would seem that, although originally it had been the pretium paid for possible children this had entirely ceased to be the significance of the mohar "at the time when vague undefined custom had given place to definite law".⁴⁴ But it has also been contended that the husband acquired more than the right to "make a woman the mother of his children".⁴⁵ This is supported by the fact that no provision was made for divorce in the case of sterility. On the contrary he could take a concubine in the case of such sterility.⁴⁶ Nor was the mohar compensation for the expenditure in the girl's upbringing as the girl's services in the father's house had already refunded the

cost of her upbringing.⁴⁷

According to the probable theory, the mohar seems to have covered two important matters, namely, compensation to the father for the loss of his daughter's services⁴⁸ and payment as the pretium pudicitiae. As the woman was of great service to her father, it is understandable that mohar included the element of compensation to the father for the loss of his daughter's services.⁴⁹

Because of the importance attached to the signa virginitatis it has been alleged that this was closely connected with mohar marriage.⁵⁰ Thus seduction of the virgin was regarded as an injury not only to herself but also to her father to whom she belonged.⁵¹ Virginity was not, however, the object of the sale, but it was an essential quality of the woman for whom mohar was paid.⁵² The girl's virginity therefore was her strongest qualification for marriage.⁵³

It is probable that the father only enjoyed the usufruct of the mohar. He was expected to give a portion of what he received to his daughter. This part, together with other property given to her, formed her dowry.⁵⁴

From the brief account already a few striking similarities between ilobolo and the mohar can be identified: these include the fact that the mohar, just as ilobolo, had to consist of money or livestock; that the payment thereof was dependent on the girl's father and the social status of the family; and that the agreement had to be between the woman's father and the bridegroom or the bridegroom's father. The woman herself was not a party to the agreement. From this can be inferred the element of male-domination.

2.2.2 The Arabic practice

Just like the Hebrews of ancient times the Palestinian Arabs had a similar practice (mahr). In ancient Arabia the two fathers could exchange their daughters instead of giving mahr. Seemingly this practice existed side by side with mahr.⁵⁶ This sum of money paid by the fiance to the girl's parents varied from

village to village. It was influenced by various factors such as the family's income, the question whether the girl was marrying within her kin or outside and whether she was of the same village or from another place. Part of the sum paid went towards the buying of the bride's trousseau.⁵⁷ This practice too, among the Arabs is not regarded by them as a sale.⁵⁸

2.2.3 The practice among the Babylonians

The ancient Babylonians also had a practice similar to ilobolo, known as tirhatu although it was not an essential of the marriage.⁵⁹ Here, too, the amount was not fixed. The money was administered by the father who enjoyed the usufruct thereof. He, however, had no right to alienate it but it reverted to the wife in case she became a widow or to her children after the wife's death.⁶⁰

In Babylonian law, the father gave his daughter goods, nudunnum, belonging to her personally⁶¹ and in which the bridegroom had an usufruct. These went back to the woman in case the husband died or the parties divorced.⁶²

2.2.4 Assyrian Law

This same custom is found in Mesopotamia. The code of Hammurabi⁶³ made provision that the bridegroom had to distribute gifts to the girl's parents. If the engagement was breached they had to restore twice what they had received.⁶⁴ According to Assyrian law if the bridegroom had given tirhatu to the bride, this consisted of ornaments given to her and a present to her father.⁶⁵

2.2.5 The practice among the Greeks

A practice analogous to ilobolo was also found among the Greeks. Aristotle tells us that in primitive ages of Greece, men bought their wives.⁶⁶ Similarly Homer⁶⁷ refers to the fact that the purchase of a bride as the unmarried daughter is a valuable possession.⁶⁸ Although there is a controversy as to the marriage consideration in Greece,⁶⁹ it would seem that this was not

strictly the purchase of a chattel, but only of the rights of a husband.⁷⁰

2.2.6 The position in Roman Law

Except for the imaginary sale (by mancipatio) in coemptio, there is no institution in Roman law analogous to the Zulu ilobolo.⁷¹ In coemptio, however, a woman was not sold but she sold herself with the consent of her father or tutor, according as she was or was not alieni iuris.⁷² It is therefore quite doubtful whether coemptio can be regarded as a survival of ancient bride purchase.⁷³

For purposes of completeness it is appropriate to have a look at another institution of Roman law which has been terminologically confused with ilobolo, and that is dos or dowry.⁷⁴ Varro,⁷⁵ makes reference to dos. Yet he does not commit himself as to whether dos is given by the husband or by the wife.⁷⁶ Similarly Tacitus⁷⁷ tells us that according to the early Teutons, it was not the wife, but the husband who brought the dowry,⁷⁸ and she herself brought some piece of armour to her husband.⁷⁹ It must be pointed out, however, that the use of the expression dos must have been made by Tacitus for want of a suitable term, and this he used in relation to the Teutons and not in relation to the Romans themselves.

Dos as used by the Roman jurists, related to gifts brought by the bride for the bridegroom for the purpose of contributing to the upkeep of the marriage, and while the marriage lasted it became the property of the husband. In early Roman law only a moral duty existed for the woman to provide dowry. Although it was not legally necessary, its existence was the best evidence that marriage was intended and not mere concubinage, and fathers often insisted on giving dos. Justinianus made it a legal duty for the father to give dos.⁸⁰ The dos, although at the same time aimed at improving the position of the woman, came under the total ownership of the husband.⁸¹ During the classical period only the dowry system existed in practice while under the law of Justinian, the manus marriage having been abolished, it also became the only one in law.⁸²

The original purpose of dos was to serve as a contribution to the

"burdens of marriage" (onera martrimonii).⁸³ A second function developed from a later part of the Republic. According to the latter function it had to secure the maintenance of the woman if the marriage was terminated.⁸⁴ According to the Republican law the husband was regarded as the owner of the dos and could consequently alienate or mortgage it, not only during the subsistence of the marriage, but even after its dissolution.⁸⁵ In the course of time, however, the rights of the husband were restricted. Augustus' lex Iulia de adulteriis of 18 BC prohibited the husband from alienating or mortgaging any fundus Italicus contained in the dos. Justinian extended this prohibition to cover all dotal land.⁸⁶ The wife's consent could not validate a mortgage or a sale of the dotal land which was preserved intact for her.⁸⁷ The husband's right to the use and enjoyment of fruits of the dos was limited to the period during the subsistence of the marriage. Although prior to Justinian the husband was regarded as owner even after the dissolution, and the law rarely allowed the wife or her father a right of reclaim, Justinian made it obligatory on the husband to return the dos in all circumstances, save when the misconduct of the wife had caused the dissolution.⁸⁸

The general tradition of the dos was taken over by the church. Its aim was to provide for the wife and to prevent the husband from misusing that property. The dos as modified by Justinian, was received in various countries.⁸⁹

In ancient Hebrew law there is no special word for dowry.⁹⁰ Yet already in old testament times it was customary for the bride to bring in property at the time of the marriage. This was not required by law, but was regarded as a gift given in return for the mohar given by the husband. Thus she could be given a slave⁹¹ or a piece of land.⁹²

From this account it is obvious that dowry is the direct opposite of ilobolo. Even the use by Tacitus of the expression "dos", when describing the Germanic institution of "brideprice", was based on a misunderstanding to the extent that this gift was not yet given, at that time, to the bride herself, but to her kin.⁹³ There is no evidence that

this dowry among the Romans was a later development of an institution analogous to ilobolo. Germanic law, perhaps, provides a better equivalent.

2.2.7 Germanic law

The Teutonic peoples had an institution having features similar to the African ilobolo.⁹⁴ This was variously called "wittum", "widum", Old High German "widemo", "widem", the Anglo-Saxons called it "weotuma", the Burgundians "wittimon", the Langobardians "meta" or "mundium", the Frisians "mundsket", the Scandinavians "mund" and in Latin was termed "pretium nuptiale", "dos" or "pretium emptionis".⁹⁵ It came into being as a result of an agreement between two families to transfer the munt over the girl from her father or guardian to her husband.⁹⁶ The Latinized form of "munt" is "mundium" and it means a hand.⁹⁷ Originally it was unlimited authority "absoluut beschikkingsrecht", of the mund-holder over a person subject to his control. Gradually some moral and legal restrictions were introduced into this concept of almost unlimited authority which later recognized a duty in addition to the right of the master. As a result the idea of protection developed according to which the authority had to be exercised not only in the interests of the person having such authority, but also in the interests of the person subject to the munt.⁹⁸ According to the original concept of munt the woman stood in the same position as a child, and a man also had in early Germanic law the power to kill his wife or to sell her into slavery.⁹⁹

"Frauenkauf" was the original and normal form of marriage among the Germanic peoples.¹⁰⁰ Negotiations took place between the prospective bridegroom and his family on the one side, and the girl's father or mund-holder and his family on the other for the fixing of the pretium nuptiale which consisted ordinarily of cattle which were the main means of exchange,¹⁰¹ money being practically unknown.

The bride was not a party to this agreement, but was merely an object of the agreement.¹⁰² The Frankish folk-laws referred frequently and freely to "uxorem emere", "feminam vendere", "pretium emptionis"; "pretium nuptiale", "puella empta"; and the Scandinavians "Kaupa". The expression "Kaufen" (to buy) for "to marry" continued for a long time in Germany even after the custom itself had changed.¹⁰³ According to one Middle Ages source a woman was regarded as a man's chattel.¹⁰⁴ This coupled with the fact that the woman was strictly speaking not a party to the agreement, but merely an object thereof strengthened the view that a woman was purchased.¹⁰⁵ This is further fortified by the use of expressions connoting a sale.

The word "kauf" or "kaufen" (to buy) for "to marry" in Germany was, however, used in a wider sense than today, and it embraced not only a sale but also every bilateral contract. As a result this has induced certain writers to conclude that a marriage in Germanic law was not a sale in the present sense of that word.¹⁰⁶ Thus Van Apeldoorn¹⁰⁷ asserts that although the marriage in all Indo-Germanic peoples approximated a sale, marriage was not simply a sale. He contends that a man made a woman his wife by sleeping with her. But before that he had to have her in his power because corpula carnalis alone did not constitute a marriage. It had to take place with the intention of concluding a marriage. He obtained that power by purchasing "te koopden of te rooven" the woman from her father which was the normal way of obtaining munt over her from her father or mund-heer.¹⁰⁸

There is an equally strong opinion to the effect that when the Germans procured their wives, they regarded the transaction as merely a sale, and that there was no difference whether they purchased the woman as wife or as servant. This does not mean that the purchase of a wife was not distinguished from all other purchases both by its object - a free woman, and by its purpose¹⁰⁹ - "nor is it inconsistent with the

fact that the will of the bride herself may also have come to be considered, at least in fact, at an early date".¹¹⁰

The objection against the pretium nuptiale as being the price for the woman is based on moral considerations. But as Huebner points out:

"The creation of the marital community for life by a transaction of sale, - it nowhere appears in more repulsive form than in some of the Anglo-Saxon laws - has to our feelings a cold-blooded and brutal character. But that can be no reason for doubting that the actual nature of this form of marriage was a sale; especially when one remarks how widespread this view has been and still is among races of the past and present day. Even now it cannot be regarded as extinct in many social strata of the German folk".¹¹¹

The idea that the pretium nuptiale was the purchase not of the woman herself but of the munt over her¹¹² may have developed later¹¹³ owing, no doubt, to the influence of Christianity which improved the position of women by prohibiting the abduction and purchase of women.¹¹⁴ This gave rise to the recognition of a woman as a person, as a legal subject, although in practice the old ideas continued to prevail, and the old terminology continued to be applied.¹¹⁵ Yet the Church had considerable influence which even found expression in the folk-laws.¹¹⁶

According to Van Apeldoorn the view that a marriage came into existence by purchase is based on a two-fold misunderstanding, namely a confusion between mund and marriage and that people did not have insight in the meaning of mund which insight developed later. According to him the agreement between guardian and bridegroom did not result in a marriage, but in the transfer of the munt.¹¹⁷ He contends that a valid marriage could come into existence without the consent of the guardian, and consequently without the transfer of the munt, but in this latter case the husband could not acquire the munt over his wife, and consequently over his

children who remained under the munt of the woman's father.¹¹⁸

The weight of opinion therefore is to the effect that the pretium nuptiale purchased the munt over the woman and not the woman herself although this idea was of later development and is negated by the earlier unlimited authority of the mund-holder. As a result it does not take the point far. Originally the amount depended on agreement, but it was later fixed by custom or statute.¹¹⁹ The practice was to deliver the agreed number of cattle before the marriage to the girl's father unless credit was granted. After this the girl was solemnly transferred by her father to the bridegroom in the presence of the assembled relations. As a token of the munt, the father would give the bridegroom a staff, sword or glove.¹²⁰

A man of straw, unable to pay the pretium nuptiale might enter the house of his father-in-law to work for it. He did not obtain the munt over his wife, but was himself under the munt of his father-in-law. A man who had abducted a woman and had not paid the pretium nuptiale could also not acquire the munt over the wife.¹²¹ A man could also perform a specified task in the place of a pretium nuptiale. As an example may be mentioned the story related in the Germanic Volksepos, the Nibelungenlied where Gunther of the Burgundians promised his sister Kriemhild to Siegfried from the Netherlands if the latter helped Gunther to win the hand of Brunhild in marriage.¹²² But this form was confined to women of royal blood only, and was not of general application.

The husband had the power to terminate the marriage at any time. This could be done simply by repudiating her and sending her back to her family. If she was repudiated for a good reason like barrenness (the main purpose of marriage being the procreation of children) the husband could reclaim the pretium nuptiale. If he repudiated her for no good reason he forfeited his pretium nuptiale. Divorce was, however, mostly by mutual agreement.¹²³

Under the influence of the church, beginning with the sixth century, polygyny was prohibited. Although the marriage outwardly remained a contract whereby a man "bought" a bride, the consent of the woman was required, and the pretium nuptiale changed character.¹²⁴ Although the woman remained under the guardianship of her father or brother, a marriage without her consent was prohibited. Among the Frankish people it was expressly provided without exception that no marriage could take place without the woman's consent. This rule was also incorporated into the laws of the other Germanic peoples. As a result a marriage was not concluded by a unilateral act of the man, but by both parties acting in concert.¹²⁵

During the Frankish period the marriage act was divided into two stages, a betrothal and the marriage proper or nuptials. In the betrothal the bridegroom paid the pretium nuptiale thereby binding the other contracting party to the counter-performance which was postponed to a later date when credit appeared. A bridegroom could in the betrothal deliver a symbolic price or earnest (arrha). This symbolic price "Mundschatz" was among the Franks a solidus and one denarius.¹²⁶ The bridegroom bound himself to a later payment of the pretium nuptiale by giving the mundium-holder of the bride a staff.¹²⁷

When it became fashionable to regard the mund over the bride, rather than her person, as the object of the sale which the bridegroom had to acquire with the purchase price, the idea that the woman was bought was incompatible with the recognition of the personality of the woman. This explains why among the Langobardians the pretium nuptiale was also known as "mundius", among the Frisians as "muntsket" ("Mundschatz"), and among the North Germans as "mundr".¹²⁸

The recognition of the personality of the woman also curtailed the unlimited mund over the woman. Thus a woman could marry a man of her choice, without the consent of her mund-holder,

and the marriage would be valid. Furthermore the mund-holder could not reclaim his mund over the woman. Although the mund and marriage had hitherto been two separate things, they became closely related, no doubt, owing to the influence of the Bible that a man is the head of his wife.¹²⁹ Thus at the conclusion of the marriage it meant that the guardian of the woman at the same time forfeited his mund in favour of the husband. The mund was transferred against the payment of a price. From this development, a marriage and mund were regarded as inseparable, and the woman had not only a husband, but also a guardian. What earlier on meant the transfer of the mund now meant the consent to the marriage. It was no longer necessary to transfer the mund because that was done by the marriage itself. The man simply obtained the consent of the bride's father, and he would promise to transfer the woman on the wedding day.¹³⁰ In actual fact the marriage came into existence by the agreement of the bridegroom and the bride. The betrothal by the guardian was a remnant of the earlier time. Although the earlier form remained, the content had changed, which can only be explained by the customary inertia even though the meaning has changed.¹³¹

The money sooner accrued to the bride rather than to her sib. This was of considerable importance. There developed from the custom of the guardian delivering to her the whole or a part of the pretium nuptiale, a legal claim of the bride to that amount. Consequently the meaning and purpose of the performance made by the bridegroom changed. Instead of giving the amount agreed upon to purchase a bride from her sib, he made her a gift (Zuwendung) to support her should she be widowed. As a result the pretium nuptiale became a dos or settlement, and the "puella empta" became the "puella dotata".¹³² Owing to this change the giving of "Wittum" which was once essential under Germanic law to the validity of the marriage, altogether lost its importance from the twelfth century onwards.¹³³

The betrothal then became a contract concluded between the

bridegroom and the bride. The exchange of rings took the place of the arrha. The betrothal ring was the last remnant of the old pretium nuptiale, and as Huebner says:

"With it the bridegroom betrothed the bride, and the bride, by putting it on her finger, obligated herself to marital fidelity. When the custom of exchanging rings developed, the mutual gift and acceptance of the rings replaced the mutual delivery of staffs, and represented the formal act of a wed-contract."¹³⁴

On the wedding day traditio puellae took place. The significance of dividing marriage into two phases was that neither of these alone sufficed to constitute a marriage relationship. Obligations were created. Failure to perform the delivery of the bride led to the father of the woman's return of the pretium nuptiale should it already have been paid, and the betrothal created the obligation of fidelity on the part of the betrothed woman.¹³⁵

In summary: Originally the woman was regarded in early Germanic law not as a person, but as a thing for which a man could pay a price to make her his wife. When the personality of the woman was recognized the pretium nuptiale came to be regarded as the price paid for the transfer of the munt. Later the munt was no longer an absolute power of disposal ("absoluut beschikkingsrecht"), but one limited by the rights of the woman. This meant that this power had to be exercised in the interests of the woman. As a result the idea developed that the power of guardianship had to be for the protection rather than the subordination of the woman. This idea was incompatible with the payment of the sum of money for the transfer of the munt. But this idea still remained ingrained in the legal system. It later became customary that the guardian gave the whole or a portion of the price to the woman herself. What was originally a custom later developed into her right.¹³⁶ If the woman was under the guardianship of a relative, the relative had to give a third of the pretium nuptiale to the bride, and a third to the woman's

family. But the father and brother could keep the whole of it. Finally the price was no longer payable to the father or guardian, but to the bride herself, and now not during the engagement, but on the conclusion of the marriage. As a result it developed into a "bridewealth" or "bruidschat".

When the pretium nuptiale became "bridewealth" paid on conclusion of the marriage, the bridegroom had to pay to the father or guardian of the girl a symbolic price on the conclusion of the engagement to make the promise to transfer the munt over the girl binding. He gave an arrha or handgeld- according to Salic law one solidus and one denarius. Among the Langobardians and Visigoths a ring would be given as an arrha, a practice known also among the Romans, and which must have been taken from them. Later when the girl betrothed herself she received the arrha herself. The ring was earlier only given to the woman, and not to the man, but the exchange of rings developed later on.¹³⁷ The giving of money or other objects than rings during the engagement continued for a long time. In Friesland, in particular, it continued until the nineteenth century.¹³⁸

From the above survey similarities and differences between the Germanic pretium nuptiale and ilobolo became apparent. It is not practicable to mention all of them. Among the similarities may be mentioned the fact that the agreement to pay the pretium nuptiale was, as in Zulu law, concluded between the two family groups, and the woman was not a party thereto, but merely an object thereof; the consent of the woman was earlier not material although it later on became essential; the use of cattle as the means of exchange and the fixing of the amount by custom and statute is also another similarity; the formal transfer of the woman against the payment of the pretium nuptiale, and the fact that this was essential to the validity of the marriage although it later on lost its importance, and also the fact that groundless termination of the marriage led to forfeiture of the pretium nuptiale.

On the side of the differences may be mentioned the fact that in early Germanic law the guardian had unlimited power of disposal over the woman analogous to the Roman concept of ius vitae necisque. Similarly on marriage this power was transferred to the husband. By virtue of this power he could even kill or sell his wife as a slave. Although the Zulu woman appeared to the early missionaries and Whites as a slave, this was by no means the case. Although she occupied a position inferior to that of a man, she was by no means a man's chattel to be sold and bought or even killed with impunity. She occupied an honoured if lower position.¹³⁹ Thus the idea that a woman was purchased or sold when ilobolo was delivered for her is foreign to the notion of marriage among the Zulu people. Nor was there ever an interchangeable use of terms denoting ilobolo and a sale,¹⁴⁰ as was the case in early Germanic law.

Another striking difference between the Zulu ilobolo and the early Germanic practice is that there is no evidence in Zulu law that a man who could not afford to deliver ilobolo would enter the services of his father-in-law in order to work for it. Other arrangements were made including the conclusion of a marriage on condition that her ilobolo be settled from ilobolo delivered for her eldest daughter. The relationship that should exist between a bridegroom and his in-laws would militate against the bridegroom's staying with them. Indeed the practice of working for a wife was also found among the ancient Hebrews. The fact that it denied the husband guardianship over his children makes it all the more unacceptable to the Zulu.

It is interesting to note that whereas the ring was among the Germanic people the ultimate development of the pretium nuptiale, the blacks in general and Zulus in particular have adopted the use of the engagement ring while they still adhere to the practise of ilobolo. This inevitably prevents the ultimate development of ilobolo to meet the same fate as the Germanic pretium nuptiale.

Before leaving this comparative survey of early marriage payments, it will be illuminating to have a brief look at the changing nature of these payments. Although reference has already been made thereto above, it is important to analyse this in comparison with ilobolc.

2.2.8 The changing nature of early marriage payment

The remarkable feature of some of the marriage payments of the ancient legal systems analysed above is their tendency to adapt to changed circumstances. Often the changes resulted in institutions totally different from the original practices. When parents of the woman lost economic benefits they derived from her marriage, greater attention was given to the interests of the marriage partners.¹⁴¹ This is particularly so with the giving of return gifts. This practice negated the effect of marriage by purchase. This tendency was evident from the Greeks. Tacitus also referred to the gifts given by the wife to her husband as against gifts for which a German obtained his wife.¹⁴²

In the laws of Hammurabi reference is made not only to the bride-price, but also to presents (nudannûm) which the bridegroom presented to his bride. Similar gifts were given in ancient Israel to the bride.¹⁴³ Among the Israelites mohar was sooner or later given either in toto or pro parte to the bride. Laban's daughters grumbled that their father had sold them as slaves and wasted their mohar.¹⁴⁴ In Arabia the mahr was as early as the pre-Mohammedan period occasionally given to the wife as her property.¹⁴⁵

The custom of the husband's providing the wife with a dowry would seem to be found even today among Jews and Mohammedans. This was established by Jewish law with the object of protecting the wife should she become a widow or divorcee. Before marriage a husband had to bind himself in writing to provide the wife with a sum of money from his estate in the

event of her divorce. This obligation was named Kethûbhah (the marriage deed). The minimum sum payable under this obligation was, in the case of the marriage of a virgin, 200 denarii, and 100 at the marriage of a widow. To secure the wife's claim to the amount stipulated in the Kethûbhah the husband's property as a whole was mortgaged.¹⁴⁶ This institution seems to have been connected with the old custom of marriage by consideration.¹⁴⁷

A similar process of change took place among the Teutonic peoples. From the sixth to the ninth century the pretium nuptiale was no longer paid to the father or guardian of the bride but to the bride herself. The right of the guardian was limited to receiving handgeld. The bride price was not, however, paid to the bride at the conclusion of the marriage. The pretium nuptiale was changed into a provision for the widow to be paid to her after death of her husband from the husband's property.¹⁴⁸

It has been said that the peculiar change in the meaning of the word "dos" was chiefly due to the influence in the oldest Frankish law of the "donatio ante nuptias" which was adopted by the Roman law from the legal systems of the provinces, and which in the later Roman period ordinarily preceded the delivery of the "dos" by the wife to the husband. It was known as "donatio ante nuptias in dotem redacta", and this may have eventually led to the use of the word dos to designate the husband's gift. The personal belongings together with dower and morgengawe constituted the wife's personal property. The dower was a gift by a husband to his wife which developed from the pretium nuptiale and which was regarded by many Germanic tribes as "a necessary and, indeed, the principal token of a legal marriage".¹⁴⁹ If it was not fixed by agreement, the wife was given a claim for dower to an amount statutorily determined, - the dos legitima.¹⁵⁰

The tendency of moving from marriage consideration to the

practice of providing the bride with a dowry often consisting in part of the pretium paid for the bride shows that more emphasis was placed on the protection of the interests of the parties. Various meanings can be attributed to this practice.¹⁵¹ In ancient Babylon for instance the bride usually brought a dowry from her father's house which remained her property although the husband enjoyed an usufruct of it. It was returnable if the husband repudiated her. On her death it devolved upon her children. If she was childless it reverted to her father.¹⁵² Similar tendencies have been found also among the Mohammedans,¹⁵³ the ancient Gauls¹⁵⁴ and the Romans.¹⁵⁵

To a person investigating the development of ilobolo, the changing nature of the ancient marriage payments provides interesting reading. These changes coincide with some of the changes which have taken place and are taking place in ilobolo. Already among the Zulus the practice developed in the past of the father giving certain head of cattle to his daughter, which cattle were taken from the lobolo cattle delivered for her. This was purely a customary practice and the courts have refused to enforce it as a legal rule.¹⁵⁶ Besides this, the practice of the father giving money he has received as ilobolo for his daughter to the latter with the purpose of enabling her to purchase gifts for her in-laws and even her personal belongings including furniture and crockery, still continues. Moreover, from interviews it became clear that parents are aware that they are not deriving any economic benefit from ilobolo. This may well be the start of a new era in the development of ilobolo. More attention will, no doubt, be devoted to the interests of the woman than to the father's or guardian's benefit. Indeed, from interviews certain isolated instances were found where the parents have given priority to the interests of the couple than to their own interests. It is, however, doubtful that ilobolo will develop to be a form of dowry owing to the development of the class of the working women among the Zulus.

2.3 SUMMARY AND CONCLUSION

Although many Africans regard ilobolo as a unique African institution, there is strong evidence that there are comparable institutions of non-African origin. The development of these institutions displays a remarkable parallel to ilobolo. A survey of this development provides interesting information to one studying the development of ilobolo. It removes the western ethnocentric bias as well as the tendency by Africans to be on the defensive.

It has become obvious that those who regard the institution as purely African do so because of ignorance. Those who have condemned the institution as barbaric and unchristian have done so due partly to ignorance of the historical parallels and partly to a lack of understanding of the basic tenets of the African social structure. Quick conclusions were drawn from inadequately studied phenomena. Consequently wrong conclusions were drawn.

A basic understanding of the milieu in which ilobolo has thrived, is essential. That is why beside the study of the development of institutions analogous to ilobolo, the historical development of ilobolo itself should also be studied. As has been shown above, no doubt, one point will become clear, and that is that ilobolo belongs to a patriarchal society. It should not simply be discarded because it appears to be a practice of ancient origin. There are many aspects of South African law, in particular private law, which are of Roman law origin. Although they were fashioned by a simple agrarian or pastoral community this has not discredited them. Their juristic and judicial extensions have made them equally applicable to the present South African community. This also holds true of principles of Germanic origin. Whether or not ilobolo still has a role to play is a question which can be answered in the light of the needs of the community in which it applies.

FOOTNOTES

1. J P Bruwer Die Bantoe van Suid-Afrika (1956) 75; Soga (1932) 280 attributes this widespread ignorance of African institutions to the lack of systematic study of their history, social life and customs. Knowledge of these was superficial. When these subjects were approached such persons were prone to look at them from the angle of their own national character, they "look out of their own little window, and think that they see the whole world", he says.
2. D S Koyana The customary law in a changing society (1980) 4; Soga 263 says: "It may well be understood that a primitive people living close to nature, and, therefore, with a morality of a low order, needs some custom or law to secure for a woman her human rights and the protection of her person, and through her to protect her family and tribal life". It is doubtful whether the purpose of giving ilobolo was originally aimed at protecting the rights of the woman.
3. Koyana (1980) 4 points out the tenacity of ilobolo even among westernized blacks.
4. Report of the Native Laws and Customs Commission of 1883 29; See especially Rev A Kropf "Ukulobola" at 259 of the appendix to the report.
5. (1980) 4.
6. ibid.
7. idem 5.
8. Perhaps Koyana is one of the exponents of the unity of African law - see Allott (1960) 57-8.
9. A T Bryant The Zulu people: as they were before the white man came 2 ed (1967) 592; E Westermarck The history of human marriage vol II 5 ed (1921) 354.
10. Bryant ibid; Soga 264, however, does point out that although ilobolo is universal among Africans, it is carried under different systems by various tribes. As a result he regards it as being unwise and unjustifiable to generalise in regard to it.
11. See below in this chapter.
12. See Report of 1883 Commission 29 and below.
13. In the old testament. See also below in this chapter.
14. See below.

15. Soga 264 regards such broad generalizations as being dangerous. He feels that the custom must be studied independently of others both as to its administration and its implications. This, however, should not be interpreted as discouraging the comparative analysis of the institution.
16. H J Simon African women: their legal status in South Africa (1968) 87; Westermarck 354 says that the payment made in contemplation of the marriage is found among the "lower races". One may not agree with that.
17. Allott (1968) 132.
18. Allott (1968) ibid.
19. ibid.
20. idem 133.
20. (a) H R Hahlo & E Kahn The South African legal system and its background (1973) 309.
21. R de Vaux & J Mc Hugh Ancient Israel: its life and institutions (1962) 26.
22. Exodus 20: 17.
23. Exodus 21: 3; 2 Samuel 11: 26; Proverbs 12: 4.
24. Genesis 20: 3; Deutoronomy 22: 22.
25. De Vaux & Mc Hugh 26.
26. E Neufield Ancient Hebrew marriage laws (1944) 94; De Vaux & Mc Hugh 26; Report of 1883 Commission 259.
27. Genesis 34: 12; Exodus 22: 16; 1 Samuel 18: 15.
28. Neufield 94.
29. Neufield 95.
30. Geneis 34: 12.
31. 1 Samuel 18: 23.
32. Neufield 95.
33. Deutoronomy 22: 29.
34. De Vaux & Mc Hugh 26.
35. Genesis 29: 15-30; Westermarck 360 The marriage by service was according to Westermarck 369 not a regular form of marriage, but was a substitute for marriage by delivery of goods.
36. 1 Samuel 18: 25-27.

37. Joshua 15: 16.
38. Neufield 96; De Vaux & Mc Hugh 27; Kropf 259, says that use in the old testament of mohar was restricted to this transaction only and not to ordinary sale.
39. Exodus 21: 7-11.
40. Neufield 96.
41. Neufield 97.
42. Neufield ibid.
43. In 1 Samuel 1, the story of Elkanah and his barren wife is related.
44. Neufield 97.
45. Neufield ibid.
46. Genesis 16.
47. Neufield 98.
48. Neufield ibid; De Vaux & Mc Hugh 27; C.H. Blaine & C N Manning Native Court practice (1931) 20.
49. Neufield 98; Kropf 260.
50. Neufield 100.
51. Deut 22: 29; Neufield 101.
52. idem 102.
53. idem 103.
54. Simons (1968) 87.
55. De Vaux & Mc Hugh.
56. Westermarck 358.
57. De Vaux 27.
58. ibid.
59. De Vaux & Mc Hugh 27.
60. idem ibid.
61. B Cohen Jewish and Roman law: a comparative study vol 1 (1966) 350 et seq.
62. De Vaux & Mc Hugh 28.

63. Sections 150-160 of the Code of Hammurabi as quoted by Bryant 587.
64. The relevant sections as quoted by Bryant 587 provide: "If a man has brought goods into the house of his father-in-law, and has given the bride price, and has looked upon another woman and has said to his father-in-law 'Thy daughter I will not marry' then the father of the girl shall retain all that has been brought but if it be the father-in-law that refuses to hand over the girl after payment therefor has been received then he shall equal all that has been brought in and repay it".
65. De Vaux & Mc Hugh 28, 33; Bryant 587.
66. Politica ii 8. translated by B Jorvett (1905) 62.
67. In his Iliad, Hymn XI 241 translated R Lattimore The Iliad of Homer (1951) 240.
68. See also Odyssey 1. 277, 11 196 translated E.V.Rieu (1946) 32, 42.
69. Westermarck 410.
70. Westermarck idem 411.
71. Gaius Inst. 1, 113 says, "Coemptione vero in manum convenient per mancipationem, id est per quandam imaginariam venditionem; nam adhibitis non minus quam quinque testibus civibus Romanis puberibus, item libripende, emittis mulierem cuius in manum convenit": See also M Kazer Roman private law 6 ed (1968) 245 translated R Dannenbring; R W Leage & C H Ziegler Roman private law 2 ed (1948) 99; F Schultz & M Wolff Principles of Roman law (1967) 193; F Schultz Classical Roman law (1954) 122 et seq; Westermarck op cit 411. This was resorted to less and less and by Cicero's time it was rare already. See W W Buckland A textbook of Roman law from Augustus to Justinianus 3 ed (1963) 119, 236, 239. The words were so framed as not to treat her as a thing Gaius 1.123.
72. P E Corbett The Roman law of marriage (1969) 81 et seq, Sohm's Institutes 452 et seq.
73. Westermarck 411.
74. The S.A. courts have in the past referred to ilobolo as dowry. It is now settled that this is a misnomer.
75. De Lingua Latina v 175 says: "dos si nuptiarum causa data: haec Graece ἰλοβόλο: ita enim hoc siculi".
76. Cohen 349.

77. Germania c18.
78. He says: "dotem non uxor marito, sed uxori maritus offert" (idem.)
79. Idem: "atque in vicem ipse armorum aliquid viro adfert".
80. Buckland 107 et seq; Cohen 349; Leage 104; Schultz 45, 70, 148, 195, 201; Kaser 251 et seq.
81. Kaser ibid.
82. Schultz 70; Kaser 251 et seq; Sohm 465 et seq.
83. Paul D 23.3.56.1
84. Sohm's Institutes 465 et seq; Kaser 251 et seq.
85. Sohm 467, Kaser 252.
86. Kaser 253 G.5.13.1.15b.
87. Sohm 467; Kaser 253; Westermarck 429.
88. Sohm 470; Kaser 253; Westermarck 429.
89. Westermarck 430.
90. Kropf op cit 260 points out that according to the old testament Jewish law, the word mohar was never used as given to the bride, which the word dowry means, but to the father.
91. Cohen 350; Genesis 24: 59,29: 24.
92. Jos. 15- 18-19. This gift was given after the wedding.
93. R Huebner A history of German private law (1969) translated F S Philbrick 598.
94. Westermarck 411; H R Hahlo The South African law of husband and wife, 4 ed (1975) 1.
95. Westermarck 412; Huebner 596.
96. Hahlo 1; Hahlo & Kahn (1973) 345.
97. Huebner 586.
98. Huebner ibid; L J N van Apeldoorn Geschiedenis van het Nederlandsche huwelijksrecht (1925) 15.
99. C Tacitus Annales iv 72. According to the law of the Langobards a man could kill his wife if she had committed adultery; according to the law of the Anglo-Saxons

if a man had slept with another man's wife he had to pay "weergeld" and provide him with another wife and bring her in his house. In this respect the woman was treated as a chattel. The same law also refers to "Wanneer iemand eene maagd koopt, zij ze door zijne kooppenningen gekocht, wanneer geen bedrog in spel is. Is er bedrog in't spel, dan brenge hij haar terug en men geve hem zij geld terug"; see Van Apeldoorn 15.

100. Huebner 594.
101. C Tacitus Germania ch18; J Caesar De Bello 19;
Huebner 595.
102. Huebner 595.
103. Huebner ibid; Van Apeldoorn 16.
104. Van Apeldoorn 16.
105. Van Apeldoorn ibid.
106. Huebner 595.
107. Idem 16. Thus he says: "Maar danblijft er niets anders over dan oet het huwelijk tot stand kwam door de eenzijdige handeling van den man. Hij maakte het huwelijk. Hij maakte het meisje tot zijne vrouw".
108. Idem 17.
109. Huebner 595.
110. Huebner 596.
111. Idem 596.
112. Huebner 598; Van Apeldoorn 22.
113. Huebner ibid.
114. Van Apeldoorn 20.
115. Van Apeldoorn 20.
116. The folk laws recognized without exception that the woman was a legal subject. Van Apeldoorn 20 refers to the law of LIUTPRAND to the effect that no one can treat a woman worse than to give her to a man whom she did not love ("Insuper et addimus, est nec ad liberas homnis eam ad maritum absque eius voluntatem dare presumat, quia peius tractata esse non potest, si illum verum tollit, quem ipsa non vult").

117. Van Apeldoorn 22; see also Westermarck 412; H Cairns Law and the social sciences (1969) 41.
118. Idem 23.
119. Westermarck 412.
120. Hahlo & Kahn (1973) 345; Huebner 597.
121. Hahlo & Kahn (1973) 347. Frauenhraub or wife-abduction was another method of concluding a marriage in early Germanic law. Like the Indian and Greek epics, the sagas and poems of the Germanic peoples ascribe to most celebrated heroes the abduction of women by violence - see Huebner 593.
122. See Van Apeldoorn 27-29.
123. Hahlo & Kahn (1973) 346; Hahlo (1975) 2; Huebner 613-614; Tacitus had this to say: "paucissima in tam numerosa gente adulteria, quorum poena praesens et maritis permissa: abscisis crinibus nudatam coram propinquis expellit domo maritus ac per omnem vicum verbere agit" Germania ch 19.
124. Hahlo (1975) 2; Van Apeldoorn 21.
125. Van Apeldoorn *ibid.* He says: "Zij maakten samen het huwelijk en voltrokken dit door vleeschelijke gemeenschap".
126. Huebner 598; Van Apeldoorn 21.
127. Huebner ibid.
128. Huebner 599.
129. Van Apeldoorn 24.
130. Van Apeldoorn 25.
131. Van Apeldoorn 26.
132. Huebner 599; Hahlo (1975) 2.
133. Huebner 599; Van Apeldoorn 33.
134. idem 600.
135. Huebner 601.
136. Van Apeldoorn 34.
137. Van Apeldoorn 35.
138. idem 36.

139. Simons (1968) 15.
140. See more of this below in Chapter IV.
141. Westermarck 414.
142. Germania ch 18.
143. Westermarck 416.
144. Genesis 31: 15.
145. Westermarck 417.
146. Westermarck ibid.
147. Westermarck idem 418. On the transformation of the similar practice among the Indo-Europeans, see Westermarck 420.
148. Westermarck 421; Huebner 598.
149. Huebner 625.
150. Huebner ibid.
151. Westermarck 423.
152. Westermarck 424.
153. ibid.
154. Caesar VI 19.
155. Westermarck 428.
156. Vilakazi v Nkambule 1944 NAC (N&T) 57.

CHAPTER III

THE HISTORICAL DEVELOPMENT OF ILOBOLO

3.1 INTRODUCTION

To trace the historical development of a long standing practice throws more light on certain aspects of it. It has in fact been said that: "in an attempt to understand the growth of institutions it is true to say that an ounce of history is worth a pound of theory".¹ In investigating an institution like ilobolo, an institution of ancient origin, it is imperative to trace its historical development among the people who have practised it.

Hosten² points out that a legal system is one of the products of the culture of a community. Both culture and community are products of history. It is therefore essential to analyse factors which have shaped the formation of a particular community as they also affect the legal system. The analysis is important because it "brings with it a sharper realization of the social function of the law and the continuing struggle to find the best way to fill this function".³ In this context it is necessary to analyse both the external and internal historical development⁴ of ilobolo although greater emphasis will be placed on the internal historical development thereof.

No doubt to trace the historical development of such an institution is difficult owing to the state of customary law in the past where there was no clear distinction between law and morality or even religion. Another problem is how far back should a person go to trace the development of the institution. There may be no written record of early law.

It is both convenient and, proper to start with the general history of the Zulu people both before and immediately after

the encounter with whites. It will then be necessary to look at their economic, social and legal systems to find out the place of ilobolo within the framework of the culture of the people.

3.2 A BRIEF HISTORY OF THE ZULUS

It is not the intention to make a detailed study of the history of the Zulu people.⁵ It is in fact unnecessary. What is important here is to find out who the Zulus are and what manner of men they are. Only a few general remarks will therefore suffice.

Much of the pre-Shaka history of the Zulus is obscure owing to the lack of written accounts by the Zulus themselves before the advent of whites.⁶ A great portion of what was written later is a matter of conjecture,⁷ and was mostly written by people who could not be expected to have objectively and impartially assessed the position of the Zulu people.

The name Zulu embraces over two hundred tribes scattered over the whole of Natal and KwaZulu.⁸ That they came to form one nation is the outcome of their consolidation by Shaka during the first half of the nineteenth century.⁹ Before that, the Zulus had been one of the small tribes that fell under the sovereignty of Dingiswayo, the Mthethwa chief. The Zulu tribe had been settled primarily in the Mhlathuzi valley under the leadership of Malandela.¹⁰ It is his son Zulu, who is regarded as the progenitor of the Zulu tribe¹¹ from whom they took their name. Zulu came to settle in the area west of Mtonjaneni hill.

Zulu was succeeded by Phunga, and the latter was succeeded by his brother Mageba who took up his heirless widow and raised seed for him among whom was born Ndaba.¹²

Ndaba was the next to rule. He gave birth to Jama. Jama had two wives the chief wife being Mthaniya by whom he had

first twins Mkabayi and Mmama, and later a son Senzangakhona.¹³ When Jama died during the minority of Senzangakhona, the throne vested in the diarchy of Mudli and Mkabayi, grandson and granddaughter of Ndaba.¹⁴ It was Senzangakhona's son, Shaka who welded the Zulu power together.

Shaka came to the throne after the death of his father in 1816.¹⁵ At the time of his elevation there were more or less fifty independent clans in Zululand.¹⁶ All spoke one language and observed the same customs. Each clan descended from a common progenitor. All together descended from a still more ancient ancestor.¹⁷ From these tribes Shaka carved a nation in more or less ten years, a truly phenomenal feat.¹⁸ Although prior to him these tribes had been autonomous, some had been stronger than others, and although some had been involved in internicine wars, relative peace had been maintained in those days when "wars" between tribes were almost like the modern sport of javelin-throwing".¹⁹

Shaka revolutionized the Zulu army in a variety of ways, conquered his enemies, and consolidated his power as supreme ruler of the Zulus.²⁰ The pre-Shaka tribes were either completely wiped out or absorbed by the other tribes, and they became more or less homogenous. Under Shaka's rule a strong Zulu-ising tendency set in, that is, the tendency to conform with the custom and language of all those tribes that belonged to the same culture group.²¹ The new military system which required all males to belong to regiments facilitated the obliteration of much non-Zulu language and custom. Yet it must not be understood that Shaka obliterated everything that had existed before his rule. In some respects the status quo ante had been retained.²²

Roundabout 1824 Shaka came into contact with English traders who had visited his kingdom. They had, on their way to India, established a settlement at Port Natal to trade in ivory and skins. Shaka could, but did not annihilate them. Impressed, no doubt, by their expertise and merchandise, he gave them a

warm reception and even appointed them as chiefs over the depopulated area around Port Natal.²³ The advent of the English traders in Zululand was a prelude to a long period of contact between the Zulus and whites which ushered in a new social set-up. The whites were a community whose technological and economic life was different from that of the Zulu community.²⁴ Shaka's contact with the Whites did not last for long, as he was assassinated in 1828.²⁵

Dingane, succeeded Shaka. It was during the reign of Dingane that a large party of Boer trekkers arrived in Natal in 1838. Their chief desire was more land and the acquisition of labourers "without equality in Church or State".²⁶ The relations between Dingane and the Boers soon deteriorated. Fighting ensued. This culminated in the defeat of Dingane by the Boers with the assistance of his brother Mpande. The Boers occupied Natal. Already there had been some liaison between them and the English. Mpande became Zulu king, although, as Gibson puts it, he was "acknowledged king of the Zulus and not of Zululand".²⁷

In 1843 Natal was annexed by the British and Advocate Henry Cloete was sent as commissioner to adjust land disputes. In 1845 it was annexed to the Cape. The other portion of Natal was occupied by the Boers. Both these states were occupied by people of a different culture and mode of production from that of the Zulus.²⁸ A clash of cultures was bound to occur which clash was preceded by a clash of arms.

When Mpande died in 1872 his son Cetshwayo succeeded him as Zulu king. Cetshwayo was fated to be the last independent Zulu king.²⁹ His relationship with his British neighbours was not as cordial as was his father's. He soon plunged into violent conflict with the British at Isandlwana in 1879, in which encounter the British suffered a severe set-back. In 1880 the Zulus were ultimately defeated at Ulundi. Cetshwayo was arrested and exiled, and thousands of cattle were taken

from him by the British as indemnity.³⁰ Zululand was divided into thirteen "principalities" under independent chiefs. Each chief had to sign a document with conditions of chieftainship laid down by the British. This arrangement proved unsatisfactory.³¹

Conflicts and quarrels, hitherto restrained by national unity, now broke into open conflict. Serious problems resulted from the actions of some chiefs and this necessitated Cetshwayo's recall.³² In the meantime he had been to England to put his case before the Queen, and it was decided he should be reinstated, which was done under certain conditions stipulated by the British.³³

This half-hearted restoration of the king led to civil strife between the Usuthu tribe under the king and Mandlakazi tribe under Zibhebhu kaMaphitha, a relative of the king and one of the influential chiefs that had the backing of the British. After a protracted period of skirmish and counter-skirmish, violence and intrigue Cetshwayo died in 1884 and left his son Dinizulu a legacy of trouble.³⁴ Because of the prohibition against the re-establishment of regiments, Zulus were thus freed for labour service. Missionaries and traders were granted a lee way.³⁵

When Dinizulu succeeded his father, his councillors turned to the Boer farmers who had infiltrated northern Zululand for the support of the 15 year old heir. The Boers recognized the paramountcy of Dinizulu, and showed willingness to help. Zibhebhu appealed to the British, but since the latter were averse from extending their supremacy over Zululand, this was unsuccessful. In the clash that ensued Zibhebhu was defeated. As compensation the Boers proclaimed a "New Republic" over a large area of north-western Zululand. Feelings among the Zulus ran high.³⁶ Dinizulu was forced to appeal to the British. The British immediately prevented the Boers from annexing a potential harbour at St Lucia Bay and arbitrated

to reduce the Boer land claims. As a result many Zulus became labour-tenants on Boer farms. Finally the British decided to terminate the quarrels by occupying Zululand in 1887. The subsequent fight between Dinizulu and Zibhebhu led to banishment of Dinizulu to St Helena. In 1891 he was allowed to return as Government "induna".³⁷ Zululand was delimited by a land commission and the rest of the country was thrown open to white settlement.³⁸

The British administration entered fully into Zulu political and social life. Their intervention had a disintegrative effect on the Zulu social and political structure. Zululand was further drawn into a new industrial and agricultural system of Europe as had been the case in Natal.³⁹

Thousands of blacks that were settled in the territory annexed by the British and Boers presented problems. There was no provision for their cultural needs. They were simply regarded as foreigners, "intruders" from Zululand. Cloete had the function of unravelling these knotty problems. He, however, failed to solve the problems and evaded the issue by regarding blacks as refugees from the Zulu country which was untrue. In order to solve the problem it was suggested that they be settled in scattered locations.⁴⁰ Thus began the modern black townships in Natal and KwaZulu.

3.3 THE SOCIAL AND ECONOMIC SYSTEMS OF THE ZULUS BEFORE THE ADVENT OF WHITES

A brief note on the social and economic systems of the Zulus before the coming of whites is called for.⁴¹ Its importance lies in its enlightenment of the set-up in which ilobolo and marriage in general took place. It is necessary not only to discuss the position before the coming of whites, but also the agents of change which have brought about a change in the life style of the Zulus.⁴²

Social organisation has been defined by Hoerrle as

"the more or less permanent framework of relationship between the members of a community which manifests itself in an ordered group life, with reciprocal rights and duties, privileges and obligations of members, determining behaviour patterns for each individual member towards other members, and moulding the feelings, thoughts and conduct of members according to these patterns so that it is only in and through them that the individual can achieve his personal self-realisation and participate in the satisfaction offered by the life of his community".⁴³

The framework of the social structure is not rigid, but is subject to constant change because of various factors. New developments may cause a change or it may disintegrate and decay.⁴⁴

When Shaka ascended the throne, Zululand was occupied by about fifty clans and sub-clans all belonging to the same culture group, namely, the Nguni.⁴⁵ The Zulus had no towns or common settlements. They lived in small homesteads made up of a circle of huts around a cattle kraal.⁴⁶ The homestead was therefore the basic unit of the whole clan system, a clan in miniature.⁴⁷ The homestead (umuzi) consisted of all male agnates, their wives, and children, and other dependants. All these were subject to the authority of the most senior male umninimuzi (family head).⁴⁸ Descent was therefore patrilineal.⁴⁹

The homestead had many huts which, though independent, were part of the homestead, each ranking differently, and having its separate identity.⁵⁰ The homestead was a self-sufficient economic unit "pasturing its cattle and working its gardens together".⁵¹ Each wife had her own fields and might even have had her own cattle.⁵² The duties of men and women were clearly demarcated. While men had to look after cattle, hunt, and build huts, women kept the households, and hoed the fields.⁵³

Polygyny was allowed although, needless to say, only the rich could afford it. A polygynous Zulu establishment could in early society consist of three main houses namely indlunkulu or great house, ikhohlo or left hand house, and iqadi or right-hand house. The ndlunkulu would either be single or have an affiliated house. The khohlo house would be situated on the left hand side of indlunkulu while iqadi would be on the right hand side, each being single or having an affiliated house.⁵⁴ Affiliation took place by public pronouncement, or by operation of the principle that a junior house becomes affiliated to the senior house which provided ilobolo for the wife of such junior house. Affiliated wives ranked after the main wife to whom they had been attached in order in which they had been married or nominated, as the case might be. An unaffiliated house would remain a separate minor house. A man would declare the status of his wives on the celebration of the marriage or later. If he did not order the rank of his wives during his lifetime, his brothers did so after his death. They usually appointed the first-married wife as the great wife, and the second-married one as the khohlo wife.⁵⁵ Thus the grading or ranking of the wives could be influenced by either the order of marriage or the social status of the wife. But traditionally among the Zulus the great wife could be married later. If the man married a woman of noble birth, she would become the great wife.⁵⁶

The traditional system of the ranking of the wives was confirmed by the 1878 Code, but modified by the 1932 one. A commoner's senior wives were limited to two, and the other wives would be affiliated to the two senior houses. Chiefs were excluded from this limitation.⁵⁷ The ranking of the wives would depend on the sequence of marriage.⁵⁸ The rank of the subsequent wives would depend on public declaration at the celebration of the marriage. If no formal declaration was made, the second wife ranks next to indlunkulu, and the rest would be automatically affiliated to the two senior houses.⁵⁹

The provisions of the Code in this respect have been effective. This has been confirmed by Reader writing on the Makhanya of southern Natal. According to him the Makhanya spoke of only two main houses, the gadi house having fallen into disuse.⁶⁰

The importance of this family arrangement was for the protection of the rights and interests of the separate wives. Thus the property belonging to a particular house would only be used by that house or inherited by the heir to that house. Moreover, cattle coming into the family as ilobolo for a daughter belonged to the house from where she came, and could be used in turn to provide ilobolo for her brother's wife. The brother and sister could be "linked", and thus have a special close relationship. Should those cattle be used for a son of another house, they would be refunded.⁶¹

A number of homesteads were usually scattered over the whole tribal area.⁶² Since polygyny was common, a man could have all his wives in the same homestead or he might have a separate homestead for each. Yet their rank would remain unequal.⁶³ Characteristic of the traditional family establishment was the extended family, although the situation today has changed. This extended family consisted not only of the man, his wife and children, but also of grandchildren as well as parents and grand parents.⁶⁷

Marriage was exogamous and the family system patrilineal. Patrilineal descent did not mean that the kin on the mother's side would be unimportant.⁶⁸ Characteristic of the marriage was the transfer of property, mainly cattle, in exchange for the woman. This transfer of cattle had been regarded as determining the affiliation of children.⁶⁹

The family head was the pivot around whom all matters relating to the homestead revolved. He was the head of the homestead, and had complete control over the inmates, although his power was not the same as the Roman concept of ius vitae

necisque.⁷⁰ He was in control of the property of the homestead.⁷¹ He represented all the inmates of the homestead to outside world, and protected them when their interests were at stake.⁷² At the tribal court he also served as their representative, and interceded between them and the ancestral spirits.⁷² Respect, deference and even awe influenced the behaviour patterns of the children towards their father. The same applied to the wife.⁷³ Thus when a young man wanted to marry he would not approach his father personally, but would speak through his mother or if he was compelled to approach his father personally, he would do it in a diplomatic manner.

Among the children seniority played a prominent role as a basis for behaviour. The older brothers always took precedence between brothers and the same applied between sisters.⁷⁴ Bonds of affection bound them together although in some cases the marriage arrangements might bring about strain if a son's marriage had to depend on the lobolo obtained for his sister.⁷⁵

Outside the family circle the same principle of kinship and seniority applied.⁷⁶ The father and his brothers formed a close-knit group. They formed a clan which is a magnified homestead.⁷⁷ It was patrilineal and had its own clan name isibongo and claimed descent from a common ancestor very often unknown.⁷⁸ Within this group marriage or sexual relations of any kind were and are even today, taboo.⁷⁹ For a Zulu every homestead having the same isibongo as himself is regarded as his own home. The owner thereof is regarded as his father or brother.⁸⁰ The same respect is accorded the members of that homestead as to his father, mother, brothers, sisters or aunts.⁸¹

The all-inclusive grouping was the tribe, mainly a body of kinsmen. They all believed to have descended from a common distant ancestor from whom the chief usually claimed direct

descent. Yet because of mixing and intermarriage foreign elements might be found within this group.⁸² As a result in the course of time membership of a tribe was determined more by allegiance to a chief and not necessarily by birth.⁸³ The chief was therefore the common focus of tribal unity.⁸⁴ Yet this equilibrium was not to endure indefinitely.⁸⁵

Before the contact with the whites, the Zulus had a subsistence economy. Cattle were the main means of exchange. They were both of agricultural and ritual significance.⁸⁶ Cattle were regarded as having a definite link between the living and the dead. They also signified the relationship between groups. Thus to drink milk with a member or members of another sib implied bloodrelationship with that sib, and would bar that person from marrying anyone from that sib.⁸⁷ It is in the light of the understanding of the value and significance of cattle that one may comprehend the function of ilobolo.⁸⁸

The social system of the Zulus is of more than passing interest to one investigating ilobolo because in the past ilobolo was, as has been shown above, interwoven with the social system. It will be shown what its importance was in determining who would be responsible for the provision of or contribution towards ilobolo of a particular person.

From this brief account it is clear that the Zulu people had a well-organised, if less developed, and less sophisticated social and economic system. It was a system that worked reasonably well in a simple community, and must have no doubt satisfied the needs of the Zulu society of that time. It is Simons⁸⁹ who has expressed the same view in the following terms.

"In spite of their technological backwardness, Africans could cope with their environment, and achieved a fair amount of security against famine, disease, disorder and aggression. They had attained a high standard of political and legal organization, observed a strict moral code, and governed themselves with dignity, discipline and self-restraint".

This system would, however, suffer attack and terrible strains as a result of the encounter with the Western culture.

3.4 ILOBOLO IN THE TRADITIONAL SYSTEM

Marriage among the Zulus of old was essentially a private, though by no means secret matter, which involved not only the parties thereto, but also their respective family groups.⁹⁰ Not only did it unite the living, but also the dead ancestors.⁹¹ Ilobolo cattle as it was shown above had the function of cementing the legal and ritual relationship. Thus ilobolo had the effect of legalizing a marriage in a legal and religious sense.⁹²

Ukulobola in Zululand before the reign of Ndaba (circa 1763) is reported to have consisted of hoes and goats,⁹³ but rich people could deliver cattle. A man who had none of these was, however, not precluded from marriage. He could marry upon the undertaking that he would settle ilobolo for his wife from ilobolo delivered for his eldest daughter.⁹⁴ Yet there is another view that even a poor person who could not afford to deliver ilobolo was obliged to deliver at least one beast "eyamadlozi" (for the ancestors) which would inform them of the intended marriage.⁹⁵ Bearing in mind what was said above that ilobolo cattle forged a bond between the living and the dead, it appears obvious that it should have been insisted on otherwise the marriage would not have been "valid".

According to Bryant, a king of the neighbouring Tembe Tsonga kingdom, king Mangobe near Delagoa Bay, traded with the Zulus. From his subjects the Zulus bought hardware, cloth, medicine, monkey skins and cats. The hardware consisted mainly of heavy rings of a new and beautiful metal named ithusi (white ithusi: brass, red ithusi: copper). Out of these copper and brass rings (called umdaka) the Zulu smiths manufactured body ornaments including neckrings, arm-rings and later brass

wrist gauntlets. These were greatly coveted by the Zulus, and it became fashionable to demand them as ilobolo.⁹⁶ An umdaka (brass or copper ring) could be given as ilobolo although the rich could also give cattle.⁹⁷

When Shaka ascended the throne there began a period of conquest and cattle-raiding. This enabled even poor men to obtain cattle by way of ukuxoshiswa (rewards) by the king.⁹⁸ Because of good pastures in Zululand, cattle increased rapidly, and as a result superseded other entities as means of ilobolo.⁹⁹ During this period, however, ilobolo was not fixed.¹⁰⁰ A bridegroom could give what he could afford. Even if he did not have cattle, he might produce one or two stones and would not be rejected, although inkomo yamadlozi would at least have to be delivered.¹⁰¹ But it was a matter of honour and prestige to lobola with many cattle, and any man worthy of his salt would strive to achieve this rare honour.¹⁰²

The reason why ilobolo was not fixed was because the idea was that umuntu kapheli, in other words you cannot buy a person like a piece of cloth.¹⁰³ Marriage created a special relationship between the bridegroom and his parents-in-law. Consequently every time the father-in-law was in need, he would turn to his son-in-law for assistance. This would continue indefinitely, the underlying reason being that umkhwenyana yisigodo sokuqhuzula,¹⁰⁴ meaning that a bridegroom is a helper. This was the idea held in particular by the early Zulu kings.¹⁰⁵ This happened whether or not the bridegroom had already delivered ilobolo before his marriage.¹⁰⁶ Nor would the bridegroom be aggrieved by this because this would be off-set by the fact that the woman would give birth to children both boys and girls. Boys would be warriors, would fight wars and capture cattle as booty. Those cattle belonged to the father. Girls would marry. For them the father would receive ilobolo.¹⁰⁷ A person could initially deliver a certain number of cattle but that did not mean he

had finished.¹⁰⁸ Yet, there is among writers on Zulu history a measure of consensus that a person seldom delivered more than five head of cattle before marriage.¹⁰⁹

During the reign of Shaka (circa 1828) commoners could lobola a woman for three head of cattle, the highest seldom exceeding ten head of cattle even among the highest classes. Ten years later cattle had so increased that during Dingane's reign the usual number was four to six head of cattle although for a daughter of a chief many more could be delivered ranging from twenty to fifty or even a hundred head of cattle. Fifty years later the number varied.¹¹⁰ Yet, there is also information to the effect that Shaka had introduced some limitation on ilobolo. According to Myburgh, he distinguished women of royal blood from commoners. For a princess there had to be a fixed number (isitsha) of 100 or 110 head of cattle to be delivered on the same day.¹¹¹ Even during the time of Cetshwayo it would seem that 110 head of cattle was the limit. The reason for the introduction of this limitation was that to regard the bridegroom as isigodo (a log) resulted in his impoverishment.¹¹²

The increase in the number of cattle demanded as ilobolo resulted from the increase in the number of cattle in general.¹¹³ During the period of conquest only valiant warriors stood a good chance of obtaining cattle by way of booty. This had the unfortunate result that some marriageable girls had to flock to men with cattle for ukudla izinkomo (meaning to obtain cattle) for their fathers. In addition some parents would choose a man for their daughter on account of his wealth.¹¹⁴ This competitive practice, however, soon subsided when cattle became plentiful.¹¹⁵

To curb the caprice of certain people Cetshwayo had also introduced some limitations. According to Myburgh ilobolo was fixed in the following ratio: for daughters of commoners, 11 head cattle; for those of izinduna, 15 head of cattle, for those of chiefs 22 head of cattle; for those of minor princes, 44 head of cattle; for those of a great prince 66 head of cattle;

and for those of the king 110 head of cattle.

It is not quite clear whether these numbers were fixed before the 1869 law of Natal and therefore influenced it or whether they were influenced by the 1869 law which fixed the number of cattle to be delivered as ilobolo. Whatever the case may be the fixing of ilobolo in 1869 by Shepstone did not differ considerably from these limitations.¹¹⁷

The general rule was that ilobolo had to be provided by the father of the bridegroom. This was because all the cattle belonged to him. Even if the son had his own cattle, he still needed his father's consent because according to Zulu custom inyoni ishayelwa abakhulu, literally a bird is killed for the great, meaning that whatever good thing a young person does the reward thereof goes to his parents.

It was this ilobolo which was later to be the object of criticism in the marriage system of the Zulus. The increase in the number of ilobolo cattle depended on the principle of supply and demand.

3.5 CONTACT WITH THE WHITES

The first English settlers had landed at Durban Bay in 1823. At that time ilobolo delivered by the Zulus had scarcely exceeded a few iron hoes, or three or four head of cattle although persons of rank could demand a higher amount. After the British annexation which took place in 1843 the practice of demanding increasing numbers of cattle began to escalate.¹¹⁸

With the spread of European occupation Zulus either through conquest of their land or through settlement dwelt in areas controlled by whites. The white legislators and administrators had then to face the problem of recognizing the customary legal system.¹¹⁹ The customary law was unwritten. The

marriage system of the Zulus, despite its logical and predictable principles considering the society in which it had developed, was strange to the colonists. This system was repugnant to their sense of propriety.¹²⁰ The institutions of ilobolo and polygyny were particularly singled out for condemnation. Simons caustically comments on this attitude in the following words:

"Polygyny appeared to the jaundiced eyes of the Whites to be less a form of marriage than a licensed system of unbridled lust. It enabled a privileged class of cattle owners to live in sensual indolence at the expense of their womenfolk. Lobolo was considered to be the price paid for girls whose fathers sold them in marriage to the highest bidders. Poor men, deprived of wives by the joint effects of polygyny and lobolo, were supposed to lapse into immorality, even to the extent, some extremists alleged, of assaulting White women".¹²¹

Although there is some substance in these claims, it is clear that they were exaggerated. Although the customary marriage allowed polygyny, there is no evidence that it invariably took place without the consent of the woman. No attempt was made to understand the basic reasons on which the institution rested. It later became apparent that despite the evils of polygyny, it had decided advantages.¹²² It is clear therefore that the pity poured on women was largely misplaced. Although they were inferior to men, they were not social outcasts. What is more, they were not utterly rightless or altogether oppressed. The traditional safeguards embodied in the social system secured their fair treatment by their husbands.¹²³ Nor has it been proved that they were worse off than their western counterparts at the comparable degree of civilization. The view that ilobolo was a sale of the woman and that she was sold to the highest bidder was later found to be incorrect.¹²⁴ This is not to say that the African culture was faultless, but it means that some of the criticism was misconceived. The cultural shock experienced by the early colonists led to the disruption of the traditional African way of life.¹²⁵ Although women did most of the

household work, they were not slaves, nor was this practice unsanctioned by custom.

There were other whites who were tolerant and more understanding of the traditional African culture. The objectivity of many was impeded by self-interest. As Simons puts it,

"Identifying their quest for land, labour, trade and security with a civilizing mission, they launched a crusade against tribalism under the banner of Christianity, feminine emancipation, and progress. They claimed that they had come to clothe the heathen, wean them from false gods, free them from superstition and immorality, save them from being exterminated in endless tribal wars, educate them and teach them the arts of industry. Their indictment of tribal institutions served to bolster up these claims. It provided a moral pretext for invading African territory and forcing peasants on to the labour market".¹²⁶

Although it might be unjustifiable to deny the sincerity of the early colonists, their sincerity was, not borne out by the facts. In fact one newspaper commentator somewhat caustically deprecated their hypocrisy as follows:

"It has become part of our colonial political clap-trap, and cant, to connect polygamy with slavery. And to get labour, the evils of polygamy have suddenly awakened the pious hostility of men whose zeal and policy would lead to slavery without polygamy".^{126(a)}

It was in this climate that the white administrators had to grapple with the problem of recognizing customary law.

3.6 THE EFFECTS OF WHITE SETTLEMENT

The settlement of the whites in Natal brought about many social changes to Africans in general and to the Zulus in particular. Their land was occupied. A new style of living was brought about which necessitated their seeking work somewhere. New challenges had to be met. Taxes were

imposed upon them and the growing towns and cities were seeking labour force. Labour recruiting agencies moved into the reserves. Zulus, like all other blacks, had to wear clothing. In order to acquire these necessities of life money was a prerequisite. Land had diminished in size because of white occupation, and Zulus could therefore no longer rely on cattle for support. This precipitated the exodus of Zulus from their own areas to the urban areas for securing employment.¹²⁷

A process of detribalisation began. Men from different tribes had to work together and consequently developed common interests. For the major part of their lives they would be divorced from the rural environment. Consequently they started learning a new style of life. Having acquired new values of the urban situation, they began gradually to discard those of the country life.¹²⁸

The hitherto closely-knit, well-organised tribal institutions prevalent before the settlement of whites had to suffer terrible strains under the new industrialisation. The urban locations and slums gave rise to a laissez-faire policy and moral laxity was the outcome. The emergent individualism weakened parental control and social sanctions with consequent undesirable results.¹²⁹

Marriage could not be left unscathed. Parental consent to marriage, hitherto an essential, lost the force that it used to have.¹³⁰

Ilobolo as an institution connected with marriage was also affected. Money took the place of cattle as a form of ilobolo.¹³¹ Although Sievwright rejects the indictment that the use of cash introduces a commercial element in the institution of ilobolo, he does feel that in one respect this form of payment has an unfortunate effect in that it retards the stabilizing effect of the lobolo institution. Whereas

cash may be negotiable and more readily available in towns than stock, and although it may still serve as an indication of respectability its function is affected by money's very negotiability. Money is easily squandered unlike cattle. By the time a claim upon it is made it may be completely spent. This may necessitate resort to legal action. Should the claimant lack means, he may be unable to bring it.¹³²

Before proceeding to discuss the recognition of ilobolo in South African law, a word on the attitude of the missionaries towards ilobolo is necessary.

3.7 THE ATTITUDE OF THE MISSIONARIES

Although the present enquiry is not a theological one, it is important to analyse briefly the attitude of the early missionaries towards ilobolo. This is because the missionaries were in constant touch with the Zulu people, and thus exercising an influence on them. Government policy towards ilobolo and customary law in general must have been influenced by the view of the missionaries. What is clear is that the policy of the government came under strong criticism from the clergy.¹³³ Moreover, Shepstone, the man that was largely responsible for the recognition of Zulu customary law, was not only himself influenced by Christian principles, but he was the son of a missionary, and two of his closest friends were missionaries, namely Bishop Colenso and Rev Daniel Lindley.¹³⁴

Although the main purpose of Christianity is the communication of the gospel, this could not be done in a vacuum, but to people with their own culture. Because of this missionaries came into conflict with accepted African views.¹³⁵ Some of the traditional African institutions received condemnation and criticism, in particular, ilobolo and polygyny.

The general attitude of the missionaries was that ilobolo was a "bride price" and that the status of a woman was

exceedingly low. Although the former attitude on ilobolo changed, that on the status of the woman remained unchanged for a long time.¹³⁶

This early attitude of the missionaries has been compared by Groves to the story of a Parisian who after his first visit to London, was asked what he thought of it. He replied that it was very fine in its way, but one thing surprised him: whereas in Paris, names commemorated famous victories - rue de Rivoli, pont d'Ièna - in London they recorded defeats - Trafalgar Square, Waterloo bridge! And, as Groves says: "It is far easier than we think to pass judgment on another society without attempting to modify our own point of view, and missionaries have been no exception."¹³⁷

Although a customary marriage required the transfer of property, this was not a commercial transaction.¹³⁸ Vehement opposition to ilobolo came mostly from the Protestant missionaries. The Roman Catholic Church was more tolerant, although subject to certain conditions.¹³⁹ It was the negative effect of ilobolo on the Christian idea of marriage as a personal relationship between two individuals that perturbed the missionaries. Not only were they averse to ilobolo but also to other institutions intimately connected with marriage like levirate and polygyny.¹⁴⁰

The American Board in Zululand, to mention one example, insisted on its members to renounce polygyny and required its male church members to sign a pledge never to practice ilobolo¹⁴¹: This involved members being prohibited from being parties to ilobolo transactions or even accepting it for their daughters.¹⁴² This was unacceptable. Although they were prepared to relinquish polygyny this was not true of ilobolo. The branding of ilobolo as a "sale" was in fact resented.¹⁴³ The condemnation of ilobolo was, however, not universal. It was based on the "un-christian" spirit of

of ilobolo, and the conviction was that church members practising it should be subjected to ecclesiastical discipline.

It would be arduous and objectionable to legislate for a matter deeply embedded in the emotional life of the people. Daniel Lindley felt that the institution of ilobolo lay at the very "foundation of the structure of native society and had done a world of good",¹⁴⁴ although he did concede that it had been open to abuse.¹⁴⁵ Any attempt to enforce the abolition of ilobolo among Zulu American Mission members was a dead letter and was bound to fail.¹⁴⁶

One American Board woman is reported to have said:

"I fear we, as a mission, have tried too much to make Americans of our Zulus and not enough to make Christians of them ... I cannot help feeling very decidedly ... that their marriage custom of paying cattle is, to the young Zulu girls, the greatest protection they have against the immorality of the nation, while it ensures good treatment and care they would not otherwise receive".¹⁴⁷

Although one may be constrained to differ with some views expressed here, it is conceded that missionaries were more preoccupied with propagating western civilisation than the gospel of salvation.

Other missionaries, however, had no clear policy on the matter. Although they realised that ilobolo was contrary to the Christian marriage, practically they also realised the efficacy thereof.¹⁴⁸

Later on a number of missionaries adopted a more moderate approach to ilobolo. They regarded it as a lesser evil than the disruption of family life, which its non-delivery seemed to precipitate.¹⁴⁹ As a result, the first half of the twentieth century saw the development of a new system of adaptationism.¹⁵⁰ An attempt to understand the African social background replaced

outright condemnation.¹⁵¹ The Christianisation of ilobolo from a judicial institution to a charitable one was even attempted, by making it free and not compulsory. Yet this also met with no success.¹⁵²

Another problem was the disappearance of the social and spiritual tie inherent in ilobolo and the consequent commercialisation thereof.¹⁵³ To curb this commercialisation some missionaries fixed a maximum amount to be demanded by their converts which amount coincided with what a young man could afford to pay, but this also fell through because there was no machinery to check what was demanded above the fixed sum.¹⁵⁴ The fixing of the maximum by the government seemed to have been understood to mean the normal or even the minimum.

The policy of the missionaries failed, it is submitted, because they failed to realise that ilobolo was an institution that was inseparably linked with the emotions and religious belief of the African people. Even those who had turned Christian could not be said to have fully understood the implications of a Christian marriage. Their value system had not changed. The white missionaries were using a different value system. Hence resulted the deadlock. Failure of the missionaries to prohibit or fix the maximum amount of ilobolo was caused by the lack of an agent to enforce their decrees. Excommunication could not be effective. Nor could it be acceptable.¹⁵⁵

Another reason for examining the policy of the missionaries is that it gives us insight into the possible method of reforming ilobolo, after learning from their mistakes.

3.8 SUMMARY AND CONCLUSION

Before the advent of whites the Zulus had a well-organized social and economic system. The subsistence economy was quite sufficient to provide for their needs. Marriage allowed polygyny, and required the delivery of ilobolo. Ilobolo was

not fixed, and relatively few cattle were demanded. The increase in the number of cattle demanded as ilobolo posed problems which eventually required limitation by legislative intervention.

The coming of whites presented a number of problems. Their superior economic system imposed excessive demands on the simple economic system of the Zulus. The marriage system of the Zulus was peculiar to the eyes of the colonists. Ilobolo and polygyny were criticised. Most of the criticism of ilobolo rested on a misunderstanding of this institution. Ilobolo was regarded as a sale of the woman. This was caused by the fact that the cultural background and system of values of the whites were simply transposed on to the value system of the Zulus with consequent incongruities. The clash between the two cultures would lead to serious problems when the white administrators and legislators had to recognize the customary legal system of the Zulus. It would be difficult for them to recognize a system of law of which they disapproved on moral and even legal grounds. Yet it would be arduous to ignore this system because blacks continued to adhere to it. Nor could the blacks be expected to relinquish old customs to which they were used, and to embrace a new system of which they hardly had an inkling. For a number of years to come the various governments had to grapple with the problem of recognizing this system of law. Ilobolo had therefore to be the object of conflicting policies.

FOOTNOTES

1. W Seagle The quest for law (1941) 27.
2. 130.
3. Hosten et al 129.
4. On the external and internal history of law see Hosten et al 130.

5. For more information on the history of the Zulus see the following: A T Bryant Olden times in Zululand and Natal (1929); E A Ritter Shaka Zulu (1962); J Y Gibson The story of the Zulus (1911); Bryant (1967); E F Brookes & C de Webb A history of Natal (1965); Brookes (1974); M Wilson and L Thompson The Oxford history of South Africa (South Africa to 1870) vol. 1 (1969); Lindsay-Young "The Native policy of Benjamin Pine in Natal 1850-55" Archives Yearbook for South African history (1951); D Welsh, The roots of segregation, (Native policy in colonial Natal) 1845-1910(1971); E J Krige The social system of the Zulus 2 ed (1974); C T Binns The warrior people: Zulu origins, customs and witchcraft (1974).
6. The art of writing was practically unknown. Before that the history and traditions of the Zulu people were passed to posterity by word of mouth.
7. Bryant (1929) 1 et seq; Krige (1974)1; Bruwer 13; Brookes & Webb 1 et seq; Bryant (1967) 2 et seq.
8. Krige 5. The Zulus are a sub-group of the Nguni and in particular the Ntungwa-Nguni - see also Bryant (1929) 4.
9. Bruwer 16.
10. Bryant (1929) 13. Although mutual jealousies did exist among these tribes these were largely peaceful times.
11. Bruwer 16; Bryant (1929) 19.
12. Bryant idem 36.
13. Bryant idem 40; Krige 9.
14. Bryant idem 46.
15. Krige (1974)10.
16. These included inter alia Mthethwa, Mdwandwe, Zulu, Buthelezi and Khumalo. On the Buthelezi see M G Buthelezi "The early history of the Buthelezi clans" in J Argyle & E Preston-Whyte (ed) Social system and tradition in Southern Africa (1978) 19 et seq.
17. Bryant (1929) 73; Ritter 3.
18. D H Reader Zulu tribe in transition (1966) 3; Krige 11; Wilson 342; Ritter 3 et seq.
19. Buthelezi 19.
20. Gibson 40; Wilson & Thompson 343; Krige 11.

21. N J van Warmelo A preliminary survey of the Bantu tribes of South Africa (1935) 70.
22. Wilson & Thompson 345; Krige 11.
23. M Gluckman Analysis of a social situation in modern Zululand (1968) 35.
24. Gluckman (1968) 36.
25. Bryant (1929) 662; Krige 17; Ritter 349.
26. Gluckman (1968) 36.
27. Gibson 90.
28. Gluckman (1968) 36.
29. Gibson 105; Krige 19; M Gluckman "The Kingdom of the Zulus" in M Fortes & E Evans-Pritchard (ed) African political systems (1946) 26.
30. Brookes & Webb 146; Wilson & Thompson 262; Gibson 170; Gluckman (1964) 26; Krige 20.
31. Gibson 218; Wilson & Thompson 264; Krige 20; Gluckman (1964) 26; Gluckman (1968) 37.
32. Certain groups in Britain, which were opposed to the Government intervention in African affairs, obtained Cetshwayo's restoration in 1883.
33. Brookes (1974) 150; Gibson 236; Krige 20.
34. Gluckman (1964) 27; Gibson 266; Wilson & Thompson 266.
35. Gluckman (1968) 37.
36. Wilson & Thompson 266; Gibson 273; Krige 20.
37. Wilson & Thompson II 345.
38. Gluckman (1968) 38.
39. Gluckman (1968) 39.
40. Simons (1968) 17.
41. A W Hoernle "The importance of the sib in the marriage ceremonies of the South-Eastern Bantu" 1925 The South African Journal of Science 481; E Preston-Whyte "Kinship and marriage" in W D Hammond-Tooke (ed) The Bantu-speaking peoples in Southern Africa (1974) 177.
42. Gluckman (1968) 1.

43. A W Hoernle "Social organisation" in I Schapera (ed) The Bantu-speaking tribes of South Africa (1956) 67.
44. Hoernle ibid.
45. A T Bryant "The Zulu family and state organization" 1923-26 Bantu Studies 47; Gluckman (1968) 28.
46. A T Bryant "Some aspects of Zulu social life" 1920 Native Teachers Journal 102; Bryant (1926) 47; Gluckman (1968) 28.
47. Bryant (1920) 102; Bryant (1926) 47; Bryant (1929) 71; Ritter 2; Hoernle 69; Gluckman (1968) 28.
48. Bryant (1920) ibid; Bryant (1926) ibid; Bryant (1929) ibid; Ritter ibid; Hoernle ibid; Gluckman (1968) ibid.
49. Preston-Whyte (1974) 178.
50. Hoernle 82; Gluckman (1964) 28; Bryant (1920) 102; Bryant (1926) 47; Bryant (1929) 71.
51. Gluckman (1964) 28; See also B Sansom "Traditional economic systems" in W D Hammond-Tooke The Bantu-speaking peoples of Southern Africa (1974) 136.
52. Gluckman (1964) 29.
53. Gluckman ibid.
54. Hoernle 82-83; Bryant (1926) 48-49; J C Bekker & J J J Coertze Seymour's Customary law in Southern Africa (1982)130; Preston-Whyte (1974) 180 182.
55. Zulu v Zulu 1934 NAC (N&T) 1; Shandu v Qwabe 1938 NAC (N&T) 133; Dhlamini v Dhlamini 1939 NAC (N&T) 95; Nene v Nene 1942 NAC (N&T) 34; Ngema v Ngema 1933 NAC (N&T) 3; Shandu v Shandu 1956 NAC (N-E) 134; Ntombela v Ntombela 1956 NAC (N-E) 177; Qwabe v Qwabe 1939 NAC (N&T) 3; Nkwanyana v Nkwanyana 1958 NAC (N-E) 4; Krige (1974) 39; Preston-Whyte (1974) 180-1.
56. Preston-Whyte 181.
57. See Dhlamini v Dhlamini 1939 NAC (N&T) 95 for a discussion of this.
58. s97(1) of the 1932 Code.
59. s99 of the Code.
60. Reader (1966) 61.
61. Preston-Whyte (1974) 180.

62. Bekker & Coertze 70.
63. Hoernle 69; Bekker & Coertze 71.
67. Preston-Whyte (1974) 183.
68. Preston-Whyte idem 178.
69. Preston-Whyte idem 179.
70. Hoernle 71.
71. Bekker & Coertze 72.
72. Hoernle 71.
73. Hoernle ibid.
74. Hoernle ibid.
75. Hoernle 72; Preston-Whyte 180.
76. Hoernle ibid.; Gluckman (1964) 29.
77. Ritter 2; Bryant (1920) 102; Bryant (1926) 47;
Gluckman (1964) 29.
78. Krige (1974) 34; Hoernle 83; Preston-Whyte (1974) 178.
79. Hoernle 83; Preston-Whyte (1974) ibid.
80. Krige (1974) 34; Hoernle ibid.
81. Krige (1974) 25 et seq.
82. Hoernle 68.
83. Hoernle 69.
84. Hoernle ibid.; Gluckman (1964) 29.
85. With the coming of whites a new social structure,
determined by new values and factors, was introduced.
For a more detailed account see Gluckman (1968) 1 et
seq; see also M Gluckman "Some processes of social
change illustrated from Zululand" 1942 African Studies
243 et seq ; Gluckman (1964) 53 et seq.
86. Hoernle (1925) 481.
87. Hoernle ibid.
88. Hoernle (1925) 482.
89. (1968) 15.

90. CT Msimang Kusadliwa ngoludala (1975) 250; DW Sievwright "Marriage in contemporary urban Bantu-speaking communities in the Republic of South Africa" 1965/66 Acta Juridica 150.
91. Msimang 251; Hoernle (1925) 482.
92. On this see chapter V below.
93. According to AC Myburgh EzakwaZulu (1934) 225; goats could not be used. He does not mention the reason why they could not be used.
94. Bryant (1967) 590; Krige (1974) 121.
95. Myburgh (1943) 227.
96. Bryant (1967) 591.
97. Bryant (1967) ibid. It is not certain how far this practice as expounded by Bryant extended. Nor was it possible to confirm this from interviews.
98. Bryant (1967) ibid.
99. Bryant (1967) ibid.
100. Myburgh (1943) 227, OEH Nxumalo & S Nyembezi Inqolobane Yesizwe (1972) 125.
101. Myburgh (1943) ibid.; Krige (1974) 121; Bryant (1967) 591; M Gluckman "Kinship and marriage among the Lozi of Northern Rhodesia and the Zulu of Natal" in AR Radcliffe-Brown & D Forde (ed) African systems of kinship and marriage (1960) 185.
102. Krige (1974) 121; Bryant (1967) ibid.
103. Myburgh (1943) 227.
104. Myburgh (1943) 227; Krige (1974) 121; Nxumalo & Nyembezi (1972) 125.
105. Myburgh (1943) 229 eg Dingiswayo, Jama and Senzangakhona.
106. Krige (1974) 121.
107. Myburgh (1943) 228.
108. Myburgh ibid.
109. Krige (1974) 121; Bryant (1967) 591.
110. Bryant ibid.

111. Myburgh (1943) 229.
112. Myburgh idem 230.
113. Bryant (1967) 591.
114. Myburgh idem 238; Msimang (1975) 266.
115. Msimang (1975) 267.
116. Myburgh (1943) 230.
117. Bryant (1967) 591.
118. H C Lugg "The practice of lobolo in Natal" 1945
African Studies 25.
119. Kahn (1960) 317.
120. Simons (1968) 15; Kahn (1960) 317; R S Suttner
"African family law and research in South Africa today:
prospect and problems" 1974 Paper presented to the
Afrika - Studiecentrum Seminar "New Directions in
African family law" 3.
121. 15.
122. Simons (1968) ibid; Suttner (1974) 3; see also below.
123. Simons (1968) ibid; Suttner (1974) ibid.
124. See chapter V below.
125. Suttner (1974) 4.
126. 15.
- 126(a) As quoted by Welsh (1969) 79.
127. Sievwright 155.
128. Sievwright ibid.
129. Sievwright 158.
130. Sievwright ibid; A Phillips Survey of African marriage
and family life (1953) 34.
131. Sievwright ibid; Phillips idem 35; This tendency has
been condemned as introducing a commercial element into
marriage; see E Torday "The principles of Bantu
marriage" 1929 Africa 290. This statement has been
questioned by Sievwright & ibid, who points out that
the writer overlooked the fact cattle constitute a type
of currency just as money does.

132. *idem* 160. Because of this, he suggests the introduction of another type of customary marriage styled "the state customary union". In this instead of the commercial ilobolo a contribution should be made by both parties to the Commissioner who would then issue them a certificate to the parties, their names, the amount of ilobolo paid etc. This lumpsum would be placed in custody of the Master of the Marriage's Division of the Appeal Court for Commissioner's Courts. He, however, doubts whether this would be acceptable.
133. See Welsh (1969) 81-86.
134. Welsh (1971) 205 et seq.
135. C P Groves "The impact of Christianity upon African life" 1960 Optima 95.
136. L Harries "The missions and bride-price" in A. Phillips (ed) Survey of African marriage and family life (1953) 360; H F Morris "Marriage laws in Africa" in Phillips idem 18.
137. Groves 96.
138. Groves 98.
139. A Reuter Native marriages in South Africa (1963) 238.
140. Harries 360.
141. Welsh (1971) 261.
142. For a detailed analysis see Welsh (1971) 73 et seq.
143. Morris 18 et seq.; Harries 361.
144. Umsunduzi Rules of 1879.
145. Harries 361.
146. Harries 362.
147. Quoted by Groves 98.
148. Morris 19; Harries 364.
149. Morris ibid.; Harries 366; Groves 95.
150. Harries 371.
151. Harries 372; Groves 95.
152. Harries idem 374.

153. Morris 20; Harries 375.
154. Harries 376.
155. A full discussion of the biblical implication of ilobolo as against the missionary interpretation thereof can take a lot of time and is not necessary for purposes of this study.

CHAPTER IV

THE RECOGNITION OF ILOBOLO IN SOUTH AFRICAN LAW

4.1 INTORUCTION

The recognition of ilobolo in South African law is inextricably interwoven with the recognition of customary law in general. It is, however, not necessary for purposes of this investigation to go into the details of the recognition of customary law in general.¹ Only information which relates to the recognition of ilobolo and related institutions will be covered, although occasional reference will be made to the recognition of customary law in general.

It was in 1927 that customary law was uniformly recognized in terms of South African law.² Before that there was no uniform policy on this matter. The policies of the various governments varied from outright rejection to qualified toleration. Although the main focus of this chapter is on the recognition of ilobolo in 1927 and the terms of such recognition, it is essential to trace briefly the policies of the variou govern=ments before Union. The relevance of these policies lies in the fact that they illustrate the impossibility of effectively applying a legal system that is foreign to the mores and social needs of a society. Even though the institutions of Roman-Dutch law were available to blacks, they continued to follow their own customary institutions. This forced even some white magistrates to apply customary law.³ The danger of not recognizing the traditional marriage system was that it would render most marriages "illicit unions", and consequently bastardise all children born of them, thus depriving them of the right to inherit from their fathers. Although the assimilationist policy was unrealistic, the policy of complete retribalisation as pursued by Shepstone would not entirely succeed because the Zulus were undergoing a process of social change in varying degrees, and the legal system applicable to them had to provide for the needs engendered in this process.

Thus the main criticism which has been levelled against Shepstone's policy is the fossilizing effect it had on African customary law.⁴ The solution therefore lay somewhere between the two extremes.

Although the main concern of this investigation is the recognition of ilobolo practised by the Zulu people, it will be necessary to refer to the position outside Natal for purposes of evaluating the recognition of ilobolo before Union as a whole, and for the reasons stated above, namely among other things the proper evaluation of the recognition granted by the 1927 Act. It is logical and convenient to start with the policy of the Cape Colony, the first white South African government to encounter the problem under discussion.

4.2.1 The Cape Colony

From the earliest period of white occupation of the Cape Colony, African customary law was not recognized. Roman-Dutch law was made applicable even to blacks⁵ "a principle as indefensible in theory as it was unfortunate in practice".⁶ Because it was obviously impractical to force a foreign legal system on Africans, the Administration was forced to adopt "illogical and spasmodic makeshifts".⁷ Thus certain commissioners in the eastern frontier, as early as 1849, recognized African customary law.⁸ In 1847 British Kaffraria had been annexed to the British Crown.⁹ Up to 1859 this territory was administered under martial law, and the question of the recognition of African customary law was evaded.¹⁰ When British Kaffraria was annexed to the Cape in 1865,¹¹ Roman-Dutch law was made applicable to it.¹² Although the courts in this area had in 1860 refused to deal with cases relating to ilobolo, their attitude later changed. For a long time, however, theory differed from practice.¹³

In the Transkeian Territories, on the other hand, African customary law was recognized, but subject to the proviso that it be "compatible with the general principles of humanity observed throughout the civilized world".¹⁴

In 1883 the Cape Government Commission on Native Laws and Customs reported in parliament, and made a number of observations and recommendations relating to ilobolo.¹⁵ According to the commission the delivery of ilobolo or the promise thereof was an essential of a customary marriage.¹⁶ It noted the objection that ilobolo amounted to "a contract between the woman's guardian and her intending husband, by which, without her consent, she is bartered away for cattle to the highest bidder ... which reduces the woman to a condition of slavery".¹⁷ After referring to the historical development of this institution the commission came to the conclusion that the delivery of ilobolo secures the father's consent to the marriage and transfers the woman from her father's guardianship to that of her husband. In addition, the father is compensated for the loss of her valuable services.¹⁸ Not only is the payment aimed at compensating the father for the loss of his daughter's valuable services, but it is also given as a guarantee of good conduct on the part of both parties.¹⁹ Ilobolo, according to the commission, did not reduce the woman to a slave because the husband did not acquire proprietary rights in her. Neither could he kill, injure, or ill-treat her without suffering legal consequences, nor could he prostitute or dispose of her as a chattel. The same applied to the father of the woman.²⁰

The commission recommended cautious treatment of the custom of ukulobola and was averse to direct suppression.²¹ It made a number of recommendations relating to customary marriages and ilobolo in the Cape Colony as well as the Transkeian Territories.²² It recommended, inter alia, that the lobolo should imply or constitute an obligation on the recipient or his representative to support the woman concerned if she was deserted or became destitute.²³ Should the husband be deserted without just cause, he would be entitled to reclaim ilobolo.²⁴ Claim for restoration would not be heritable or transferable from the husband.²⁵ Furthermore it was recommended that ilobolo be eliminated from the essentials

of a customary marriage.²⁶ Compulsory marriage against the woman's consent was deprecated.²⁷ The rest of the recommendations dealt with the factors to be taken into account in the restoration or otherwise of ilobolo, namely, the duration of the marriage, and in the case of the death of one of the spouses the cause of the death, as well as the number of children of the marriage.²⁸

Despite the recommendations of the commission, the Cape Government did not interfere with the activities of the magistrates and did not recognize customary law as such,²⁹ but in the Transkeian Territories the courts continued to apply customary law.³⁰ In the Cape Colony the courts remained opposed to the recognition of customary marriage, the objection being its polygynous nature which was regarded as repugnant to good morals.³¹ In Ngqobela v Sihele,³² for example, Lord De Villiers C J said:

"Provision is made by Act No. 16 of 1860 for the appointment of marriage officers for solemnizing the marriage of persons professing the Mohamedan faith according to the Mohammedan customs and usage but no similar provision exists for marriages according to Native customs and usages. The only mode in which a valid marriage can be contracted between Natives in this Colony is before a minister of religion, or a lay marriage officer, with previous publication of banns or notice, or failing these by special licence. A union, therefore, founded only upon Native customs and usages within the Colony proper is not a marriage, whatever rights may by special legislation have been given to the offspring of such a union upon their (sic) death. In the absence of special legislation recognizing such a union as a valid marriage, the courts of law are bound - however much they may regret it - to treat the intercourse, I will not say as immoral, but as illicit".³³

Since a customary marriage was not recognized as a legal marriage, it meant that ilobolo given for a customary marriage either was not recoverable or could not be recovered by an action in court. Ilobolo was regarded as "a consideration given for future immoral cohabitation".³⁴

Where ilobolo was delivered in contemplation of a civil marriage it was decided in a number of cases that ilobolo was valid and enforceable and could be recovered by way of court action.³⁵ This approach was anomalous. As Simons correctly points out, "(i)t was indeed a strange chain of reasoning that led to the rejection of a custom when firmly embedded, so to speak, in its native soil, and to its acceptance when grafted on a foreign legal code".³⁶ In the Transkeian Territories³⁷ on the other hand, ilobolo continued to be recognized when attached to either a customary or a civil marriage.³⁸ This anomalous position continued until 1927.

From this brief account it is clear that the complete non-recognition of customary marriage and ilobolo was unrealistic and was therefore bound to fail. It was obviously based on an underestimation of the force of custom. Even where Roman-Dutch law was made applicable to blacks, they continued to marry according to their traditional marriage law which made the application of Roman-Dutch law difficult. Even where they married according to civil rites, they often included stipulations for the delivery of ilobolo. Ilobolo attached to a civil marriage would pose special problems as it was an institution of customary law. Although the courts were prepared to brand ilobolo attached to a customary marriage as "consideration given for future immoral cohabitation", when this same ilobolo was given in anticipation of a civil marriage, they were bound to change their stance and regard it as valid. This reasoning appears artificial. It could not be regarded as a sound principle to be applied by the courts. Perhaps Natal had a more pragmatic approach to the problem of recognizing ilobolo.

4.2.2 Natal

When Natal was annexed in 1843, Africans were nominally placed under Roman-Dutch law.³⁹ Sir Theophilus Shepstone

soon realised the artificiality of this arrangement on arrival in 1846, and proceeded to govern them through tribal institutions. This he did even against the wishes of Henry Cloete, the Recorder of the District Court.⁴⁰ The system was legalized by Ordinance 3 of 1849 which in effect transferred the tribal system to the Lieutenant-Governor as Paramount Chief.⁴¹ Chiefs exercised judicial powers until white magistrates had been appointed.⁴² The recognition of customary law was, however, subject to the usual repugnancy clause.⁴³

The attitude of tolerance showed by whites in Natal towards traditional African institutions was, according to Simons, not due to their exceptional understanding of tribal culture or because of their respect for its merits but for other reasons,⁴⁴ as their attitude as reflected in the report of the Natal Native Commission of 1852/53 had been uncompromising. They had advocated the abolition of polygyny and ilobolo as these institutions, according to them, degraded women to the position of slaves,⁴⁵ enabled men to spend their lives "in indolent sensuality" and constituted "the great bars to the civilization of the Kaffir population".⁴⁶

The imperial government consented to the system of "indirect rule" which Shepstone inaugurated and administered between 1847 and 1875. Royal instructions of 8 March, 1848 stated that there had been no interference or abrogation of the customary law in practice among the inhabitants prior to annexation except if it had been "repugnant to the general principles of humanity recognized throughout the whole civilized world".⁴⁷ The customary law was subsequently codified.⁴⁸

The broad structure of polygyny, ilobolo, ukungena and other customs although found repugnant by early colonists was left untarnished.⁴⁹ Although polygyny and ilobolo had been recognized,⁵⁰ the official policy, had been the gradual elimination thereof.⁵¹ It was Shepstone who was responsible

for the shaping of this policy. His views, therefore, merit closer scrutiny. His views were clearly stated before the 1883 Commission.⁵²

The Natal Government had wanted to impose a hut tax as a way of raising revenue, and indirectly restricting ilobolo. In 1849 a tax of seven shillings had been exacted. The government in 1857 intended to take other steps in this direction.⁵³ The same year, the government flirted with the idea of passing an Act imposing a fine in an increasing ratio, on every additional marriage.⁵⁴ In April 1857 the "Bill to discourage polygyny" was published. It provided for the registration of all traditional marriages before a magistrate on payment of a fee. For the first marriage a shilling was payable and for the second marriages the payment was to be three shillings in a pound of ilobolo given. An additional three shillings in every pound sterling of ilobolo for every subsequent marriage had to be charged.⁵⁵

This measure, however, never became law.⁵⁶ After its failure a period of ten years elapsed without any further attempt at reforming the marriage law.⁵⁷

Shepstone had envisaged a regulation of ilobolo which would greatly improve the lot of the Zulu people. Although the number of cattle demanded for ilobolo had seldom exceeded five head of cattle, in 1848 it had risen to ten head, and during the late 1860's it had increased to about forty or fifty head of cattle for a commoner's daughter and a hundred head for that of a chief. This made marriage absolutely impossible for young men while it conduced polygyny for the richer and older men. This inevitably increased "forced marriages". Increased amounts had increased cattle theft, at the same time increasing adultery and illicit unions. For these reasons Shepstone proposed a maximum amount of ilobolo to be claimed. This was to be ten head of cattle for a commoner's daughter, and thirty head for a chief's daughter. Any

number given in excess of the prescribed maximum would not be claimable in court.⁵⁸ That the girl's marriage had taken place with her free will and consent had to be ensured, and the girl's guardian was not allowed to withhold his consent to the marriage of his daughter unreasonably after receiving ilobolo, and after the girl had given her consent.⁵⁹

Many officials were quite sceptical about the efficacy of Sheptone's recommendations. Others supported the idea.⁶⁰ In themselves the proposals had decided advantages for young men and women.⁶¹ Although these proposals would give recognition to polygyny and ilobolo, it was only realistic to do so because to ignore these institutions would ruin the family system of the Zulus.⁶²

The bill giving effect to the recommendations of Shepstone was published in September 1868 and was ultimately passed as Law 1 of 1869, "To enable the Lieutenant-Governor to impose fees on the registration of Native Marriages, and on certain other customs and usages of the Natives, and to make provision for remunerating the Chiefs of such Natives". In terms of this law the Lieutenant-Governor was empowered to frame regulations.⁶³

Before the promulgation of regulations under that law Shepstone had, in the meantime, toured the colony and held discussions with the Zulus on the proposed regulations. He reported in a memorandum his findings that:

"the objects sought to be obtained by the law of enabling young men to get wives, by lowering the number of cattle transferred to the woman's family on marriage, of registering marriages, so that evidence independent of oral testimony might afterwards exist of the fact and condition of the marriage, were admitted by the old men to be good and desirable objects, and hailed by the young as a great boon. But, they asked, could those improvements not be made without the heavy payment to the Government, which it was proposed should accompany them?"⁶⁴

To this last question Shepstone had replied that their contribution to the colonial revenue was considered insufficient. He also pointed out that whites paid "much more", which was rather a simplistic explanation. On the question of ilobolo the Zulus recommended that, in line with the ancient custom, a difference be made in the fixing of the maximum according to the different ranks.⁶⁵ This proposal was accepted by Shepstone, and he fixed the lobolo with references to the father's status as follows⁶⁶:

Hereditary chiefs	- no limit
Appointed chiefs	- 20 head of cattle
Brothers and sons of hereditary chiefs	- 15 head of cattle
Commoners	- 10 head of cattle

These were adopted. Any amount claimed in excess of this maximum ilobolo would be forfeited to the chief, and the seizure would be reported to the magistrate.⁶⁷

The aim of limiting ilobolo was to clothe the customary marriage "with as much finality as possible" by severing the bonds between a married woman and her family.⁶⁸ Although Shepstone was aware that a woman had the right to return to her home if the husband ill-treated her, he felt that this power was used "sometimes to an extravagant and pernicious extent" despite the fact that the chief could protect the right of the husband. Moreover, he felt that it was rather immoral for the woman's father to demand further ilobolo in a subsequent marriage after the dissolution of the previous one.⁶⁹

These proposals which eventually limited ilobolo might be laudable if they were only considered purely for the purpose of making marriage accessible to the young men, and to facilitate proof of the delivery of ilobolo. The problem is that they had other motives which were ingenuously shielded from the Zulus themselves. The reasons that were given were

merely a pretext for interfering in the marriage system of the Zulus.

Shepstone was severely criticised especially by the clergy for the 1869 law. The main thrust of the criticism was against the sanctioning of the "odious" customs such as polygyny and ilobolo.⁷⁰ Yet as he had earlier pointed out, it would be unrealistic not to recognize ilobolo and polygyny because non-recognition of polygyny did not take into account the interests of the woman who regarded herself as much a wife as the first one, and it would be unjust and harmful to disregard and sacrifice the feelings of thousands of women who regarded themselves as properly married.⁷¹ There was even a move to amalgamate the offices of the Natal Colonial Secretary and that of the Secretary of Native Affairs with the aim of breaking Shepstone's power.⁷² This, however, fell through.⁷³

Another criticism of the 1869 law was that, although it provided for a limit in the amount of ilobolo, there were other ways of evading this amount, namely, by a rich man's promising the girl's father a present of 12 head of cattle or more if the young woman made a choice in his favour.⁷⁴ Indeed many such evasions were reported.⁷⁵ Polygyny was continuously deprecated and ilobolo also received continued condemnation.⁷⁶ This was coupled with the criticism of forced marriages emanating apparently from the demand for ilobolo. Because of this it was even mooted that women would have to declare their consent before a magistrate instead of before the official witness because of the inefficacy of the latter system.⁷⁷

The regulation of ilobolo under the Marriage Law,⁷⁸ did not produce the results desired by Shepstone.⁷⁹ Ilobolo as a stabilizing factor in marriage had been weakened. Because the father had lost his protective rights in respect of a married daughter he would no longer be obliged to return a

portion of the lobolo if the marriage was dissolved.⁸⁰ The Zulus complained that this was a perversion of the function of ilobolo, and that the fixing of the number amounted to a matter of "buying and selling".⁸¹ The latter criticism is not valid if it means that the fixing itself converted ilobolo into a sale.⁸² Although it had a contrary effect, the aim had been to prevent the abuse of ilobolo.⁸³

Another complaint was that the change in the function of ilobolo in fact facilitated the granting of divorce.⁸⁴ Indeed the 1869 law was accompanied by a number of socio-economic forces which undermined the traditional kinship system.⁸⁵

The position of the Christian marriage and ilobolo deserve some consideration here. Although there was no statutory provision for Christian marriages in Natal, the regulations promulgated under the Marriage Law of 1869 dealt with this matter.⁸⁶ Parties who desired to, could forego the transfer of ilobolo in respect of such a marriage. The father or guardian of the woman had to make a declaration before the magistrate renouncing his right to receive ilobolo. This voluntary renunciation would effectively bar any future claim to ilobolo.⁸⁷ These provisions were criticised because it was difficult to implement them.⁸⁸

Shepstone gave evidence before the 1883 Commission. The evidence he gave reveals his whole attitude towards ilobolo, and will be briefly outlined. Shepstone wanted to recognize ilobolo and did not seek to abolish it.⁸⁹ Yet the "steady aim" of the Natal Government was to abolish it together with kindred practices.⁹⁰ Shepstone was of the opinion that ilobolo was returnable in the case of the death of the woman without issue. In Natal in particular, this had been a problematic case to decide. But there was a desire to "clothe the marriage with as much finality as possible" and the transfer of the woman was to be regarded as the final act

of marriage which would have many advantages, both political and social.⁹¹ But this would be disadvantageous to the woman.⁹² Clothing the marriage with finality meant that the cattle that were delivered at the first marriage could not be reclaimed at its dissolution, and that on the marriage of the daughter the father lost all rights to interpose on her behalf. According to Shepstone the original object of ukulobola was the protection of the woman and to enable the father to maintain her should need arise. This, he further held, meant that in any legislation on the matter, ilobolo would have to be held to give the daughter "the legal right of asylum and maintenance".⁹³ This did not mean that on the death of the husband ilobolo would become the property of the children of the marriage.⁹⁴ The daughter and her children would, however, have a legal claim on her father's property if she was in need.⁹⁵ This claim was not confined to the father's estate but also lay against the heirs of such estate and those who received ilobolo.⁹⁶ Shepstone did not regard ilobolo as a sale.⁹⁷ But he was against the father's receiving ilobolo twice for the same woman.⁹⁸

In treating ilobolo as a trust or settlement, Shepstone realised that there would be some difficulties. One of these would be that the trust fund would be represented by cattle, "a description of property that must involve perpetual litigation". This would be the case in relation to cattle of the second marriage, but the father-in-law would always have the advantage in a dispute relating to them. Thus the idea of maintenance appeared more preferable.⁹⁹ This, however, required supervision by a magistrate¹⁰⁰ who would have to know the custom.¹⁰¹

According to Shepstone ilobolo was an essential of the marriage. This did not have to be cattle, but could be any property including corn or even hoes where cattle did not thrive well.¹⁰² Without the passing of such property, he was convinced that, as the ideas of women on ilobolo remained

unchanged, the marriage would break down because a woman married without ilobolo looked upon herself as being disgraced, and would be scorned by other woman.¹⁰³ Ilobolo, as Shepstone held, represented a bond of alliance between the two families whereby one gave the daughter, and the other filled "the void with cattle".¹⁰⁴ Something had to pass between the families to make a marriage lawful.¹⁰⁵ At the same time this enhanced the esteem of the woman for having added to the comfort of her family.¹⁰⁶ The passing of property did not reduce the woman into the position of a slave,¹⁰⁷ although she might be subservient to her husband.¹⁰⁸ Yet she enjoyed the status of a wife and privileges attached thereto.¹⁰⁹

Whatever the original principle of ilobolo was, Shepstone¹¹⁰ felt that this practice should be limited to discourage the idea of "buying and selling".¹¹¹ But legislation, dealing with any innovation of ilobolo would have to be cautious, and not offend the predilections of the blacks because that would frustrate any improvement.¹¹² Radical interference with ilobolo would be met with fierce opposition. Prohibition of ilobolo, and consequent confiscation of any ilobolo cattle given, would produce this result.¹¹³ There was no opposition in Natal where the number of cattle was fixed, and any amount in excess forfeited, presumably because the Zulus themselves had regarded the demand of excessive ilobolo as an evil whose repression they hardly resented.¹¹⁴

As to whether ilobolo should be settled in full in advance or in instalments, Shepstone was of the view that each had its advantages.¹¹⁵ While he favoured full settlement before marriage,¹¹⁶ payment in instalments, on the other hand, would have the advantage of enabling young men to marry, and not delay marriage. Yet full settlement before marriage had the advantage of finality, and the prevention of further litigation.¹¹⁷

Shepstone retired from his post in 1875,¹¹⁸ and indeed he had

been regarded as an able administrator.¹¹⁹ Much can be said about him, but this assessment is confined to his policy on customary law, and in particular ilobolo, the course of which he had greatly engineered.¹²⁰ He was regarded as an authority on Zulu law and custom,¹²¹ and indeed he had shown considerable insight and anthropological understanding of this law. Although his policy was considered as having the hall-mark of resistance to change, he was per se not against change provided it was gradual.¹²²

Shepstone was opposed to the codification of customary law as he believed that this would destroy the flexibility of this legal system,¹²³ which was indeed proved true by the later codification. It cannot be denied that he was more conservative than liberal in his approach.¹²⁴ Yet he was more sympathetic to Zulu traditional culture, and was also sympathetic to the efforts of the Zulus to oppose any factors subverting it.¹²⁵ Although Shepstone was moderate in his dealing with ilobolo, some Zulus resented his converting ilobolo into a commercial transaction.¹²⁶

This indictment is not quite appropriate because the very reason for the fixing of the limit of ilobolo in the 1869 law was to temper mercenary tendencies. In essence he never prevented the charging of ilobolo according to the traditional custom, but insisted upon its not exceeding ten head of cattle for a commoner. Possibly this law was not properly interpreted to them and was therefore wrongly understood. This law also encouraged certainty in the law should there be a dispute.

The fiercest opponents of Shepstone's attitude towards ilobolo were obviously the missionaries.¹²⁷ In 1890 there was even an attempt to approach the government to request it to take steps to abolish the custom, but this fell through.¹²⁸ In Natal customary law had therefore been recognized.

4.2.3 The codification of customary law in Natal

The recognition of customary law in Natal gave rise to another problem, the problem of the contents of Zulu law. The need for codification had been articulated by the 1852 Commission, as there was little if any knowledge of customary law to be applied by magistrates.¹²⁹ The discussion of the recognition of customary law and consequently ilobolo in Natal would therefore be incomplete without a discussion of the codification,¹³⁰ and the effect of that codification on customary law and ilobolo. It is, however, not necessary to deal in detail with codification, but only in so far as it affects ilobolo.¹³¹

Although the agitation for the codification of law was motivated by the desire for making Zulu law readily available, it had another motive. It was an indirect attack on the Shepstonian system.¹³² It was particularly his secretive approach to customary law that was objectionable. As Welsh puts it:

"The content of customary law was believed to be locked up in Shepstone's breast, and to force it out, colonists hoped, might be a spectacular expose of all the nefarious dealings that were alleged to be conducted in the name of customary law".¹³³

This discussion of the codification of Zulu law must therefore logically start with the attitude of Shepstone.¹³⁴ As has been pointed out above, Shepstone was opposed to the idea of codification.¹³⁵ Various attempts to persuade him to have Zulu law codified failed.¹³⁶ Even though Lieutenant-Governor Pine accepted the 1852 Commission's recommendations on codification, Shepstone remained adamant.¹³⁷ His view was that such codification would be difficult and would result in the rigidity of customary law. According to Welsh:

"Shepstone's resistance to the codification of customary law may have been partly attributable to his notorious secretiveness. But nowhere in his public statements or private papers does he adduce as a reason for his resistance the view that publication of a code would be

a further stick with which he would be belaboured by the colonists. He genuinely believed that codification would be undesirable because it would import a rigidity to customary law which, in its traditional setting, it did not have".¹³⁸

The codification of Zulu law has therefore been regarded as marking the end of the Shepstonian policy.¹³⁹

In the Native Administration Law of 1875¹⁴⁰ a board of Native Administration was provided for. This board had the function inter alia to draw up a code of customary law as a guide for the magistrates to the unwritten customary law. It was initially not meant to be an enactment binding on the courts.¹⁴¹

4.2.3.1 The 1878 Code

The Code was, as Welsh puts it, "a curious document"¹⁴² consisting of 68 sections. Its provisions on ilobolo deserve some comment. In terms of this Code ilobolo was an essential of a valid customary marriage.¹⁴³ This provision was obviously in accordance with Zulu customary law. For a civil marriage, ilobolo was, however, expressly excluded as an essential. The father had, prior to the marriage, to renounce his right to ilobolo before a magistrate.¹⁴⁴ Even for a customary marriage of a widow ilobolo had to be delivered.¹⁴⁵ Provision was also made for the number of cattle to be delivered as ilobolo.¹⁴⁶ Any cattle delivered in excess of the stipulated maximum would be confiscated.¹⁴⁷

The code provided that the father of the woman who received ilobolo would be precluded from claiming ilobolo for the same woman in a subsequent marriage. Any payment for a subsequent marriage would accrue to the estate of the previous husband if deceased.¹⁴⁸ In addition provision was made for the payment of ingquthu beast to the woman's mother together with one goat for the bridesmaid. The woman's father had to provide one or more head of cattle for the marriage feast as his position permitted.¹⁴⁹ Ilobolo given to the father would go to the estate of the house to which the woman belonged.¹⁵⁰ The Code

further provided for the return of cattle or their value if through the fault of the woman the marriage could not be consummated within a reasonable time after its celebration. The same would apply if the marriage could not materialise through no fault of the husband. The father would, however, have no right of action against his daughter's husband for any arrear payments of ilobolo irrespective of any express or implied agreement thereto.¹⁵¹

If the marriage had been consummated, the Code also provided, ilobolo could not be recovered.¹⁵² The magistrate was further given a discretion to settle any dispute relating to the amount given for any marriage other than for the first marriage.¹⁵³ If divorce was decreed owing to the husband's misconduct, he lost the lobolo delivered for any subsequent marriage by the woman, and such ilobolo would go to any person indicated by the magistrate.¹⁵⁴

According to the Code there would be no legal obligation on anyone to provide ilobolo for anyone else's marriage, but a lineal ancestor or an elder brother, who was the common ancestor's heir, unless there was cause to the contrary, would be expected to contribute towards the first marriage of his descendant or brother, as the case might be.¹⁵⁵ This would especially be so if cattle had been received for the marriage of a daughter of the house to which the descendant or brother belonged. For a chief's great wife the tribe had to contribute ilobolo.¹⁵⁶

The 1878 Code received a mixture of criticism and praise. It was, as Welsh says "an amalgam of traditional law and such modifications as had been introduced in the past by the Natal Government. The regulations under the Marriage Law of 1869, for instance, were woven into the Code. In so far as the Code embodied customary law, it was an exceptionally poor statement of that law".¹⁵⁷

Some provisions on ilobolo deserve some critical comment.

The provision for the delivery of ilobolo for the marriage of a widow was questionable because it did not distinguish between the remarriage of a widow and ukungena which was more common, and for which no further ilobolo is required in customary law. The Code also included payments which were purely customary and non-obligatory among provisions that were obligatory. As an example may be mentioned the payment of a goat to the bridesmaids and the provision of a beast by the father for the festivities. Denial of the right of action by the woman's father to recover arrear ilobolo from the bridegroom even where the groom agreed thereto, is also questionable. It is also doubtful whether the provision requiring the delivery by the tribe of ilobolo for the chief's great wife was a wise one.

The Code was soon to be amended.¹⁵⁸ The executive council was given power to issue a new code. A draft code was drawn up by Mr W J Campbell, and printed in 1888. This formed the basis of the 1891 Code. It was finally introduced in Parliament in 1891. It was passed as Law 19 of that year and was applicable to Natal. It did not contain any provisions that enabled the executive to amend it. In Zululand the 1878 Code continued to apply until 1932.¹⁵⁹

4.2.3.2 The 1891 Code

The 1891 Code consisted of 298 sections. The essentials of marriage remained the same as in the 1878 Code. Ilobolo was still retained as an essential requirement.¹⁶⁰ Most of the provisions of the 1878 Code were retained. It was provided that the bridegroom or his father or family head or any other person who had contributed ilobolo, had to, at a convenient time during the marriage ceremony, publicly declare to the official witness the source or sources of ilobolo and whether any debt in respect of such ilobolo existed. If there was a debt he also had to disclose the amount of such debt, and to whom it was owed together with the time, manner and source of payment of the debt.¹⁶¹ All the information

relating to ilobolo would have to be furnished by the official witness when registering the marriage.¹⁶²

The Code further provided that on divorce the court would have to declare, among other things, the number of cattle, if any, to be returned to the woman's husband.¹⁶³ If the woman remarried, the lobolo of that marriage would be delivered to the father or guardian of the woman. But if no cattle had been returned by the woman's father or guardian on divorce on account of the misconduct of the husband, ilobolo to be delivered would not exceed five head of cattle or their equivalent.¹⁶⁴ If there was a dispute relating to ilobolo of a divorced woman or widow upon re-marriage, ilobolo would be fixed by the Administrator of Native law.¹⁶⁵ The Code also provided that when the marriage was declared a nullity, the court would at the same time make an order for the refund of ilobolo together with the increase of the cattle, and also the actual expenses incurred, including ingquthu beast.¹⁶⁶

The new Code further imposed a duty on the recipient of ilobolo to give the woman asylum if there was need.¹⁶⁷ Ilobolo had to be delivered on or before the day of marriage. Any cattle delivered before that day had to be regarded as sisa cattle and if there was any increase or decrease in those cattle prior to the marriage, they would have to be regarded as profit or loss of the payer. But if any ilobolo cattle died within fourteen days after the marriage, they would, if duly reported, be replaced by the payer.¹⁶⁸ The determining factor of the amount of ilobolo of a woman would be the father's rank or position, but in cases of doubt, cattle had to be fixed at ten.¹⁶⁹

Where a wife died within a year after the day of her marriage without issue of the marriage, her husband would be entitled to recover from the late wife's father or guardian a portion of the lobolo which did not exceed three quarters of the original value or number. If there was lawful issue of the

marriage, there would be no refund.

Section 182 barred any action, after 31 December 1893, for the recovery of ilobolo, or inheritance arising out of ilobolo claims relating to marriage concluded before the Code had been promulgated. Claims were likewise barred if brought with the aim of recovering ilobolo in respect of marriages concluded after the promulgation of the Code.

These were the provisions of the 1891 Code on ilobolo. This Code could be criticised in a number of respects, but for present purposes comment and criticism will be confined to ilobolo and related institutions. Before levelling criticism, let us look at the comments made on it at the time of its promulgation. These varied.

The American Board Mission castigated it in strong terms as "an English adaptation of barbarian law" and as "an abominable strong hold where heathenism hides and defies progress". The mission further called for its immediate abolition or modification. It profoundly regretted that the Code had not discouraged ilobolo and polygyny.¹⁷⁰

Although the Zulu/English press was initially of the opinion that it was "a very good digest of our Native Laws", it later changed its stance describing it as "an abortion" with "omissions and commissions" too numerous to mention.¹⁷¹

The 1891 Code has also been criticised for regarding umqholiso beast, the mumba beast and the ngquthu beast as the same.¹⁷²

The mumba beast was allocated to the mother of the bride which she in turn gave to her last-born son for ilobolo purposes. The ngquthu beast was given to the mother of the girl when the girl lost her virginity. The mother also received ubikibiki, a present in money or kind from her son-in-law on the celebration of the marriage. A father might also give his daughter inkomo yokwendisa. The

inaccuracy of the Code was the summary equation of these various gifts.¹⁷³

The provisions of the Code went even further than Shepstone's changes in the lobolo in 1869. It provided that ilobolo cattle had to be delivered on or before the day of the marriage.¹⁷⁴ This provision would tend to delay marriage. It has been criticised as seriously affecting "the African view of what in itself is a laudable institution and tended to emphasize more the conception of barter or sale".¹⁷⁵

The barring of claims of unpaid ilobolo claims upon marriage in terms of s132 was deeply resented by Africans.¹⁷⁶ It caused much harm especially after the rinderpest epidemic of 1897 and the outbreak of East Coast fever had caused the death of many cattle. Prospective husbands were unable to find cattle for ilobolo. Fathers debarred by statute from suing for the balance of ilobolo would not allow credit. Although some did accept a few head of cattle on account, and "lent" their daughters to suitors, they refused to have the marriage solemnized before receiving the whole amount.¹⁷⁷

This state of affairs resulted in much irregularity and immorality, jeopardised family relations, and proved detrimental to social order in general. As Welsh points out, "To Africans it was puzzling and inconsistent for the Government to regulate lobolo in detail and yet to prevent the courts from hearing disputes arising out of it".¹⁷⁸

The government reacted to this by repealing the limitation on claims in 1910.¹⁷⁹ The rigidity of the Code vindicated the claims of Shepstone. This was echoed in 1897 by the Prime Minister Sir H Binns:

"In our young days as politicians we were all very hot about codifying the Native Law, and I am not very certain whether we were very clever in our ideas at that time. There was a certain amount of elasticity about Native Law before you codified it, which made it extremely

useful. But now we are bound hard and fast, and tied to the four corners of the law".¹⁸⁰

Another problem of this Code was that it purported to codify the whole of customary law. This was also attributable to a "cultural misunderstanding" and "the inability of white administrators to grasp the essentials, as well as the nuances, of the unwritten law".¹⁸¹ This was further exacerbated by the fact that the Code had been enacted by a parliament in which there was no African representative, and which "remained unresponsive to African representations about the inadequacies of the legal system by which they were bound".¹⁸²

What became immediately obvious was that the Code was lagging behind social change instead of being a mirror of such change.¹⁸³ It was perhaps unintentional that the Code did not achieve the goal for which the colonists had clamoured, namely female emancipation. Welsh succinctly expressed the ironic results of codification as follows:

"It is one of the ironies of colonial Natal's history that those who pressed for codification as a means of attacking the Shepstonian system and fostering legal assimilation should have allowed the Code to become in effect, a straitjacket which stultified the development of customary law. Another irony was that African women, whose plight was bemoaned so vigorously, suffered a deterioration in status as a result of the Code".¹⁸⁴

The merits of codification is a topic on its own requiring intensive study.¹⁸⁵ It is not intended here to dwell on it.

As to the efficacy of the 1891 Code the following statement of Brookes is instructive:

"Quite certainly, the Natal Code has not been a complete success: equally certainly, it has not been an utter failure. Whether things are better or worse for its enactment than they would have been otherwise it is not possible to say at all dogmatically on the evidence before us ... There is always a certain conservatism in people who administer justice. The only verdict we can come to as regards the Natal Code is 'not proven' and

to arrive at a definite conclusion relative to the problems of codification generally we must pass from the concrete history of codes in South Africa, to the consideration of the general causes and characteristics of codification".¹⁸⁶

From the 1869 regulations emerged the "codes that have distinguished Natal's legal dualism".¹⁸⁷ This dualism, as Simons says, "once derided as a device to perpetuate tribalism, became a model on which South African governments were to base their systems of judicial and tribal administration".¹⁸⁸

It must be remembered that the codification of Zulu customary law was part of Natal's policy on the recognition of customary law. Natal was therefore characterised by a policy of recognition in a code. Although the 1891 Code was later amended, its amended form will be considered later because the present discussion is confined to the recognition of ilobolo before 1927. The next policy to be considered is that of the Transvaal. The policy of the Transvaal was a complete negation of the Natal policy.

4.2.4 The Transvaal Government

The attitude of the Afrikaner republics was less tolerant towards ilobolo and tribal marriages. Laws were passed condoning or rejecting ilobolo and kindred practices without making any provision for the cultural needs of the blacks.¹⁸⁹ No detailed rules were provided for the administration of justice among the blacks. In terms of section 3 of Law 3 of 1876, civil disputes between blacks would be settled by chiefs, assisted by an assistant magistrate.

In the Transvaal Republic customary marriage was prohibited.¹⁹⁰ The relevant provision stipulated: "Tot bevordering der zedelijkheid wordt het aankopen van vrouwen of veelwijwerij onder de kleurlingen in deze Republiek door de wetten des Landes niet erkend".¹⁹¹ This meant that both the customary marriage and the institution of ilobolo were not recognized.¹⁹²

The Transvaal Republican legislators had decided to follow the policy followed at the Cape Colony proper in this regard, and not that of Natal.¹⁹³ There was not enough time to assess the efficacy of this policy as early in the following year the Transvaal was annexed to the British Crown.¹⁹⁴ In the instrument of annexation, Sir Theophilus Shepstone had referred to the failure of the Native policy and the practical independence of the Native tribes among the reasons for that annexation.¹⁹⁵

In the meantime cases were decided which showed an inclination towards the recognition of a customary marriage.¹⁹⁶ Moreover, if a man had two wives the second one was regarded as much his wife by customary law as his first one.¹⁹⁷

During the time of annexation of the Transvaal, a law¹⁹⁸ was passed "for the better government of, and administration of justice among, the Native population of the Province". After repealing the Republican legislation relating to blacks, it reproduced almost in toto the Natal law of 1875. It was later adopted by the South African Republic almost unaltered.¹⁹⁹

This law laid down that the laws, habits, and customs hitherto observed among the blacks had to continue in force as long as they had not appeared inconsistent with the general principles of civilization recognized in the civilized world.²⁰⁰ All matters and disputes of a civil nature between blacks had to be dealt with according to African customary law then in force, provided the same did not occasion obvious injustice or was in conflict with the accepted principles of natural justice (natuurlijke billijkheid).²⁰¹

Despite this liberal approach, the supreme court decided in a number of cases that the 1885 legislation could not possibly have reversed the principles laid down in 1876, and that the African customary marriage, on account of its polygynous nature, was inconsistent with the general principles of civilization recognized in the civilized world.²⁰² Yet the 1885 Law has

been regarded as a milestone towards the recognition of African customary law in the Transvaal.²⁰³

Because of the attitude of the Transvaal supreme court judges, all customary marriages were considered void.²⁰⁴ The limitation on the recognition of African customary law caused difficulties.²⁰⁵

In 1895 a circular was issued by the superintendent barring claims, (purchase of women for money or cattle) as contraband dealing upon which the Native Courts had no power to adjudicate. This circular was, as Garthorne puts it, "rather infelicitously phrased" as the concept of the "sale of women" was foreign to the Africans, and the use of money was alien to the lobolo transaction.²⁰⁶ An attack on ilobolo meant an indirect assault on marriage and the whole family structure as ilobolo is the method of validating a customary marriage. It is consequently incomprehensible, how it could be argued that the African's moral standards would be raised by denying him the right to practise the custom. Chiefs on the other hand, continued to settle ilobolo disputes although they could not enforce their judgments by way of legal action.²⁰⁸

In 1905 the Attorney-General of Transvaal opined that the recovery of ilobolo in certain cases of hardship was certainly not contrary to the accepted principles of natural justice.²⁰⁹

Although an opportunity for "clearing the debris" had presented itself with the Anglo-Boer War, when in 1901 the legislative power lay in the hands of one man, even this chance had been let slip. The Transvaal supreme court established after the War (1899-1902) had been, even less tolerant.² Although Law 3 of 1897 had made provision for the regulation of matrimonial affairs relating to blacks,²¹¹

Innes C J ruled in later cases that customary marriages whether actually or potentially polygynous were inconsistent with the general principles of civilization recognized in the civilized world.²¹² This was indirectly an indictment against ilobolo as the two are according to customary law inseparably linked.

In the case of Kaba v Ntela²¹³ the court had the opportunity to express itself on the question of ilobolo. This was a case for the return of ilobolo after the husband had been deserted by the wife. After investigating the legal position relating to the marriage of blacks, the court came to the conclusion that because of its polygynous nature a customary marriage was contrary to "the general principles of civilization".²¹⁴ Whenever a customary marriage is impugned ilobolo as an essential of it cannot be left untouched. Because a customary marriage was regarded as "illicit cohabitation", the return of ilobolo was therefore not sanctioned. Referring to the case of Nggobela v Sihele,²¹⁵ the court said: "In law there is a par delictum and the claimant cannot prevail over the possessor".²¹⁶ In adopting this line of reasoning the Transvaal supreme court was following the Cape. The return of ilobolo delivered in contemplation of a civil marriage was allowed.²¹⁷

Up to 1911 the Transvaal courts took no cognizance of ilobolo cases. Before 1897 it was a matter of usage, but Law 3 of 1897 made this binding on the courts.²¹⁸ The non-recognition of a customary marriage together with ilobolo was criticised by a number of jurists. Mason J said that "it is true that one result of that necessary conclusion from the invalidity of polygamous marriages is to render ineffective to a great extent the provisions of Law 4 of 1885 preserving as far as possible Native customs".²¹⁹ In the same case Wessels J said: "When we have rejected these, we have so undermined the fundamental Native customs that there is very little left of their customs as to marriage and status".²²⁰ As a result

of the legislation and judicial decisions, almost the whole black population of the Transvaal was held to be de iure illegitimate. Husbands were deprived of the rights of guardianship over their wives. Fathers also lost guardianship rights over their children. Claims in respect of ilobolo could not be entertained in courts, and as a result the great portion of the customary law system was rendered nugatory so that very little of the African's legal status survived.²²¹

The policy of the Transvaal Republic towards ilobolo and customary marriage was harsh, when one considers that in 1902 a Tax Ordinance had subjected polygamous blacks to an additional tax in respect of additional wives. In the words of Garthorne: "(t)he cynicism that extorted revenue from a practice which the law rejected as immoral could hardly have been intentional".²²²

In short in the Transvaal Republic the African marriage system was regarded as repugnant to general principles of civilization, and held therefore illegal. This was a legacy from the Cape.

4.2.5 The Orange Free State

In the Orange Free State there was no general recognition of African customary law.²²³ Yet the offspring of customary marriages were regarded as entitled to succeed to their parents if these regarded each other as man and wife. The power of the father was recognized. In the event of separation the innocent party was granted the rights of guardianship.²²⁴ There was, however, no recognition and application of ilobolo custom.²²⁵

4.2.6 Towards recognition

The policies of the various governments towards ilobolo before Union remained as confused and as diverse as they were in the

1840's. Apparently the white rulers had not obtained a deeper insight into the traditional culture of the blacks.

Views on ilobolo and polygyny continued to vary greatly. This can be observed from the views expressed by various interviewees on customary marriage by the S.A. Native Affairs Commission 1903-5. Whereas some favoured government control and restriction of ilobolo and polygyny, others favoured a policy of non-interference. While some were for the abolition of ilobolo and polygyny, others were of the opinion that these should be allowed to die on their own as they believed that legislative abolition would be opposed not only by men but also by women themselves. There was in fact a strong belief that polygyny was decreasing. There was obvious dissatisfaction with the Code's provision for the delivery of the whole ilobolo before the celebration of the marriage, and for the barring of ilobolo claims in court.²²⁷

Even after Union the various provinces continued to have a legacy of colonial and republican diametrically opposed policies on customary law. While in the Cape three approaches to customary law were discernible, the recognition of customary law in Natal had been thorough-going. The code had made far-reaching changes into customary law including ilobolo.²²⁸

In the Transvaal and Orange Free State courts could not entertain ilobolo claims or settle disputes arising out of a customary marriage. In the Transvaal this happened despite the recognition of customary law by Law 4 of 1885. But as the rejection of a customary marriage did not mean positive prohibition, most blacks continued to conclude customary marriages, and to demand and deliver ilobolo therefor.²²⁹ This unsatisfactory state of affairs needed a remedy.

A number of bills relating to the regulation of customary law were introduced in parliament, but these were abortive for

various reasons.²³⁰ Out of the wreckage of one of these bills emerged the Act that granted uniform recognition to customary law in South Africa.²³¹

4.2.7 The Black Administration Act of 1927

At last the South African Parliament had the opportunity to create uniformity in the recognition of customary law,²³² and to end the confusion left by the heritage of conflicting statutes, judgments and policies regulating the operation of customary law.²³³ The 1927 legislature had the benefit of learning from the successes and failures of the previous policies of the earlier colonial governments. But when the recognition came it was "grudging" and conditional.²³⁴ Instead of recognizing customary law as a system of law equal to Roman-Dutch law, commissioners were given the discretion to apply customary law provided certain conditions were met. It had to be applied if the suit related to questions of custom between blacks. The dispute had to be between blacks, and the customary rule must not be contrary to principles of public policy and natural justice.²³⁵ Courts were precluded from declaring ilobolo or similar institution contrary to public policy and natural justice.²³⁶

In enacting s11(1) the legislature chose a flexible approach which it adopted from the Transkeian Territories, and thus eschewed the rigid approach pursued in the nineteenth century by Natal, the Boer Republics and the Cape Colony proper of compulsory application or complete rejection of customary law.²³⁷

According to Brookes,²³⁸ customary law ought to have been recognized without recourse to legislation, but because of the influence of Benthamite and Austinian positivism at the time, legislation was resorted to. Although one agrees with Brookes in principle, yet because of the preceding conflicting decisions and statutes, it was necessary that the

recognition be forthright to clear away any doubt as to the status of customary law, and to create uniformity in such recognition.

Commissioners' courts throughout South Africa therefore have a discretion²³⁹ to apply customary law. This discretion is, however, not arbitrary, but is a judicial one.²⁴⁰ In Ex parte Minister of Native Affairs in re Yako v Beyi,²⁴¹ Schreiner

J A said:

"What is intended is that wherever the case is one in which Native law could be applied on the ground that the issues relate to matters in respect of which native custom exists, the discretion arises".²⁴²

Commissioners' courts are regarded as courts of law, and in the absence of the provisions of s11(1), they would normally apply the law of the land in which case any customary practice like ilobolo would have to be proved and recognized according to the principles applying to customs.²⁴³ The advantage of establishing these courts, and granting them the discretion to apply customary law has been said to be that they would be manned by persons versed in customary law who would not need to have the existence of a custom proved in every case although evidence might be adduced where the said judicial officer has no knowledge of the custom.²⁴⁴ But whether these judicial officers are adequately and suitably qualified for this task has been seriously doubted.²⁴⁵ Not only commissioners' courts, but also the appeal court for the commissioners' courts,²⁴⁶ and the appellate division of the supreme court²⁴⁷ under certain circumstances have the competence to apply customary law which means dealing also with cases involving ilobolo.²⁴⁸

The legal dualism created by the recognition of customary law in 1927 has led to the possibility of a conflict of laws. This has also been the position in other countries in Africa.²⁴⁹

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4.2.7.1 Internal conflict of laws

The subject of internal conflict of laws is important for resolving problems arising from the transitional social change. Law cannot be evaluated in isolation from its social environment. Many and varied changes have taken place within the black society. These changes may never be ignored, but have to be properly given effect to in the law. People from different degrees of acculturation become involved in a dispute that comes before the courts. It is then immediately in issue which law has to be applied to settle the dispute, the common law or customary law. Besides, an issue which comes before the court may not necessarily involve a "conflict situation", but it may be important to know which customary law rule to apply, the old or the rule as modified by recent changes.²⁴⁹ It may well be inequitable to apply an old customary rule to a person who has emulated a western way of living or to a person who comes from an area where a new customary rule has taken the place of an earlier one. This is particularly so in the law of marriage. It may be patently unjust to apply the law that was evolved for a society in which the interests of the individual were subordinate to the kinship group to a highly sophisticated individualistic one. Nor will the application of Roman-Dutch law lock-stock-and-barrel solve the problem. Although many blacks may find need-satisfaction from Roman-Dutch law, many others lead a life that is partly western and partly tribal. In the case of marriage for instance, although blacks marry by civil rites, they always include ilobolo agreements to that marriage. A need therefore arises to modify and adapt the law in respect of those blacks who have been largely detribalised, but cannot find complete satisfaction from Roman-Dutch law.²⁵⁰ The judicious use of the rules for internal conflict of laws could be of great assistance in settling cases involving not only customary law and common law, but also questions relating to which rule of custom should be applied, the new or the old one.

Although commissioners' courts have been granted a discretion to apply customary law in appropriate cases, no detailed rules have been laid down for the guidance of the courts. This flexibility has been commended for permitting a decision of each case based on the sensitive assessment of the facts, although this in turn leads to uncertainty.²⁵¹ In Yako v Beyi²⁵² Schreiner J A expressed this in the following manner:

"Faced by such difficulties, Parliament in enacting sec 11(1) appears to have used a device which may have been expected to permit of some elasticity and provide scope for development, so as to achieve the primary desideratum of an equitable decision between the parties without laying down any hard and fast rule as to the system of law to be used to attain that end".

Although it is not necessary to make a comprehensive analysis of the rules for choice of law,²⁵³ it is relevant to deal briefly with rules suggested for marriage as this enquiry is concerned with an institution that is intimately connected with marriage.

Some writers are of the view that the common law is of primary application, and customary law only of secondary application.²⁵⁴ In Yako's²⁵⁵ case, however, the court held that neither of the two legal systems is regarded as prima facie applicable.

It has also been suggested²⁵⁶ that in matters of status, a person's marriage should be decisive. If it is a civil or Christian marriage that person's status is governed by common law, but if he is married according to customary law, his status is regulated by customary law. The objection against this viewpoint is that it assumes that once a black person marries by civil rites he has severed all ties with customary law which is not the case. Proof of this is the fact that although blacks marry by civil rites, they also demand and receive ilobolo in contemplation of that marriage. Thus to apply just or only common law to those persons may be inequitable.²⁵⁷

Although it has also been suggested that the law which provides a remedy should apply,²⁵⁸ the Appellate Division has held that the existence of a remedy is only one factor to be considered in selecting the appropriate law, but under certain circumstances justice may best be done by applying the legal system which does not provide a remedy.²⁵⁹

A better approach is that advocated by Bennett²⁶⁰ of utilising techniques used in private international law. In this context connecting factors could be of assistance. But instead of using them individually, as in private international law, in internal conflicts they should be used cumulatively akin to the "proper law" approach adopted in the rules for choice of law in the law of contract. This will undoubtedly help to meet the reasonable expectations of the litigants.

Ilobolo attached to a civil marriage poses special problems. Courts have treated it as a customary institution, and have not incorporated it into the common law marriage.²⁶¹

Closely connected with the question of internal conflict of laws is the problem of intertribal conflict of laws. At a time when there is great mobility and intermingling of people from different tribal laws this is not a theoretical problem. Suppose a Zulu man enters into a customary marriage with a Sotho woman.²⁶² As a result he expects to deliver only ten head of cattle as ilobolo as is the position according to the provisions of the Code²⁶³ whereas the Sotho father expects more for his daughter in accordance with Sotho custom. The question is: which customary law is to be applied? The answer is provided for in section 11(2) of the Act. It stipulates:

"In any suit or proceedings between Blacks who do not belong to the same tribe, the court shall not, in the absence of any agreement between them with regard to the particular system of Black law to be applied in such suit or proceedings, apply any system of Black law other than that which is in operation at the place where the

defendant or respondent resides or carries on business or is employed, or if two or more different systems are in operation at that place, not being within a tribal area, the court shall not apply any such system unless it is the law of the tribe (if any) to which the defendant or respondent belongs".²⁶⁴

Firstly it is clear from this subsection that the parties may agree to the law which would regulate the transaction.²⁶⁵

But what would be the case if the parties had not applied their minds as to which law should be applied? This question is very important because today blacks are forging contacts which were unheard of in the distant past.²⁶⁶ It may not be equitable in all instances to follow the law of the place of residence or employment of the defendant or respondent.²⁶⁷

The use of the word "resides" itself is quite problematic.²⁶⁸

Residence on the other hand, may be a useful guide in determining whether they implicitly agreed upon a particular system to govern the transaction.²⁶⁹ Yet to allow the law of the defendant's residence to regulate all the aspects of the transaction may be unjustifiable.²⁷⁰ The position may further be complicated if the defendant resides in one tribal area, is employed in another, and carries on business in yet another.²⁷¹ In such a case it would even be unrealistic to apply the law of the defendant. The more preferable approach, is that the commissioners in cases of this nature should exercise their discretion creatively.²⁷² The "proper law" approach, suggested above, should still be used in this case.²⁷³ In other words the law that should be applied is the one with which the transaction has the most substantial connection. This law may not necessarily be that of the defendant, but it may be the law which will ensure the most equitable performance of the transaction, and thereby meet the reasonable expectations of the parties thereto.²⁷⁴

4.2.7.2 The repugnancy clause

Section 11(1) of the Act gives commissioners a discretion to apply customary law provided it is not repugnant to public

policy or natural justice. This proviso (otherwise known as the repugnancy clause) has been a common feature of all colonial legislation recognizing customary law in Africa.²⁷⁵

The terms "natural justice" and "public policy" have been described as "notoriously vague and ill-defined".²⁷⁶ It was Burrough who once described public policy as "a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all, but when other points fail".^{276(a)}

The concept "natural justice" is a term of art embracing principles like the audi alteram partem, and nemo iudex in sua causa.²⁷⁷ Although natural justice is of relevance to questions of procedure, and not substantive law, it has been used interchangeably with public policy. Commissioners' courts are, however, not supposed to apply procedural customary law in terms of s11(1), but substantive customary law. From this it can be inferred that the proviso refers to public policy.²⁷⁸ Public policy is an equally nebulous concept which comprises principles relating to morality.²⁷⁹

In Africa in general, and South Africa in particular, courts have been inclined to declare the marriage system of blacks as contrary to public policy owing to its polygynous nature, and because of ilobolo. But with the increase of sociological knowledge of African peoples, and the knowledge of more details of customary rules the tendency in Africa has been not to declare institutions of customary law repugnant to public policy simply because they are incomprehensible to a western mind.²⁸⁰ In this respect South Africa has been lagging behind. Despite the increase of anthropological knowledge of African culture, a customary marriage is still not recognized as a marriage because it is potentially polygynous.²⁸¹ The change of attitude towards ilobolo is evidence that public policy is a concept that is not fixed and immutable for all time, but that it changes as people change.^{281(a)}

South African courts have in a number of cases given conflicting decisions based on the repugnancy clause.²⁸² Public policy is based on value judgement of the customary rule concerned.²⁸³ The system of values used to strike down a customary rule is obviously the European and not the African one as the existence of the repugnancy clause implies the subservience of customary law to another legal system of more general application.²⁸⁴ The objection against this approach is that it may whittle away the greatest bulk of customary law.²⁸⁵ Yet the courts have been generally tolerant when one considers that this discretion is unlimited.²⁸⁶ Because of the policy considerations involved in the repugnancy clause, it has been suggested that it has become obsolete as areas of customary law contrary to principles of humanity observed in a civilized world have already been covered.²⁸⁷ Its retention would only be justifiable if the role of the courts were regarded as creative.²⁸⁸

Courts have been statutorily precluded to declare that ilobolo is contrary to public policy or natural justice.²⁸⁹ Because of the decisions given by the courts even before 1927 it was apparently unnecessary to include this proviso in s11(1).²⁹⁰ Even before 1927 the Transvaal courts had enforced ilobolo agreements²⁹¹ when coupled with a civil marriage, although these agreements were unenforceable when attached to a customary marriage. The same applied in the Cape, although the Orange Free State did not entertain ilobolo claims.²⁹³ The inclusion of this proviso was most probably intended to clear any doubt relating to the legal position of ilobolo as it had been quite controversial.²⁹⁴ It was included not to enable ilobolo to continue, but to prevent the courts from losing complete touch with the "living" customary law.²⁹⁵

Although courts are not entitled to declare that ilobolo is contrary to public policy or natural justice, they have declared certain institutions closely connected with ilobolo repugnant to public policy when those institutions were

purported to be incorporated in a civil marriage.^{295(a)} As a result a civil marriage has served the purpose of purging ilobolo of "impurities" or westernizing it although these institutions are recognized in connection with a customary marriage.

It is puzzling that the legislature chose expressly to recognize ilobolo, an accessory of a customary marriage without a concomitant recognition of a customary marriage itself.²⁹⁶ It is also ironical that ilobolo was excluded from the essentials of a customary marriage²⁹⁷ in the Code, although according to customary law ilobolo is the chief ingredient of a customary marriage.²⁹⁸ Whatever the motive was for the exclusion of ilobolo from the essentials of a customary marriage, the position in practice has not changed. The legislature must obviously have underestimated the force of this custom.

4.2.8 The 1932 Code

The express recognition of ilobolo in the 1927 Act placed it on a firm footing. In 1932 the 1891 Code was revised and republished.²⁹⁹ It is of interest to note some of its provisions on ilobolo.³⁰⁰ Most provisions of the previous codes on ilobolo were retained.

One formal alteration was the introduction of the appellation customary union to indicate a customary marriage. Ilobolo hitherto regarded as an essential of a customary marriage in Zululand was excluded from those essentials.³⁰¹ The basis of a customary marriage thus became the consent of the parents of the parties. Although the father's consent was not required for the marriage of an emancipated woman, this did not debar the father from claiming ilobolo.³⁰²

The exclusion of ilobolo as an essential of a customary marriage has been justified on the ground that when a marriage is

solemnized publicly and registered, ilobolo loses its probative function, and its discarding as an essential is therefore harmless.³⁰³ This is, however, unacceptable because the law as codified is not reflecting the law as practised by the people. It is likely that Natal had acted upon this proposition when it repealed a clause in the 1891 Code that made the delivery of ilobolo an essential ingredient of a customary marriage.³⁰⁴ According to this approach mention of the passing of ilobolo as an essential was regarded as superfluous.³⁰⁵

The draft bill to the 1932 Code had contained a highly questionable provision, that ilobolo had to be delivered in cattle unless it was impossible to obtain cattle for that purpose.³⁰⁶ Fortunately this never became law.³⁰⁷

Provision was made for the registration of ilobolo delivered after the registration of a customary marriage.³⁰⁸ For an ukungena ilobolo was expressly excluded,³⁰⁹ a provision that is apparently redundant although necessary to clear the confusion created by earlier codes.³⁰⁹ Where a husband sued his wife for divorce, he had to cite, in addition to the wife, her father or protector as co-defendant³¹⁰ with the aim of enabling himself to reclaim ilobolo. This provision would become highly contentious later on.

The Code also provided that in the absence of an agreement, ilobolo had to be delivered on the day of the celebration of a customary marriage.³¹¹ It also fixed the amount of ilobolo to be delivered and the medium thereof as well as the value of such ilobolo. All this had to be entered into the register of customary marriages.³¹² Anyone who received more than the required maximum would be guilty of an offence.³¹³ As a result any person who handed over more than the prescribed amount could not recover the excess by an action in court.³¹⁴ This provision was more severe than its predecessor which had merely rendered the excess forfeit without making it an offence to exceed the maximum.

Provision was also made in the Code for the sponsorship of ilobolo and the liability, if any, flowing from such assistance in the provision of ilobolo.³¹⁵

An amendment of s82 of the 1891 Code was incorporated into the

1932 one. Claims for the recovery of ilobolo were recognized. This recognition was confined to the period after November 3 1909 in Natal proper.³¹⁶ Agreements relating to the delivery of ilobolo for the daughter of a chief's deputy that fell within the prescribed scale were regarded as valid and binding in Zululand notwithstanding the provisions of the 1878 Code.³¹⁷

Upon the death of a woman within twelve months without issue a portion of ilobolo not exceeding half the cattle delivered would be returnable.³¹⁸ Although this provision had been included in the previous Code the number of cattle returnable was an innovation of the 1932 Code. The retrospective operation of such claim in Zululand was limited.³¹⁹

Payments generically known as izibizo were outlawed. If paid, they would be deemed to form part of ilobolo at the discretion of the commissioner.³²⁰ They would also be refundable to the payer if the union was abortive.³²¹

The Code made a number of changes in the law of marriage and ilobolo.³²² What soon became clear was that the Code was not a natural outgrowth from the blacks themselves as it tended to arrest the development of the law.³²³ This would invariably result in a discrepancy between the law as codified and the law as practised by the Zulus. The codification presupposed that Zulu law had reached its ultimate stage of development which was not the case. Because of a number of social changes which had taken place among the Zulus the law applied to them had to change otherwise it would be bound to be inequitable.³²⁴

4.3 SUMMARY AND CONCLUSION

The recognition of ilobolo by various governments before Union had a chequered career. Except in Natal and the Transkeian Territories where recognition had been frank, ilobolo was not recognized elsewhere when attached to a customary marriage and was styled "consideration given for future immoral cohabitation", and consequently not justiciable in the courts of law. The non-recognition of a customary marriage had serious social and legal consequences.

Recognition of customary law in Natal gave rise to codification. Although the codification of customary law has had its advantages, it is open to criticism for making the law rigid and for including many provisions which are questionable, and out of step with the practices of the people. The recognition of customary law which is only partial, has created numerous possibilities of conflict, the solution of which depends on the judicial officers' exercising their functions creatively.

The express recognition of ilobolo in the 1927 Act without the express recognition of a customary marriage of which it is a requirement poses problems, particularly in Natal, where the Code makes provision for various aspects of this marriage. The express recognition of ilobolo has partly solved the problem relating to the legal significance of this institution. When attached to a civil marriage this institution, however, poses special problems with which the courts have had to contend. It is consequently necessary to examine the significance of this institution for proper accommodation thereof in the marriage system of the blacks in general and of the Zulus in particular. The recognition of ilobolo in terms of South African law has, however, cleared the confusion created by the earlier policies. Whatever may be said about it, it was realistic in that it took into account the consistent practice of the black.

FOOTNOTES

1. For more information on this see the following: Moima v Matladi and another 1937 NAC (N&T) 40; G M B Whitfield South African Native law 2 ed (1948) 1 et seq; Bekker & Coertze 1 et seq; G A Brand Die regspleging van die Bantoe in Suid-Afrika Unpublished LLD thesis 1965 U P 173 et seq; N J J Olivier "Artikel 11(1) van die Bantoe Administrasiewet, Wet 38 van 1927" 1976 De Jure 284 et seq; N J J Olivier "1977 De Jure 141 et seq; Kahn (1960) 319; E R Garthorne "Application of Native law" 1929 Bantu Studies 245 et seq; J Lewin Studies in African Native law (1947); H J Simons "The law and its administration" Handbook of race relations in South

Africa (1949) Ch 4, 41 et seq ; W G Stafford and E Franklin Principles of Native law and the Natal Code (1956), N J J Olivier et al Die privaatreë van die Suid-Afrikaanse Bantoetaalsprekendes 2 ed (1981) 593 et seq ; H Rogers Native administration in the Union of South Africa 2 ed (1949) 200, D Welsh "The cultural dimension of apartheid" 1972 African Affairs 35 et seq ; D J Swanepoel Die erkenning en toepassing van die bogadi-gebruik by sekere Tswanastamme in die Suid-Afrikaanse reg (1977) Unpublished LLM dissertation P U C H O 9 et seq ; Brookes 15 et seq ; Simons (1968) 15 et seq ; N Rubin "Customary family law in Southern Africa: its place and scope" in J N D Anderson Family law in Asia and Africa (1968) 255 et seq ; H R Hahlo "The matrimonial regimes of South Africa" in Anderson op cit 143 et seq ; L Rubin "The adaptation of customary family in South Africa" in H Kuper & L Kuper (ed) African law: adaptation and development (1965) 196 et seq D Welsh Natal racial policy and the institutions of traditional African society: 1845-1910 Unpublished Ph D thesis U C T (1969) 76 et seq ; D Welsh (1971) 7 et seq.

2. In terms of S11(1) of the Black Administration Act 38 of 1927.
3. Suttner (1974) 6.
4. Suttner (1974) 7.
5. Brookes 127; Olivier et al 285; Simons (1949) 47.
6. Brookes ibid.
7. Rogers 200.
8. Brookes 129.
9. Kahn (1960) 319.
10. Kahn (1960) ibid.
11. British Kaffraria Incorporation Act No. 3 of 1865.
12. In terms of S23 of Proclamation 110 of 1879.
13. Brookes 130.
14. S23 of Proclamations 110 and 112 of 1879.
15. See Report of 1883 Commission 29.
16. 1883 Commission Report 29.
17. Ibid.

18. ibid. Swanepoel 11, notes that the commission did not refer to the function of transferring the reproductive capacity of the woman by ilobolo.
19. 1883 Commission Report 30. On the basis of this principle there would be return or forfeiture of ilobolo depending on whether the wife or husband had misconducted himself/herself. The commission pointed out that the Natal Code had departed from this principle which was the creation of "an evil".
20. ibid except that it was liable to abuse.
21. 1883 Commission Report 31.
22. See Annexures II and III to Commission Report.
23. 1883 Commission Report 31.
24. ibid.
25. ibid.
26. 1883 Commission Report 32.
27. ibid.
28. See annexure 2 to Report.
29. Brookes 131.
30. In terms of S23 of Proclamations 110 and 112 of 1879 and S22 of Proclamation 140 of 1885.
31. Ngqobela v Sihele 10 SC 346 (1893).
32. Supra.
33. At 351-2; see also Nantc v Malgas 5 SC 108 (1887). In the latter case concern was expressed over the legislature's omission to recognize a customary marriage.
34. Malgas v Gakavu 5 EDC 225 (1891) at 226. It is interesting that in this case the court was prepared to stamp the union as immoral unlike in the case of Ngqobela where the court simply regarded it as "illicit". The court was not against ilobolo as it did note the contention that such ilobolo was given as a guarantee of the husband's good treatment of his wife.
35. Ngqobela v Sihele 10 SC 346 (1893); Hebe v Mba 12 EDC 6 (1897); Nombombo v Stofile 19 SC 353 (1902); Piet v Goneso 17 EDC 23 (1902). The court was of the view that ilobolo was not contrary to the general principles of the Cape law and was therefore recoverable if attached to civil marriage.

36. H J Simons "The status of customary unions" 1961 Acta Juridica 17 at 20.
37. Simons (1961) 20.
38. Swanepoel 14, Simons (1961) 20.
39. Ordinance 12 of 1845; Kahn (1960) 321.
40. Lindsay-Young 244, Olivier (1976) 289; On Cloete as a firm supporter of Roman-Dutch law see P R Spiller "Hendrik Cloete, recorder of Natal : as revealed in his judgments" 1982 THRHR 148 et seq
41. Lindsay-Young 245; Kahn (1960) 321.
42. Lindsay-Young 245; Olivier (1976) 289; Garthorne 245 et seq ; Brookes 50 et seq. Although customary law as a whole was recognized, certain of its less desirable features e g punishment for witchcraft, were never adopted but discouraged.
43. Parliamentary Papers 1848 No.980 208-209.
44. (1961) 17.
45. This was in contrast with what was found later by the 1883 Commission to be the case.
46. Proceedings and report of the Commission appointed to inquire into the Past and Present state of the Kaffirs in the district of Natal 1852-3 p 37-38.
47. The instruction appeared in the preamble to Ordinance 3 of 1849, and was published in Natal by proclamation of 21 June 1849. Provision was made to the effect that all crimes by blacks, and all transactions between them should be cognizable according to customary law under the Ordinance. All other crimes which might be deemed repugnant to the general principles of humanity recognized throughout the civilized world would be subject to the prosecution in the colonial courts. These wide and unusual powers provoked the question whether they were not ultra vires the common law which they purported to exclude - see Garthorne 246. The ordinance was repealed by law 26 of 1875 which provided that:

"All matters and disputes in the nature of civil cases between Natives shall be tried under the provisions of the law and not otherwise, and according to the Native laws, customs and usages for the time being prevailing, so far as the same shall not be of a nature to work some manifest injustice, or be repugnant to the settled principles and policy of natural equity". A similar provision was included in s80 of the Courts Act of 1898.

This section was held to have been implicitly repealed (Yeni v Jaca 1953 NAC (NE) 31 - See schedule to Act 38 of 1927. These provisions affirm the validity of tribal law in Natal, albeit within the confines of the repugnancy clause.

48. The Codes of 1878, 1891, 1932 and 1967. The law as codified, however, introduced many foreign rules having the features of Roman-Dutch law.
49. Welsh (1971) 69; Welsh (1969) 78 et seq and the views quoted therein.
50. By Ordinance 3 of 1849.
51. Welsh (1969) 80; Welsh (1971) 70.
52. See below.
53. Welsh (1969) 86; Welsh (1971) 77.
54. ibid.
55. Welsh (1969) 87; Welsh (1971) 77.
56. Welsh (1969) 88; Welsh (1971) 78.
57. Welsh (1969) ibid; Welsh (1971) ibid.
58. Welsh (1969) 89; Welsh (1971) 79.
59. Welsh (1969) 90; Welsh (1971) 80.
60. ibid.
61. Welsh (1969) 91; Welsh (1971) 81.
62. Welsh (1969) 92; Welsh (1971) 81.
63. This was subsequently replaced by S4 of Law 13 of 1875.
64. Welsh (1969) 93; Welsh (1971) 82.
65. Myburgh (1943) 230. Yet there were some changes when these eventually became law.
66. Welsh (1969) 94; Welsh (1971) 83.
67. ibid.
68. 1883 Commission Minutes of evidence 34.
69. Welsh (1969) 94; Welsh (1971) 83.
70. Welsh (1969) 96-7; Welsh (1971) 86-87.

71. Welsh (1969) 80; Welsh (1971) 71.
72. Welsh (1969) 98; Welsh (1971) 87.
73. Welsh (1969) 99; Welsh (1971) 88.
74. Welsh (1969) 101; Welsh (1971) 89.
75. Welsh (1969) 101; Welsh (1971) 90.
76. Welsh (1969) 103-4; Welsh (1971) 92.
77. Welsh (1969) 105; Welsh (1971) 93.
78. Law 1 of 1869 repealed by Law 13 of 1875.
79. He himself admitted this before the 1883 Commission where he said that the change had loosened the ties between the father and the child.
80. 1883 Commission Evidence 283.
81. 1883 Commission 171.
82. Most probably this criticism was based on the idea that according to customary practice the idea was that you cannot buy a person and the paying of the whole amount simultaneously was regarded unfavourably as meaning that "uthenga umtanomuntunjengebhayi" meaning that you are buying someone's child like a piece of cloth.
83. More of this below.
84. 1883 Commission 242 and 350.
85. Welsh (1969) 106; Welsh (1971) 94.
86. Welsh (1969) 115; Welsh (1971) 103.
87. 1883 Commission Minutes of Evidence 32 Q470.
88. Welsh (1969) 115; Welsh (1971) 103.
89. 1883 Commission Minutes of Evidence 33 Q 575.
90. Minutes of evidence Q 577 and 485.
91. It would prevent misunderstanding and litigation, and attach more reality and solemnity to the marriage itself.
92. The woman would lose her protection from her natural protectors should she be ill-treated by her husband. The feeling created in her mind by the custom of ukulobola that the cattle which passed from her husband's to her father's family gave her the right to claim from the latter, should the need arise, both protection and

maintenance would be destroyed and her interests materially injured.

93. 1883 Commission Minutes of evidence Q 577.
94. Minutes of evidence Q 578.
95. Minutes of evidence Q 579.
96. Minutes of evidence Q 580.
97. Minutes of evidence Q 584
98. Minutes of evidence Q 588 and 492.
99. Minutes of evidence Q 495, 496 and 490.
100. Minutes of evidence Q 591.
101. Minutes of evidence Q 593.
102. Minutes of evidence Q 596.
103. Minutes of evidence Q 483, 484 and 598.
104. Minutes of evidence Q 469 and 511.
105. Minutes of evidence Q 483.
106. Ibid.
107. Minutes of evidence Q 488.
108. Minutes of evidence Q 490.
109. Minutes of evidence Q 491.
110. Minutes of evidence Q 493.
111. Minutes of evidence Q 494.
112. Minutes of evidence Q 500.
113. Minutes of evidence Q 518, 519 and 520.
114. Minutes of evidence Q 521.
115. Minutes of evidence Q 601.
116. Minutes of evidence Q 602.
117. Minutes of evidence Q 603.
118. Welsh (1971) 201.

119. ibid.
120. Welsh (1971) 202.
121. ibid.
122. Welsh (1971) 204.
123. Welsh (1971) 205. More of this below.
124. Welsh (1971) 209.
125. Welsh (1971) 212.
126. Welsh (1971) 214.
127. Welsh (1971) 260-3.
128. Welsh (1971) 264.
129. 1852 Commission 29-30. See Welsh (1969) 176 et seq and Welsh (1971) 159 et seq for other attempts to secure the codification of Zulu law.
130. This is important because subsequently the law to be applied would be that contained in the code.
131. This is because it had a number of effects on ilcbohc.
132. Welsh (1969) 176; Welsh (1971) 159.
133. ibid.
134. This is because he had so much influenced the course of Native law in Natal.
135. See 1883 Commission Minutes of evidence questions 151, 259, 435, 436 and 437.
136. See Welsh (1969) 177 et seq ; Welsh (1971) 160.
137. ibid.
138. (1969) 181 and (1971) 164.
139. Brookes 147.
140. Law 26 of 1875.
141. Brookes 147.
142. Welsh (1969) 183; Welsh (1971) 166.
143. s2.
144. 23.

145. s4.
146. s10. The numbers fixed by the 1869 law were retained.
147. s11.
148. s12.
149. s13.
150. s14.
151. s15. This provision was in line with the Natal Government's policy of clothing the marriage with finality.
152. s15.
153. s17.
154. s18.
155. s21.
156. s23.
157. Welsh (1969) 183; Welsh (1971) 166 and further on criticism of the Code.
158. By Law 44 of 1887.
159. Brookes 148.
160. s148.
161. s157.
162. s158.
163. s169.
164. s171.
165. s172.
166. s173.
167. s176.
168. s177.
169. s179.
170. As quoted by Welsh (1969) 186; Welsh (1971) 168.
171. Welsh ibid.

172. s26 of the Code.
173. Welsh (1969) 188; Welsh (1971) 170.
174. s177.
175. Brookes 148.
176. On this see Welsh (1969) 189; Welsh (1971) 171.
177. Simons (1968) 145; Welsh (1969) 189; Welsh (1971) 171.
178. Welsh (1969) 189; Welsh (1971) 171.
179. Act 7 of 1910; see also S93 (1) of the present Code of Zulu law.
180. Quoted by Welsh (1969) 190; Welsh (1971) 172. He was also supported by the Attorney-General Sir Henry Bale.
181. Welsh (1969) 190; Welsh (1971) 172.
182. Welsh *idem* 191; Welsh (1971) 172.
183. Welsh (1969) 192; Welsh (1971) 173; Brookes 148.
184. Welsh (1969) 194; Welsh (1971) 176.
185. See H.R.Hahlo "...And save us from codification" 1960 SALJ 432.
186. idem 149.
187. Simons (1968) 25.
188. Simons (1968) 26.
189. Simons (1961)23 et seq; Simons (1968) 37.
190. Act 3 of 1876.
191. s24 of Act 3 of 1876.
192. Swanepoel 14.
193. Garthorne 255.
194. Brookes 98; Garthorne ibid; Simons (1968) 37.
195. Garthorne 255.
196. The Queen v Fleischman and Katryn (1880) Kotzé 172.
197. The Queen v Sepana (1880) Kotzé 172.

198. Act 11 of 1881.
199. As Law 4 of 1885.
200. s2 of the Act.
201. s5.
202. In Kaba v Ntela 1910 T S 964 for instance the supreme court reversed a decision of a commissioner's court granting a husband married by customary law guardianship of his children and return of ilobolo. On appeal the contention was that the repeal of Act 3 of 1876 had not been intended to reverse the principle therein outlawing polygyny. See also J F Holleman "Bantu marriage at the cross-roads Part II" 1961 Race Relations Journal 36.
203. Brand 197.
204. Holleman (1961) 37.
205. Kahn (1960) 325.
206. op cit. 256.
207. Simons (1968) 39.
208. Simons (1968) ibid.
209. Garthorne 256. This was different from the "infelicitous" circular. In Marroko v The State 1893 Hertzog 110 the High Court of the Republic in 1893 had decided that customary marriages were valid.
210. Innes C.J. for instance in Ebrahim v Essop 1905 TS 59 at 61 defined marriage as "the union of one man with one woman to the exclusion while it lasts, of all others". This definition obviously defines a European marriage and not a marriage by Muslim rites or an African marriage which deserves judicial recognition; see also Simons (1968) 40.
211. Section 1 of the Act provided for the conclusion of the marriage. s11 provided for divorce. Ilobolo was not expressly mentioned.
212. R v Nalana 1907 TS 407; R v Mboko 1910 TS 445. Because a customary marriage was not recognized it was decided that a woman could testify against her husband.
213. 1910 TPD 964.
214. In this case the Court had also relied on Cape decisions of Ngqobela v Sihele 10 SC 346 (1893); Malgas v Gakavu 6 EDC 225 (1891).

215. supra 352.
216. 969.
217. Sifolo v Mokou 1911 TPA 426.
218. Brookes 136.
219. Meesedcosa v Links 1915 TPD 357 at 361.
220. 359.
221. Stubbs P. address at the opening of the first session of the Native Appeal Court (Natal and Transvaal Division) reported in (1929) NAC (N&T) 1.
222. 257.
223. Kahn (1960) 327; Garthorne 258.
224. s28 of Law 26 of 1899.
225. Swanepoel 18.
226. Simons (1968) 42.
227. S.N.A. 11/4/1 1 et seq.
228. Simons (1968) 43.
229. Simons idem 44.
230. One of these reasons were that these bills were unacceptable to blacks because they coupled the recognition of customary law with segregation. Others failed because they clashed with the interests of white farmers.
231. The Black Administration Act 38 of 1927.
232. Olivier et al 593; Simons (1968) 53; Kahn (1960) 327.
233. Sievwright 27.
234. Holleman (1961) 37.
235. s11 (1) of the 1927 Act. See also Visser (1979) 289 et seq ; Rubin (1965) 263.
236. Proviso to s11(1).
237. R S Suttner "Internal conflict of laws - an unwarranted rigidity?" 1970 SALJ 19. According to Simons (1968) 53 the method followed in the 1927 Act was a compound of Natal's repressive techniques

of colonial rule and the Transkei's policy of tolerance and adaptation in the treatment of customary law.

238. op cit 111.
239. In Afrikaans it is "na goedvinde". See also Olivier (1977) 142.
240. Fuzile v Ntloko 1944 B A C (C&O) 2; Ex parte Minister of Native Affairs: in re Yakov Beyi 1948 1 S A 388 (A); Umvovo v Umvovo 1953 1 S A 195 (A).
241. 1948 1 S A 388 (A).
242. 395.
243. Van Breda v Jacobs 1921 A D 330.
244. Msoni v Dingindawo 1927 A D 531.
245. Suttner (1974) 9; R S Suttner "Legal pluralism in South Africa: a reappraisal of policy" 1970 International and comparative law quarterly 142-3; R S Suttner "Problems of African civil law today (2)" 1974 De Rebus 312-3; R S Suttner "Towards judicial and legal intergration" 1968 SALJ 447.
246. s13 of 1927 Act.
247. In terms of s14 of the Act the Minister of Co-operation and Development may submit any question of law to be argued before the appellate division in any decision the correctness of which he doubts. In terms of s18 of the Act permission may be granted for appeal to the appellate division of the supreme court. On the application of customary law in the supreme court there are conflicting decisions. cf Sigcau v Sigcau 1944 3 SA 67 (A) and Mosii v Motseoakhumo 1954 3 S A 919(A); Saliwa v Minister of Native Affairs 1956 2 S A 310 (A); See also Kerr (1957) 313; Bekker (1976) 359.
248. On the position in other parts of Africa see A N Allott "Marriage and internal conflict of laws in Ghana" 1958 Journal of African law 164; A N Allott New essays in African law (1970)107 et seq; Visser (1979) 42.
249. Suttner (1974) 11 is of the view that courts have been reluctant to be creative and have preferred to apply old customs instead of the customs as they have been modified by the living patterns.
250. Suttner (1968) 151-152.
251. Bennett (1979) 399.
252. Supra.

253. On this see Visser (1979) 42 et seq ; Bennett (1979) 397 et seq ; Bekker & Coertze (1982) 41 et seq ; Olivier et al (1980) 598 et seq.
254. Olivier et al (1980) 598.
255. 397.
256. Bekker & Coertze 47.
257. Bennett (1979) 400.
258. Mtolo v Poswa 1950 NAC (S) 253.
259. Umvovo v Uvmvovo 1953 1 S A 195 (A).
260. (1979) 407 et seq.
261. See below on this.
262. For a similar example see J Lewin "The conflict of tribal laws" 1944 SALJ 269; C Forsyth "Ius inter gentes : section 11(2) of the Black Administration Act 1927" 1979 SALJ 418.
263. Proc R195 of 1967.
264. This provision follows the same pattern as in the old Transkeian law viz s104 of Proc 145 of 1923 based on 523 of Proc 110 of 1879.
265. Forsyth 420-21.
266. Forsyth 418.
267. This is so where the defendant is temporarily resident or employed in a place which has a different legal system. In the absence of an agreement Blacks are not regarded as following their own tribal customs: - Lewin (1944) 271 is of the opinion that Blacks are deemed to follow the custom prevailing in the place where they live regardless of their tribal origin.
268. Ex parte Minister of Native Affairs 1941 AD 53. See also Lewin (1944) 274.
269. Bennett (1979) 412.
270. Forsyth (1979) 422.
271. Ibid.
272. Forsyth ibid. Forsyth points out that commissioners are "busy, hard-pressed men", and have no time to go into all the intricacies of conflict of laws. For this reason he pleads for legislative intervention.

273. Bennett (1979) 413; See also Lewin (1944) 274 et seq.
274. Bennett ibid.
275. N S Peart "Application of the repugnancy clause" 1980 Institute for Public Service and Vocational Training Bulletin 51 et seq; N S Peart A consideration of certain aspects of African customary law Unpublished LLM dissertation UCT (1981)7; Visser (1979) 295; on the repugnancy clause in other parts of Africa see Allott (1970) 158 et seq; R D Leslie "The repugnant rule in African law and the public policy rule in conflict of laws" 1977 Acta Juridica 117; 9 Peart (1981) 16.
276. Bennett (1979) 415; Peart (1980) 51. See also Allott (1970)
276. (a) Richardson v Mellish (1824-34). All ER Rep 258 at 266.
277. Allott (1970) 159-160.
278. Bennett (1979) 415.
279. Allott (1970) 162.
280. Allott ibid.
281. See chapter V below.
281. (a) Peart (1981) 23, 25.
282. In Tyobeka v Madlewa 1943 NAC (N&T) 40 the court asked to consider the procedure in customary law whereby a husband sued the wife's guardian for the return of the wife or return of ilobolo for purposes of obtaining divorce. The court held that such a procedure was irregular as a woman is not an article to be sued for but she herself should be regarded as the defendant to the action fully assisted by her guardian. This decision contradicted a number of previous decisions viz Motini v Selepi 1941 NAC (N&T) 44, Phiri v Nkosi 1941 NAC (N&T) and Dube v Holden 1941 NAC (N&T) 57. Tyobeka's case was criticised in later decisions of Mashapo v Sisane 1945 NAC (N&T) 57 and Zwana v Zwana 1945 NAC (N&T) 59.
283. Peart (1980) 53-54; Peart (1981) 33.
284. idem 54.
285. Meesedoosa v Links 1915 TPD 357.
286. Peart (1980) 55 et seq.
287. Peart (1980) 58.

288. Zwana v Zwana 1945 NAC (N&T) 59.
289. Proviso to s11(1).
290. Swanepoel 22.
291. Sifolo v Mokou 1911 TPA 426.
292. Kaba v Ntela 1910 TPD 964.
293. See supra.
294. Swanepoel 22.
295. Verloren van Themaat (1968) 49.
295. (a) See chapter XI below.
296. See the definition of a "customary union" in terms of s35 of the Act of 1927; SANTAM Bpk v Fondo 1960 2 SA 467 (A); Zulu and another v Minister of Justice 1956 2 SA 128 (A). See also R B Mqeke "Guardianship over the children born of a customary union: a critical evaluation of the decision in Samente v Minister of Police and Another 1978 4 SA 632 (ECD)" 1979 IPSVT Bulletin vol 3 26.
297. s59(1) of the Code.
298. Mdletshe v Kunene 1945 NAC (N&T) 52; Sitole v Xaba 1945 NAC (N&T) 81; Mpanza v Qonono 1978 BAC (c) 136.
299. In terms of s24 of the Administration Act.
300. Those already referred to will not be covered here. Only those introduced in the 1932 Code will be mentioned.
301. s59 of 1932 Code.
302. s59(2) of the Code.
303. Simons (1968) 144.
304. s2 of Act 13 of 1894 which repealed s148(d) of the 1891 Code.
305. Mkize v Memela 1953 NAC (N-E) 18. This is, however, not the case outside Natal.
306. s35.
307. Brookes 123.
308. s71(d) of the Code.
309. See supra.

310. s80 of the Code.
311. s85 of the Code.
312. s87(3).
313. s88.
314. Mdhluli v Zuma 1938 NAC (N&T) 164. Shabalala v Shabalala 1953 NAC (N-E) 35.
315. ss 91-92 of the Code.
316. s93(1).
317. s93(2).
318. s94(1).
319. s94(2).
320. s95(1).
321. s95(2).
322. Simons (1968) 140)
323. Brookes 149.
324. On the requirements for codification see Maine 14-15.

CHAPTER VTHE LEGAL SIGNIFICANCE OF ILOBOLO5.1 INTRODUCTION

Although, owing no doubt to its ephemeral nature, concern with the legal significance of ilobolo might be regarded as an academic exercise, the continued popularity¹ of ilobolo despite social, economic, legal and even religious changes among blacks necessitates a re-evaluation of its legal significance to the marriage of a black person. It is not sufficient to content oneself with the present purpose and function of ilobolo,² but to trace its original significance is imperative due to the prevalent controversy surrounding this institution and its function in the past. To discover the original significance of ilobolo is a difficult task, made more so often by the investigator's cultural background and system of values.³

The question as to the significance of ilobolo, like the question as to what is law, has received several answers but cannot be regarded as settled. Despite the copious ink which has been spilled on the subject, the search for the real meaning of the institution continues.⁴ Lack of deeper insight into the significance of ilobolo, and the cultural background of the Zulus has been responsible for the superficial treatment of the institution in the past. Some of the contributions have generalised on the significance of ilobolo. These have not taken into account that just as there are local variations in the nature of ilobolo, there are also differences relating to the purpose and function thereof.⁵ Although the comparative treatment of ilobolo may illuminate some obscure points, to assume that the existence of this institution among various black tribes or peoples automatically implies uniformity of purpose and function is dangerous. The discussion of the legal significance of ilobolo will therefore

be primarily related to the Zulu group although some information will also be relevant to other black tribes.

Before analysing the purpose and function of ilobolo, a consideration of a marriage as an institution to which ilobolo is accessory, is appropriate. Some writers regard ilobolo as entirely independent of marriage.⁶ This view is both true and false. If it means that ilobolo is distinguishable from marriage it is true, but if it means that there is "no inherent connection in any society between marriage and lobolo",⁷ it is false. If it is assumed that ilobolo is an essential of a customary marriage, then there is no "perfect parallelism of independence between",⁸ them. As Reuter correctly says:

"Marriage appears as the primary institution, not only because it is independent of lobolo in its origin and constitution, but also, and in this connection mainly, because it is causative of lobolo both as 'terminus aquo' and as 'terminus ad quem', that is as origin and as object or purpose of this custom. This means a decisive dependence of lobolo upon marriage..."⁹

Whether or not ilobolo is dependent on marriage hinges on one's definition of marriage.

5.2 MARRIAGE

5.2.1 Definition of marriage

Although various definitions of marriage have been offered,¹⁰ it is scarcely possible to find one definition that, while being flexible, is comprehensive enough to cover all conceivable forms of marriage. Owing to the importance of marriage, it is hardly conceivable to find a society however primitive, devoid of the institution of marriage.

In general terms, a marriage may be regarded as a socially or legally accepted stable union for life between persons of

the opposite sex which is distinguishable from other sexual relationships.¹¹ Obviously there are variations of what in each society is regarded as legal, and various societies have prescribed various requirements for a valid marriage at different times.¹² The existence of these differences does not imply the absence of marriage in some societies. Despite the variations of what is legal in various legal systems,¹³ certain fundamental similarities can also be found.¹⁴

A definition of marriage is essentially a theoretical abstraction from particular marriages. This means that the one who defines a marriage will formulate his definition from his experience of marriage forms. As a definition is formulated ex post, after analysing a particular marriage or marriages, it invariably follows that any form falling outside the experience, and consequently outside the ambit of the definition of the investigator, will not be regarded as a marriage. This should not be so. Because a definition is a working hypothesis, a lawyer from one legal system investigating an institution of another legal system may use a definition he has formulated from his experience as a point of departure. If he finds other forms in his investigation that fall outside, but should in fact fall inside his definition, he should be flexible enough to amend his definition.

Definitions of a marriage offered by South African lawyers, as they emphasise the monogamous nature of a marriage, are in some respects inapplicable to a customary marriage.¹⁵ Yet this does not make it any less a marriage because the people that practise it regard it as a marriage.¹⁶

Through the influence of canon law marriage came to be regarded as a contract because it requires the consent of both parties thereto.¹⁷ Although a marriage has contractual features, it is now settled that a marriage is not a simple contract, but a juristic act sui generis.¹⁸ A customary

marriage among the Zulus involves not only the parties thereto, but also their respective family groups. These features distinguish it somewhat from a civil marriage. But because of the importance of a marriage in any society, even in a highly individualistic society, marriage is not a matter purely for the two individual parties thereto. Society through its appropriate organs is involved in its formation.¹⁹

From this it appears that marriage is a legally accepted life-long union between persons of the opposite sex. This is so even though some of these may exhibit some differences. Thus a customary marriage is regarded as a marriage even though it differs from a civil marriage.²⁰ Any denial of a customary marriage as a marriage is a question of semantics, and a quibbling with definitions rather than with real substance.

5.2.2 The purpose and function of marriage

There is a measure of consensus that the primary purpose and function of marriage is the procreation and rearing of children.²¹ This is so not only in black traditional society, but also in other societies. This, however, is not the only purpose of marriage, but it is the most important one, the others being secondary.

It is perhaps the emphasis placed on the begetting of children in black society which has led certain writers to regard ilobolo merely as a price to be paid for children of the marriage.²² The danger of this view is that it arbitrarily makes the function of marriage the function of ilobolo.

5.2.3 The dual marriage system

A characteristic feature of the South African legal system is the dual marriage system. This emanates from the dual legal system which is in turn a product of the ideological dichotomy between common law and customary law which has led

to the rejection of a customary marriage as a marriage and to be styled simply as a "customary union".²³

The distinction prompts the question whether there is anything in a customary marriage which makes it inherently not a marriage. Put differently, the question is whether a customary and a civil marriage are different species of the same genus or fundamentally different institutions. In other words does the relationship of husband and wife which in western society constitutes "marriage", exist, in its essentials, in the indigenous African social system.²⁴

In Guma v Guma²¹ G J Warner C M said:

"It is necessary to guard against the assumption that, because the single term 'marriage' is used to describe the conjugal relationships established under both the common law of the country and Native law, they are one and the same thing. They have, indeed, so much in common, that each form regularises sexual union and the status of offspring, but in other respects the two institutions are fundamentally different in nature and the law governing them".

Some have even expressed the view that it is because of the poverty of language that such dissimilar things as a customary marriage and a civil marriage should be called by the same name, "marriage".²⁶

Despite the differences existing between a civil marriage and a customary one, the latter is nevertheless a marriage. Many authors, no doubt from a deeper insight they have gained into a customary marriage, share this view, and have even rejected the appellation "customary union".²⁷ Even the Zulu people regard the two forms of conjugal relationships as forms of marriage. This was manifest from informants interviewed. It is perhaps for this reason that they demand and deliver ilobolo indiscriminately and irrespective of the type of marriage. Refusal to recognize a customary marriage as a legal marriage has been attributed to an aversion from

"gracing anything except a 'Christian' marriage with the name marriage",²⁸ although certain statutes do recognize it for certain purposes,²⁹ and others even equate it with a legal marriage.³⁰

The non-recognition of a customary marriage as a legal marriage is based on moral considerations. One of the characteristic features of a customary marriage is the institution of ilobolo although, as it has been pointed out, blacks demand and deliver it even in a civil marriage.³¹ Although in the Cape Colony and the Boer Republics the earlier attitude was to brand ilobolo as being per se immoral, this was changed later. Thus ilobolo was not regarded as per se immoral and was consequently valid and enforceable when attached to a civil marriage. It was only when it was given in contemplation of a customary marriage that it was termed "consideration given for future immoral cohabitation".³² It is therefore clear that ilobolo cannot be regarded as one of the reasons for the non-recognition of a customary marriage. Another reason must be sought for this non-recognition.

Another feature of a customary marriage which distinguishes it from a civil marriage and for which it was earlier condemned, is that it is potentially if not in fact polygynous in that it does not preclude a man from concluding a subsequent marriage during the subsistence of the earlier one.³³ This marriage was repugnant to the mores of the early colonists. This was adequately evidenced by the opprobrious epithets which were lavishly used in qualifying a customary marriage.³⁴ Yet it is ironical that the early Germanic marriage, of which the present civil marriage is a later development, was similarly polygynous, but there is no suggestion that it was not a marriage until it became essentially monogamous owing to the influence of the Church.³⁵

According to Joyce,³⁶ a polygynous marriage does satisfy in a way the definition of a marriage inasmuch as it is intended

to be a permanent union, and confers the status of wife on each of the women. This, however, does not mean that it is an ideal type of marriage, but it suffers from certain defects.³⁷ He concludes:

"Yet opposition of polygamy to natural law is not such as to involve the dissolution of society, nor is it incompatible with a certain measure of civilization. And inasmuch as it is in conflict not with the primary precepts of nature regarding marriage, but with its secondary ends, it is possible for a society to practise it without recognizing that it is a breach of the moral law".³⁸

Philips and Morris also observe in similar vein as follows:

"It is no doubt, only in relation to possible alternatives that value judgments can profitably be made on African marriage customs. Where no such alternative presents itself there would be comparatively little tendency towards revolt: and much that now seems objectionable, not only to the foreign observer but also to many Africans, was probably in the past, within the closed circle of the traditional environment, a matter of unquestioning acceptance. It is probable that even at the present day the actual 'victims' of customs which shock the outside world are often oblivious of their own grievances. Hence in connection with attacks on la grande polygamie as practised by high-ranking Africans ... the question may arise whether the condemnation is based on principles or morality and public policy or on fundamental human rights; and (if on the latter) whether the wishes of the women concerned are to be treated as relevant".³⁹

Although the recognition of a customary marriage as a marriage would present problems, the non-recognition thereof presents even more serious problems. The emergence of independent states like Transkei with a new marriage system will have to be accommodated.⁴⁰

Be that as it may, the law at present in force in South Africa is that a polygynous union is contrary to public policy.⁴¹ It is, however, strange that the law of South Africa disparages polygyny, but allows divorce which is more

destructive of family life than polygyny.⁴² Yet despite the non-recognition of a customary marriage as a marriage many blacks still continue to marry according to customary law. When they marry they demand ilobolo even if they marry by civil rites.

5.3 THE ORIGINAL SIGNIFICANCE OF ILOBOLO

By original significance of ilobolo is meant the original purpose and function it served in a customary marriage. No magic formula will be used in discovering this. Use will be made of the theories which have been offered in the past. A critical analysis thereof, in the light of the Zulu cultural background, will be made with a view to establishing their authenticity.

The difficulty of establishing the original purpose and function of ilobolo in a scientific manner is exacerbated by the fact that this custom was practised for a long time without its real significance being properly investigated. This in itself is not surprising as customary law is not a product of rational thought, but emanates from the practices of the people within a specific environment.⁴³ The tendency in a traditional environment is to regard law as a sacred heritage of the people which is not made but exists, something to be eulogised, appreciated and obeyed, but never to be criticised or analysed.⁴⁴

Even among the traditional Zulus customary law was regarded as something sacrosanct which could not be changed. This is evident from the statements made by king Cetshwayo to the 1883 Commission.⁴⁵ A similar point of view was clearly enunciated in the case of Sila v Masuku.⁴⁶ where Mc Longhin P said:

"In most primitive systems of law legal and religious conceptions merge into each other. This is true of Native law, and especially so in the case of their marriage laws and customs. We cannot understand the

real and original function of the 'ukulobola' transfer of cattle for a bride and the accompanying sacrifices until we analyse the custom and resolve its elements into their legal and religious components. Native ideas are radically different from ours, especially in regard to the part played by the cattle in the transaction .

"There is a tendency among writers and legislators to confuse the two systems, European and Native, and to emphasize some elements of the Native law system as to the essential features which correspond most nearly to those so regarded in the European system. The Natives themselves ... tend to lose their tradition and to substitute ideas borrowed from Europeans. At the best of times even in the reserves they are not in a position to understand and explain the real and original function of their customs as they are not in the habit of reflecting on and analysing them".⁴⁶

It is therefore proposed to examine the original significance of ilobolo while not losing track of the guiding principles on which the custom is based.⁴⁷ Care will also be taken to discover any significant changes in the purpose and function of ilobolo in the light of the varied social change which the Zulus have undergone.

5.3.1 The dowry theory

Courts and some writers have used the term "dowry" to denote ilobolo.⁴⁸ Dowry, as it has been shown, means property or money brought by the woman on marriage. It does not correspond with ilobolo.⁴⁹ It has been suggested that the use of the word "dowry" was not meant to convey the same meaning which the word had in Roman law. This word has acquired a South African meaning different from its real significance.⁵⁰ The use of the term "dowry" has been felt to be advantageous in that, although apt to be misleading, it has been historically linked with institutions analogous to ilobolo, and because it is a neutral term devoid of any connotations of "purchase and sale".⁵¹ In other instances it may have been used as a convenient term of reference rather than to use the vernacular term of various tribes. Yet, it is preferable to confine the use of the term dowry to its

generally accepted meaning of dos.⁵²

Commenting on the use of the term dowry Torday says:

"It is, of course scarcely possible to find an English word which will convey the meaning of every native expression translated as 'bride-price'; but it would be difficult to find one which is more inadequate and mischievous".⁵³

From the above it is obvious that reference to the term "dowry" was not meant to convey the meaning which that term has in Roman law or even in Germanic law. Analysis of that term therefore cannot help in determining the purpose and function of ilobolo. Although there is a great possibility that ilobolo may eventually turn out to be a form of dowry, yet for present purposes one must look somewhere else for the significance of ilobolo. Perhaps the "bride-price" theory will throw more light on this subject.

5.3.2 The sale or bride-price theory

Ilobolo has also been referred to as bride-price, the price for the woman.⁵⁴ From the use of this term one may discern two schools of thought, namely the one that uses the expression as a convenient term of reference as an English equivalent of the traditional terms, using such term because the institution to which it refers also approximates a sale, although by no means implying that the term should be understood in its ordinary everyday meaning. The other school uses this expression because of the belief that ilobolo is in fact the "purchase and sale of the woman". The latter will be analysed.

It is scarcely surprising that people who had come from a background where the exchange of property had mercenary implications should have concluded that the exchange of property for a woman was a sale in the ordinary sense. It is also not surprising that the early colonists for instance held the view that the woman was a slave. That was a logical

conclusion from the view they held that the woman was sold.^{54(a)} Coming from a background which had practised slavery, they simply transposed their ideas to the institution of the blacks without adequate justification. This was also based on a comparison of a civil marriage with a customary one as Soga observes:

"Members of civilized races, who have been brought up under enlightened conditions of life, subject to a superior environment, training and thought, whose moral standards and code of conduct are determined by Christian ethics, inevitably regard the customs of other races from their own angle: praise or condemn them as they approximate or recede from their own customs and ideals. This is not prejudice but an incapacity to understand the guiding principles and the foundations on which the customs of others are based. There are, therefore, false deductions made from imperfectly understood premises, and terms are employed for which there is no justification. Hence we have a condemnation of the custom of lobola".⁵⁵

Fortunately the view that ilobolo is a price for the woman has long been refuted as the woman is not the slave of her husband. He does not treat her as a chattel, and has no proprietary right in her; he cannot kill or injure or cruelly ill-treat her with impunity; nor can he sell or prostitute her.⁵⁶ In fact it has been said that ilobolo is "no more the price of a wife than is dowry the price of a husband", but both can acquire commercial qualities in a commercially-minded community "where property is valued for its own sake".⁵⁷ Although recent trends have tended to inject the element of "price" in ilobolo in that the qualities or qualifications of a woman are often taken into account when ilobolo is demanded, this cannot be used to determine what the original significance of the institution was. Despite suggestions that terms like "price" and "payments" should not be understood literally but as "terms sui generis used for a transaction sui generis",⁵⁸ this cannot help in throwing light on the purpose and function of ilobolo. This must be sought somewhere else.

5.3.3 The exchange theory

Closely connected with the bride-price theory is the view that ilobolo represents an exchange based on the Zulu custom of ukulobolelana whereby cattle received for a sister were used for obtaining a wife for the brother.⁵⁹ Protagonists of this theory allege that this is probably a logical evolution of an ancient usage of exchanging sisters, which is closely akin to that which resulted in the substitution of the use of currency for simple barter.⁶⁰ This means that a man may be interested in marrying a girl whose brother has no interest in marrying his sister, or alternatively a young man may have no sister available for purposes of exchange. In such a situation the transfer of cattle in lieu of the sister is simply obvious. To pastoral people, the argument goes, this could not have been regarded as derogatory in any sense.⁶¹

This explanation may appear plausible, but it is too simplistic and has not attracted a wide following. Although this custom could have been practised at certain places, there is no evidence that ukulobolelana enjoyed wide distribution among the Zulus to support this theory.⁶² Although the custom might have been known in ancient times, during the formation of the Zulu nation there is no proof of the existence of such. It may not be entirely rejected, however, that the delivery of ilobolo as it does today is a symbolical extension of the original practice. It must also be pointed out that certain customs followed in the provision of ilobolo like the linking of brother and sister among the Zulus seem to support the exchange theory. But this does not explain what the original purpose and function of ilobolo is. The fact that ilobolo received for a sister is used for ilobolo for a brother does not explain the purpose and function thereof in marriage. It only shows for what purposes ilobolo received could be used.

5.3.4 The guarantee or stability theory

Perhaps the one theory which has enjoyed a wide following, in particular among blacks, is that ilobolo is a stabilizing factor and a guarantee of good treatment by the husband, and a guarantee of good conduct on the part of the wife, because should he ill-treat his wife, he will forfeit his cattle if the marriage is dissolved, and thus lose both wife and cattle, or alternatively, should the wife misbehave the father would have to return ilobolo if the marriage is dissolved through her fault.⁶³ This theory requires closer scrutiny.

It must immediately be conceded that the average traditional Zulu attached great value to cattle, and this might influence the giver and receiver of ilobolo, but that this was the sole or even the most important purpose and function of ilobolo is to be doubted. This is because this theory suffers from serious deficiencies. *Prima facie* it may command a lot of cognency, but to take it at face value is dangerous because informants who support it tend to be idealistic about what role ilobolo plays in marriage.

This theory ignores the fact that ilobolo in early Zulu society was in many cases not delivered by the husband but by the father of the bridegroom, especially for the first wife. This would mean that in the past there should have been a regular breakdown of marriages of the first wives, because in any case the husbands would not care for them which is not true. It is doubtful whether in all cases of unhappy marriages the thought of the father's impending forfeiture of cattle would be sufficient deterrent for the woman. Conversely, there are instances where a woman tolerated a marriage where the husband grossly ill-treated her. If she would only be deterred from deserting him, because she was afraid that her father would lose ilobolo, then there would be no reason why she would stay because in any case the principle is that should the marriage be dissolved through the husband's

misconduct, he forfeits ilobolo. But this was never the case. The husband's rough treatment of the wife was never a sure determinant that a marriage would break down. If forfeiture of ilobolo were the only sanction, then there would be no reason why a woman ill-treated would stay. From Zulu folk lore stories abound of women who were izaliwakazi (an unloved wife) who persevered in marriage.

The theory that delivery of ilobolo acts as a stabilizer in marriage seems to rest on the wrong premise that once ilobolo has been delivered, stability is ensured. This is not borne out by the facts.⁶³ Moreover, this theory places emphasis on economic motives. It is doubtful whether this was the basis of ilobolo in Zulu law. Practised, no doubt, by people in a society not actuated by economic gain, ilobolo cannot easily be said to have its basis in acquisition or loss of property. Marriage in any case is not a question of economics. To attribute such economic motives to the early Zulu society is unacceptable as an explanation of ilobolo although, as it has already been said, it might be taken into account by a man when deciding to divorce his wife. Evans-Fritchard is nearer the truth when he says:

"There is no necessary or constant correlation between the ideology of marriage and the psychology of the persons concerned ... We should be naive to suppose that in consequence the maintenance of marriage relations is due to economic motives. Yet this assumption is at the basis of the assertion so often made that the function of bride-wealth is to stabilize marriage. The word "function" carries no meaning in this context. Is it true, moreover, that the relations between husband and wife persist through what amounts to economic blackmail? No evidence is adduced to justify belief in a functional relationship between the amount of bride-wealth paid to the bride's group and the durability of her union with her husband. No one would deny that the difficulty of returning a very large amount of wealth may be a motive in the pressure which the parents of a girl bring to bear on her to remain with her husband, but it is a hopeless distortion of social realities to regard this as an explanation of bride-wealth".⁶⁴

Further he continues to say:

"The stability of their relations is not precariously dependent upon the difficulty of paying back bride-wealth, a difficulty which is not great during the first years of marriage. Indeed, it is evident that the stability of the family is not really a function of economic motives, but of moral and legal norms, from present-day conditions ... for in spite of payments, divorce is rife. It is morals the censure of divorce and law that refuses to recognize grounds for divorce which ensure the stability of the union of husband and wife. It derives its stability from the restraint imposed by law and morals and not from economic blackmail. In the past ... marriage was an indissoluble union between man and wife, and as unseverable relations between their affines, and divorce was allowed only for a flagrant breach of obligation on the part of the husband towards his wife's father or brothers".⁶⁵

One can agree wholeheartedly with this argument. Because of the psychological element involved in the delivery of ilobolo, it must be conceded that it may have a stabilizing effect on the marriage in the sense that the parties would regard it as a regular union for life and not just an irregular one but to aver that the economic element is the sole consideration, is imprecise.

This theory is also defective in that it ignores the fact that even in traditional society when a man decided to marry there were certain features he had to look for in his partner.⁶⁶ This means that he had to take somebody he loved. There is no reason why a person should not treat a wife he loves well. There is still less reason to impute the husband's good treatment of his wife to ilobolo. It just is not logical. No doubt there were instances of "forced marriages", but these were exceptions rather than the rule. It is therefore dangerous to build a theory on exceptions. Moreover, sayings such as "umbhantshi udliwa yinhliziyoy" which means that "a person must marry a woman he loves" attest to the general acceptance of love as being the guiding principle in marriage even in traditional society. Above this, if ilobolo were a

stabilizing factor, it would imply that the more ilobolo a man gave for his wife, the more he would appreciate his wife, and the more he would be apprehensive of abusing her, and consequently the more stable the marriage. Yet there is practically no evidence in support of the view that there is some correlation between the amount of ilobolo given for a woman and the stability of the marriage.⁶⁷ In fact the converse may be true in certain cases.

The stability of the marriage and the relative absence of divorce in traditional Zulu society can be attributed to a number of factors other than ilobolo. To say that ilobolo is delivered with the purpose of stabilising the marriage is circular reasoning. One cannot determine a priori that ilobolo will stabilize the marriage because the stability of the marriage can only be determined ex post. Even then one can only determine with certainty that it has had a stabilizing effect if other factors have been removed, so that ilobolo was the only factor responsible for such stability. Since experimentation with human beings is not feasible, a person must be involved in a mental elimination of other factors and then ask the question whether but for ilobolo the marriage would have been stable, which is highly suspect as a scientific method. In the absence of such proof one must assume that the allegation that ilobolo stabilizes the marriage is not proven.

From a closer look at the marriage in tribal society it appears that not just ilobolo or to put it differently, not just ilobolo in its economic implication was effective in curtailing the rate of divorce. The incidence of divorce in present society despite the persistence of ilobolo is sufficient proof of this.

Perhaps Krige is nearer the point when she says:

"Under tribal conditions, lobolo is said to provide the binding form in marriage. If this is correct, how then is it that lobola in urban areas does not fulfil this

function at all? The answer lies in this: that it is not lobola as an economic consideration and the mere fact that cattle have been handed over that keeps the couple together and makes the marriage. It is lobola as a symbol of the bond between the two families that fulfil this function. Lobola alone, without the whole tribal setting and ceremonial in which the new relationship is created, cannot keep the couple together. Moreover, the bond between the two families which is created by marriage is a far firmer and more lasting bond than one between individuals. In urban areas lobola has lost its old significance, taking on an economic aspect, and as such cannot be a guarantee of the marriage".⁶⁸

The stability of the marriage, or to be more precise, the absence of divorce, in traditional Zulu society can be attributed to a number of social, legal and even moral considerations. Marriage in traditional society was regarded as an indissoluble bond, and the society was a closed one unlike the position today.⁶⁹ When a woman was to marry, the father would take her by the hand and tell her that she must go "uyosikhonzela" in other words to represent the whole clan in her new marital status, and literally to be utterly loyal under even extreme conditions. This implied that there was no turning back. In addition, before marriage the woman would be taught and warned by her close relatives that "kuyabekezelwa emendweni" meaning that perseverance is the norm in marriage. Marriage in traditional society was referred to as "Kwamfazi ongemama" literally meaning a place where the woman is not a mother, figuratively meaning that the woman would be ill-treated in marriage in particular by the mother-in-law.

All this means that a woman would be taught and mentally prepared for marriage. Consequently she did not enter marriage under any illusions, and took it as it was with the result that she suffered very few disappointments unlike perhaps one who enters marriage with the idea that romantic love "ought to precede marriage, does precede it and is the only reason for it".⁷⁰ This by no means implies that in traditional Zulu society romantic love in the western sense

was utterly unknown, and that marriages were loveless unions.⁷¹ What it really means is that the wife was more realistic and did not have too high expectations of what marriage would bring. As a result she would not break down if things went as predicted, and would face problems with equanimity. Moreover, respect by the wife, approximating awe of her husband, made her subservient so that when there was some misunderstanding the man would prevail and the woman would yield. This would minimize conflicts. Then there is also the factor of children. A woman might even tolerate a marriage that was unhappy because of her children. This she would do with no thought of ilobolo delivered for her, but in consideration of the impending fate of her children should the marriage be dissolved. Divorce also carried a stigma in early society. A divorcee would always be regarded as "uMabuyemendweni" (one who returns from marriage) which would imply that she was a failure. She would not easily return to her parents or brothers because she would be unwelcome there. To her father she would be a disgrace because her failure implied not just her failure personally, but of her kin as well. To her brothers who in any case would be married she would also be unwelcome because their wives would resent her presence. At the same time she might cause problems there because she would interfere in the sphere of domain of her sisters-in-law. To her uncles and relatives she would not go. Marriage was publicised and all relatives knew that she was married and she had no place to hide. The only course open to her would be to stick to her marriage even against odds.

Because of the economic dependence of women on their husbands, a woman might not easily break down her marriage frivolously.⁷² This is more realistic than the fear of refund of ilobolo by her father or guardian. With the advent of western education, urbanization, and industrialization, a new outlet was provided for the woman frustrated by her marriage. Not only would she seek asylum in an industrial area where few if

any people knew her, but she would also secure employment from which to make a living.⁷³ Ideas on divorce in the black community have changed. Even if a woman may not run away she may be a professional woman and as a result she will be self-supporting. Thus the development of the working woman in the black community is another factor which has changed the attitude of the woman from that of subservience to that of independence. The institution of polygyny also served to limit divorce in that even if there was sexual dissatisfaction between the partners, the husband could have another wife without divorcing the other.

In itself it is not desirable that a personal relationship between husband and wife be cemented by material considerations.

What is disputed here is the treatment of ilobolo as a panacea for marital instability. One must therefore probe still further for the real significance of ilobolo.

5.3.5 The thanksgiving theory

Another view which has been advanced in an attempt to explain the purpose and function of ilobolo is that it is a token of appreciation or gratitude to the parents of the bride for their care and upbringing of her.⁷⁴ This view seems to be more prevalent among the Tswana, and is reinforced by the lack of bargaining as to the amount to be given. According to traditional Tswana law no mention of it is even made during negotiations. The bridegroom only gives what he can afford. This has the characteristic of being a gift. But even there, one must add, ilobolo is not purely non-obligatory as some consequences follow the non-delivery thereof.⁷⁵

In Zulu law, however, the position is somewhat different. Ilobolo is in the first instance demanded, and the bridegroom does not give only what he can afford although this was the practice in early Zulu society where ilobolo was not fixed. Despite the giving according to his means, this giving was obligatory! Moreover, even if the bride had not been brought

up by her parents, they would still demand ilobolo which negates the idea of thanksgiving for upbringing. Yet if one looks at the original nature of ilobolo it appears that it did have the character of a gift rather than a legal obligation.⁷⁸ But the thanksgiving must have been implicit rather than explicit in the lobolo agreement.

5.3.6 Is ilobolo an antenuptial contract?

It has also been suggested that ilobolo is an ante-nuptial contract whereby the bridegroom or his family gives a number of cattle to the woman's family for her subsistence and that of her children in the case she becomes a widow or in the event of her becoming indigent.⁷⁹ The main objection against this theory is that cattle pass to the family of the bride and she has no legal claim to them.⁸⁰ The father of the woman can do with them as he pleases without any thought of the position of his daughter and her children. In traditional society the network of kinship relations made it impossible for the widow and her children to lack a person responsible for their support. No doubt, there would be a moral duty on the woman's father to come to the aid of his daughter, or her children should they be rendered fatherless, but this would not be a legal duty. If the marriage is dissolved owing to the woman's misconduct at least a portion of the cattle is returnable to the husband.⁸¹ If the woman's or the children's security was the prime consideration this would not be so. Should the woman be widowed she cannot claim maintenance from her father as of right. In fact she is supposed to remain at the deceased husband's residence and to be maintained by the deceased's heir.⁸² This theory too, cannot be regarded as a sufficient explanation of the purpose and function of ilobolo. Perhaps the compensation theory offers a more convincing explanation.

5.3.7 The Compensation theory

Several anthropologists and lawyers express the view that one of the primary purposes and functions of ilobolo is to compensate the woman's father for the loss of the woman, her services as well as her reproductive and productive capacity.⁸³ Arguments to support this seem quite plausible. It is argued that the loss of a member is an event that is keenly felt. Consequently something must be given to the father to "soften the blow" and to recompense him for the loss of her services which will benefit her bridegroom.⁸⁴ A qualified version of this theory is to the effect that ilobolo compensates the father for his upbringing, educating and caring for his daughter.⁸⁵ Others do assert strongly, however, that ilobolo in its original essence could not have been aimed at compensating for the loss of the woman's services as there was in early times, among blacks in general, no value attaching to services of any kind.⁸⁶ Besides, the argument goes, according to traditional practice all girls were born to be brought up and given in marriage. Consequently marriage was always eagerly anticipated, and its realization could not have been interpreted to be a loss in the sense of bereavement, but a happy though painful event.⁸⁷ The need for compensation, therefore, is out of place.

It is difficult to find fault with this argument. Even the supporters of the compensation theory do admit that in the last analysis the compensation which the father of the woman gets is more psychological than material because it is impossible for the father to cover all the expenses he has incurred in bringing up his daughter.⁸⁸ It is also improbable that in a society where a human being could not be evaluated in terms of economic value, one would speak of compensation for the loss of the daughter. In any case such a statement is tantamount to a revival of the bride-price theory because it amounts to saying that a person can be exchanged for property. This has already been refuted. Even though one qualifies

the statement to the effect that compensation is for the loss of services of the woman, it has been said that such a view is untenable unless one were to prove that those services were rendered by virtue of a legal duty. In a community where there was little or no remuneration for services, it would be difficult to uphold the view that when those services were lost, they should be compensated for. Moreover, this cannot be reconciled with the fact that the amount of ilobolo is not calculated according to the 'value' of the woman, but according to the status of the father. Or was the "value" of the woman simply imputed to the father? There is, however, a present tendency of taking into account certain attributes of the woman, like her educational standard, but this is of recent origin, and cannot be used as an explanation of the original significance of ilobolo. Even according to recent trends, it is impossible for the father of the woman to claim all expenses incurred because it would be too expensive to marry his daughter. Above that, it is doubtful whether that would be justifiable. If the father were to purport to claim compensation for the expenses incurred in discharging his legal obligation from somebody who was not legally bound to do that, it would amount to the father's evasion of such legal obligation. The father's duty to maintain and to bring up his daughter is a legal one. As a result he cannot shift that to somebody else, or attempt to evade it by claiming compensation from the bridegroom.

That compensation could not have been the purpose of ilobolo in Zulu society becomes all the more obvious when it is remembered that in early Zulu society ilobolo was not fixed, but was dependent on what the bridegroom could afford. If this was dependent on the ability of the bridegroom, there can be no talk of compensation since the latter is assessed according to the loss suffered. One must qualify this by pointing out that this practice itself did change. Parents tended to demand as much as they could get. Yet the limitation placed on the lobolo to be delivered prevented the

escalation of ilobolo. It is obvious therefore that the idea of compensation could not have been generally accepted.

It must be conceded that in a poverty-stricken community ilobolo could be used as compensation, but such use cannot be used as an explanation of the primary purpose and function thereof. Thus the economic basis of ilobolo seems to be unfounded. If it were the economic logic of loss and gain entailed, there would have to be some relationship between the value and extent of costs and benefits involved.⁸⁹ Moreover, it is "circular to interpret the payment ... as compensation of a group of agnates for the loss of a sister or daughter, when bridewealth is such an important factor in making them such a group in the first place".⁹⁰

Despite arguments that compensation should not be viewed in an economic sense, but in the social, religious, and even legal one,⁹¹ it appears that compensation cannot be regarded as an adequate theory for the explanation of the purpose and function of ilobolo. It may have picked this function during the course of development. It is submitted that the idea of compensation may have gained ground when parents started to demand exorbitant amounts for their daughters. That they wanted to be compensated for the loss of their daughters simply became a reasonable explanation or justification of the high amounts demanded. To later generations it simply became second nature to argue that no one can get something for nothing and hence no one must get a wife without giving something equivalent to her "worth". But this cannot be reconciled with the idea of ilobolo being given according to the ability of the bridegroom. Change in the economic climate from the traditional one may have been the source of this theory.

5.3.8 The reproductivity or child-price theory

Another theory which has elicited a number of supporters

among both anthropologists and lawyers is that ilobolo secures the transfer of the reproductive capacity of the woman from her lineage to that of the husband.⁹² An extreme version of this theory characterises ilobolo as nothing else but a "child-price".⁹³ A qualified version thereof is to the effect that the right to ilobolo forms an aspect of the comprehensive right of guardianship, the object of which is the woman's reproductive potential which is capable of economic value and of cession.⁹⁴ Literally taken the latter view implies that once a man delivers ilobolo he is entitled to the reproductive potential of the woman. This is just not so.

Because of the interest this theory has attracted it will be subjected to closer scrutiny with the purpose of determining its truthfulness. One contribution on this theory that is outstanding in terms of substance and scholarly merit is that of Jeffreys.⁹⁵ Consequently it will be taken as a point of departure.

Jeffreys adopts an evolutionary approach. He points out that originally marriage took place without any transfer of property, and marriage consideration is a later development which neither arises from nor affects the validity of marriage.⁹⁶ He distinguishes ilobolo from marriage and argues that the former is not essential for the latter, but is something apart from it.⁹⁷ He further asserts that ilobolo and marriage exist independently of each other.⁹⁸

Although it may be difficult to find fault with Jeffreys' evolutionary approach, it is too vague a generalisation to apply equally everywhere. His view that ilobolo is not an essential for a valid marriage cannot be accepted. In Zulu society for one thing, ilobolo is always attached to a marriage. It has never existed separately from marriage. Furthermore, the approach of Jeffreys is to be questioned on the basis that he attempts to deal with ilobolo in various

societies, and yet ignores the fact that various societies have at different times required various essentials for a valid marriage. This view is unacceptable. To start with, the appellation that ilobolo is a child-price seems to import the element of sale,⁹⁹ but this time not of the woman as such but of her children and as a result it is open to the same objections as the theory that ilobolo is bride-price mutatis mutandis. Although it may not be denied that ilobolo has some relevance to the bearing of children, it is to propound a fallacy to say that it is simply nothing else but a child-price.

If ilobolo is regarded as the price for the children to be born out of the marriage, it implies that this is a contract of sale and the procreation of children is an emptio rei speratae¹⁰⁰ dependent on the actual bearing of children, which view could hardly have been contemplated by the people under tribal conditions. Moreover, if ilobolo is only the child-price, it would invariably be demanded after such children had been delivered. Although this is mostly the position among the Tswana, it was never the position among the Zulus.

It must be pointed out, however, that the conclusion which Jeffreys comes to is not unsupported by evidence and vigorous converging arguments. On the contrary, he relies on a number of institutions which ultimately tilt the scales in favour of his child-price theory. For a further appreciation of this theory it is imperative to analyse the arguments on which he bases his theory.

Jeffreys says that the reason why ilobolo has no function in and consequently independent, of marriage is because there are certain marriages without ilobolo, and there are instances where ilobolo passes without marriage.¹⁰¹ The typical example which he refers to is the practice among certain African tribes where a woman of wealth procures a woman

by delivering ilobolo for her. Here the union between these two women is no marriage at all as marriage is, according to him, a recognized union between persons of the opposite sex.¹⁰² He definitely and correctly refutes the argument that this arrangement is a brothel.¹⁰³ The fact that this woman is entitled to the children by virtue of the delivery of ilobolo irrespective of the fact that they might have their natural fathers who in any case have no claim to them, impells Jeffreys to come to the conclusion that viewing ilobolo as a child-price implies that anyone may buy the rights to children without becoming married.¹⁰⁴

The greatest flaw in this argument of Jeffreys is that he substitutes the exception for the general rule. Even in such unions the "bride is the object or counterpart of a lobolo transaction", such unions, being secondary, vicarious and fictitious which makes it clear that they are not the appropriate criterion for determining the purposes and function of ilobolo as this ordinarily appears closely related to marriage as a regular or normal union between a man and a woman.¹⁰⁵ Marriage, as it has been shown above, is a primary institution on which ilobolo is dependent and for which ilobolo is delivered. This means a decisive dependence of ilobolo on marriage.¹⁰⁶

Another argument which Jeffreys canvasses to support his child-price theory is the institution of sororate¹⁰⁷ whereby a woman who dies prematurely without issue or who is sterile is replaced or aided as the case may be by her sister. Although the institution of sororate seems to give credence to this theory,¹⁰⁸ the institution of sororate was not so general among the Zulus as to be sufficient premise from which to establish the purpose of ilobolo. It may be conceded that in traditional Zulu law in principle, if a woman was barren or died without issue, ilobolo might be returnable or a substitute would be provided.¹⁰⁹ It is, however, interesting to note that the Code is silent on the effect of

sterility on ilobolo.¹¹⁰ Moreover, the contention that there would always be a substitute in the case of premature death without issue or even sterility is not supported by the slightest shred of evidence.¹¹¹ In addition there is no proof that there was in Zulu law a legal obligation resting on the father of the woman to provide a substitute. This was at most a moral obligation.¹¹² For a proper understanding of this institution one must understand the social background and value system of the Zulus.

According to the traditional Zulu society, it was pointed out above, infertility of the woman carried a stigma. As the aim of marriage was the procreation of children, her failure to do that had serious consequences. As a result a father would out of sympathy with his daughter provide a substitute. But even for this substitute among the Zulus at least a few head of cattle had to be given.¹¹³ In any case there are few if any instances where the practice was resorted to.

At present among the Zulus barrenness no longer entitles a man to divorce his wife nor even to claim a substitute. This is so even among traditionalists. The lobolo delivered no longer imposes a duty to procreate as was the position in the past.¹¹⁴ One may say therefore that the institution of sororate has practically fallen into disuse. Even where recourse is had to it the view held by informants is that ilobolo will normally be given even for the substitute. Yet ilobolo continues.

The institution of levirate is also another justification used by Jeffreys to support his theory of child-price. According to him the real explanation of the levirate practice lies in the function of ilobolo functioning as child-price.¹¹⁵ He concludes:

"Whereas in the 'ghost-marriage' the man has died before he was married or had paid lobolo, so these things are done on his behalf after his death, and then

a seed-raiser takes on the necessary biological role as in a normal levirate marriage; but whether one refers to a levirate marriage or to a ghost-marriage the function of the lobolo is the same; it buys on behalf of the dead man, the payer the right to keep and raise the children as his".¹¹⁶

It is submitted that the institution of levirate does not provide a satisfactory explanation of the function of ilobolo as being a child-price. It is felt that ukungena or similar institutions would exist even without ilobolo. Such institutions can be understood in the light of their purpose. Ukungena for instance had a number of functions.¹¹⁷

Lastly Jeffreys uses divorce and the return of ilobolo as an argument in favour of his child-price theory. If, he says, ilobolo validated the marriage, the full ilobolo should be returned when a marriage is invalidated or dissolved irrespective of whether or not there were children in the marriage. The fact that it is never returned when there are children of the marriage is evidence that its purpose and function is to transfer the status of the children from the mother's group to the father's.¹¹⁸

The same argument could be used to refute this contention. If ilobolo were child-price only, its return would not be possible if the woman had misconducted herself provided she had borne children. This is not so in Zulu law. Furthermore, if one takes into account that in early Zulu law ilobolo was not fixed, and where it passed it seldom exceeded five head of cattle, it makes the theory all the more fallacious. Moreover, when one bears in mind that divorce in early Zulu society was something anathema, it becomes totally unjustifiable to build a theory on that premise.

Serious objections can be raised against the reproductivity theory in general. It does not answer the question why ilobolo was delivered in Zulu society. Secondly the father of the woman acquired ownership in the cattle and used them

without waiting for children to be born of the woman. In addition this theory does not answer the question why if ilobolo is the purchase of the reproductive capacity of the woman, is the fixing of the lobolo dependent on the status of the father and not on the woman or her fertility as such. Further, one would expect that there would have to be an a priori determination of how many children a woman would bear before the fixing of ilobolo would take place.

The question then is whether ilobolo has no connection at all with the bearing of children. The answer to this question is that ilobolo does have some relevance to children. The better view is that it procures the procreation of legitimate issue.¹²⁰ Ilobolo distinguishes a marriage from an illicit union. Simons further says:

"To procreate legitimate children, a man must marry their mother, and this he can do under tribal law only by handing over lobolo to the head of her family. Lobolo marriage and the procreation make up a single and indivisible complex. Tribal marriage is a socially approved relationship between a man and a woman which is established by the transfer of lobolo and which has as one of its aims the procreation and rearing of legitimate children".¹²¹

This view, it is submitted, is to be preferred. The children are a product of a marriage and legitimate children can only be procured in a valid marriage.¹²² According to Zulu law no marriage can be valid without the delivery of ilobolo. Put differently, there can be no marriage without the delivery of ilobolo.¹²³

To determine what the object of ilobolo is, it is submitted, one should use a simple test. This test is: what does a young man in ordinary discourse say he is delivering ilobolo for? He usually says: "Ngilobola umfazi", meaning "I lobola a wife". Hardly does he ever say that "I lobola children". What does happen in practice is that when the wife gives birth to a child in particular a female child, the bridegroom's

family group will say that "izinkomo zibuyile" meaning the cattle have come back because whatever cattle the father gave away for the mother of the child will come back when she herself marries.¹²⁴

Some writers find support for the view that ilobolo is a purchase of the reproductive capacity of the woman from maxims such as "cattle beget children" and "children are where the cattle are not".¹²⁵ There are no such sayings in Zulu law. They belong to the Pedi or the Venda.¹²⁶ It is not surprising that among the Pedi a man who marries a woman who has borne a child by somebody else is entitled to that child, provided he gives extra cattle, and such child is regarded as being entirely legitimate.¹²⁷ The underlying philosophy is, as Whitfield puts it, that to an old man who may marry a woman who has been seduced and borne a child, chastity amounts to very little. His pride is simply in that he marries a woman who is capable of bearing children.¹²⁸ But courts have expressed serious reservations about these transactions as being trafficking in children and hence contrary to public policy.¹²⁹

This practice has never formed part of Zulu law. According to Zulu law such a child belongs to the mother's guardian and not to the man who marries his mother.¹³⁰ Even if there is an agreement to that effect the court will not sanction it as it is regarded as being contra bonos mores.¹³¹ Instances where this has happened in practice are also when a mother does not marry the father of the child. Because of the high cost of maintenance today the woman's parents may give the child to his natural father in exchange for a few head of cattle. But this is a practice of recent origin caused by problems of maintenance, and cannot be used to justify ilobolo as a price for the children. Moreover, should this come before the courts it will be regarded as unlawful practice because the view taken by the courts is that children cannot be treated as chattels to be sold and bought.¹³² Nor have

the Zulus ever used the expedient of the Tswana people of retaining guardianship over all children born of the woman until bogadi is delivered.¹³³ What used to happen in traditional Zulu society was that if the bridegroom could not at all afford to deliver ilobolo for his wife, he could arrive at an agreement with his father-in-law that the father-in-law give him the wife, and the lobolo for the wife would be claimed from ilobolo delivered for the eldest daughter.¹³⁴ This did not even entitle the father of the woman to take the eldest daughter of his daughter. He would only be entitled to claim her ilobolo when she married. If he was already deceased, his heir would be entitled to claim.

This shows therefore that some of the popular arguments used to justify the theory that ilobolo is a price for the woman's fertility cannot be wholly applicable to Zulu law, and must be regarded as unfounded.

The rejection of the reproductivity theory as propounded by certain jurists and even anthropologists is not based on fear of lending inadvertant support to insinuations that a person can be bought or a reaction against slavery, nor even a denial that certain aspects of a person's personality can be the objects of rights capable of economic value to the person having such rights.¹³⁵ Nor is it disputed that the right to receive ilobolo to be delivered in future for a woman can be ceded to somebody else to whom the father owes a debt.¹³⁶ What is insisted upon is the identification of the correct counter-performance of ilobolo. It is submitted that the counter-performance of ilobolo is the woman as a whole. This does not mean that she is bought. It simply implies that the husband secures the power of guardianship over her and as a result over her children. Consequently the delivery of ilobolo may be regarded as containing an implied term to the effect that the woman so lobola'd has all the attributes of a wife, some of these being of primary importance, and others being secondary. The bearing of children therefore being of

primary importance in a marriage according to customary law means that the wife who fails in this important respect is no wife at all. But the right which the husband has is not only confined to the bearing of children, but also includes the husband's entitlement to her services, sexual privileges and companionship. That there was in customary Zulu law no mention of these can be understood in the light of the cultural background of the people. It was regarded as not being decent to mention certain things openly, one of them being sexual privileges in marriage.

Support for this view can be found in the fact that among the Zulus there never was a practice whereby a person would simply procure a woman by delivering ilobolo for her and from whom he would procreate children without marrying her. The incident among other tribes of a woman's obtaining another woman by delivering ilobolo for her with the object of begetting children through her must be evaluated differently. In any case there is no sufficient evidence that such a practice did form part of Zulu law. There may have been areas among the Zulus which were influenced by other tribes, but this has never been widespread. But even if it were so, it was pointed out above that such unions must be regarded as forms of vicarious marriages and are exceptional. As a result they should not be regarded as the normal criterion for assessing the purpose and function of ilobolo. In any case such fictitious unions have other purposes, and these should be evaluated as a whole. This then brings us to the most probable theory as to the real purpose and function of ilobolo.

5.3.9 The most probable theory

The difficulty of unravelling the original purpose and function of ilobolo has already been alluded to. Nor is it possible to single out one theory as being all-inclusive. A number of factors should be taken into account in order to

come closer to the truth. One must look at the practice of the people themselves. One must look at what they say and what they do and why they say and do that. In addition one must ascertain the reaction of the people in the event of non-observance of a custom. Do they protest or express shock or do they simply acquiesce to it?¹³⁷

The enquiry is further complicated by the fact that early Zulu law was closely connected with the religious convictions of the people. The position today is made more difficult by the practice varying from place to place, and even at the same place people are at different degrees of acculturation.

The original purpose of ilobolo among the Zulus would seem to have been mainly the securing of a valid marriage, and hence the procreation of legitimate issue.¹³⁸ This validation had both a legal and religious significance. Ilobolo was in essence not an economic consideration, but a social and spiritual symbol of a bond between the two families.¹³⁹

Cattle which were the main means of ilobolo were very closely linked with the ancestral spirits and the clan.¹⁴⁰ Besides, ilobolo cattle could be used as a means of communicating with the spirits of the ancestors. The treading of the lobolo cattle on the premises would be tangible proof to the ancestors that the woman was about to marry. Upon their arrival the father of the woman or the eldest male in the homestead would then say "nina basekuthini nazo-ke izinkomo zomtwanà" meaning "there are the cattle of the child you of so and so".

It has already been adverted to above that one can also find out from the words of the bridegroom himself what actually the purpose of ilobolo is. He says "I lobola a wife" which is definitely against the children being the object of ilobolo. Reuter puts it eloquently when he says:

"Nevertheless, the African who marries 'because he wants children' does not marry those children who are but the

remote object or purpose of his marriage contract, but he marries the woman, his bride, who is the immediate object and counterpart of the marriage and of the concomitant or preceding lobolo negotiations and payments. Call it a totum-pro-parte match, if you will, yet it cannot be denied that when the marriage is contracted the 'price' is given and received in exchange for the bride who may bear children".¹⁴¹

Further insight may be obtained into the purpose of ilobolo by analysing the old formal address by the abakhongi on the occasion of commencing ukucela or ukukhonga. The usual formal words are as follows: "Wena wasekuthini uthi okaSibanibani asizomcelela isihlobo esihle usho ngezinkomo ezithile" meaning "You of so and so (by his praise names) he of so and so has sent us to request a good relative from you. He does this by..." and they would name the number of cattle describing them by their colours. On the day of the receipt of the lobolo cattle a beast then would be slaughtered to officially inform the dead ancestors of the coming of such cattle.¹⁴²

From the words of the abakhongi one can deduce that the lobolo cattle are a means of securing the father's consent to the marriage and also of bringing about the marriage relationship. The relationship is created by the marriage and the lobolo is only the means of creating the marriage. Marriage negotiations would therefore never be commenced without the offer to deliver ilobolo. It is in this sense that it was inconceivable for the Zulus that a marriage could take place without ilobolo. Even a man who could not afford to offer ilobolo had at least to count stones.¹⁴³ On failure to get any help from the relatives he would ask his father-in-law to consent to the marriage on the understanding that his eldest daughter would be the source of the lobolo for the mother. But even then, at least one beast eyamadlozi had to be given.¹⁴⁴ Without ilobolo there would be no marriage, even if the parties would stay together, and the children born of such union would be illegitimate. Ilobolo, therefore, distinguished a marriage from an illicit union.¹⁴⁵ Because of this ilobolo was unconsciously transposed onto a civil marriage despite

its not being essential for the validity of such marriage, because the Zulus could not imagine a marriage without it.¹⁴⁶ In addition ilobolo can be regarded as counter-performance by the bridegroom in return for the transfer of the right of guardianship by the father over the woman and his children to him. The right transferred includes her services, sexual privileges and bearing of legitimate issue.¹⁴⁷ It also serves in concrete form to indicate that a marriage is intended. Thus it is obvious that the purpose and function of ilobolo is cumulative.¹⁴⁸

To summarise, it is apposite to quote the words of Allott:

"The 'bride-price' serves several legal purposes in African law. To begin with, its ceremonial transfer from husband's to wife's people is a public record and expression of the coming into being of a new matrimonial relationship. It is thus both evidence of a solemn transaction and also the validating act by which it is concluded. Secondly, it marks the formal creation (or, more often, confirmation) of the husband's marital power over the wife, giving him exclusive access to the wife, making it the legal wrong of adultery for another man to have relations with her, and in many societies giving him a claim over her services in home and field. And lastly, especially in the patrilineal societies, it gives the husband parental power over the children born of his wife. The issue of the bride are not only under her husband's legal control but are by the payment of 'bride-price' legally affiliated to him".¹⁴⁹

So much for the traditional purpose and function.

Besides the original and main purpose and function of ilobolo, it has other secondary functions some of which have been acquired in the process of adaptation to the changing social and economic conditions.¹⁵⁰ These functions are secondary in the sense that they are not objects with which the lobolo is delivered. It is impracticable to mention all of them, but a few most commonly mentioned will be briefly outlined here below.

5.3.10 The modern function of ilobolo

As ilobolo is not a requirement for a valid civil marriage it logically cannot have the same functions in a civil marriage as in a customary one. The question then is: What is the function of ilobolo in a civil marriage?

To find an answer to this question a number of informants were interviewed around KwaDlangezwa. These included some members of staff from the University of Zululand, labourers, students both married and unmarried, and even people working elsewhere. What became manifest was that ilobolo is still a question that is emotionally-loaded. People tend to be sensitive and defensive to ilobolo. Subconsciously if one asks them a question on it, they assume that he is one of the abolitionists. This is perhaps because of the severe denunciation of the institution in the past. Many of the informants interviewed seemed not to have a ready answer as to the functions of ilobolo, which gives one the impression that few ever apply their minds as to why they demand and deliver it. They simply take it as a custom which has to be observed. Few even know that it is not a legal requirement for a civil marriage. Many do not seem to see why there should be a difference between the two forms of marriage. The functions which they say ilobolo has, have not changed from the functions mentioned by others elsewhere or even a number of years ago. Most of these functions are attributed to ilobolo by mostly non-traditionalists.¹⁵¹

The changes in the function of ilobolo do not follow any fixed pattern. Some are permanent whereas others are temporary.¹⁵² Some of the old functions have been discarded while others have been retained.

Before analysing these new functions of ilobolo it is fitting to quote Simons who has summarised these as follows:

"Africans give the conventional reasons for adhering to the custom. They say that a lobolo compensates parents for the cost of raising and educating their daughter and for the loss of her services, discourages a man from illtreating his wife, or her from deserting him, and therefore deters them from dissolving their marriage; obliges a woman's family to give her shelter and support in case of need; provides a form of social security; and constitutes an important part of the African's heritage. In the last resort they say the custom is good because it is theirs and not the White man's. Urban Africans advance additional reasons that lobolo pays for a girl's wedding expenses and brings in money her parents badly need".¹⁵³

At the risk of repetition it is intended to explore once more some of these conventional reasons for the retention of ilobolo. It is often said that ilobolo secures the respect and good treatment of the wife by the husband. The belief is that a woman for whom no lobolo has been given will be treated with nonchalance.¹⁵⁴ The woman herself feels that she is treated as being "given for nothing". Even the man feels the wife is not his if he has not delivered ilobolo for her.¹⁵⁵

To say that a man will value his wife because he has "paid" ilobolo for her is to be doubted. Parties marry each other because they love each other. When they enter marriage they intend their marriage to be happy and stable. The delivery of ilobolo may be evidence that a man loves a woman, but to say that a man will value his wife because he has delivered ilobolo for her is just not true. Reference is made by informants to isolated instances where parties were married without ilobolo, and the marriages were unhappy, and the husband would always say to the wife, "In any case I did not pay for you". Alternatively the wife would say, "You are doing this to me because you never gave anything for me". Eventually such marriages break down.

To conclude that the absence of ilobolo in such cases is the cause of unhappiness, and consequent break-down of the marriage is, to say the least, deceptive. One must look beyond

the words to the motive of the person who utters them. The reason why a man says that to his wife is not because he has not delivered any lobolo for her. It is because he feels that his wife for one or other reason is not good enough. It is an expression of disappointment. It is aimed at spiting the wife perhaps with the intention of making his wife repent of what she has done. By the same token the wife who moans that her husband is treating her with nonchalance because he never gave anything for her says that as a result of some prior conduct which aggrieves her. She then attributes this to the non-delivery of ilobolo.

The psychological effect the absence of ilobolo has in marriage is not disputed. What is disputed is that ilobolo enables the husband to value his wife. That is a reversion to the bride-price theory, to wit that the husband has "paid" for her, and consequently values her. Even where a man has delivered a number of cattle for his wife, if he does not love her, he will not cherish her. In fact that will cause him to regret that he gave away his cattle for somebody not worthy of being his wife. Consequently the stability of the marriage cannot be attributed entirely to ilobolo. It is a product of the compatibility and maturity of the spouses. It is their ability to handle the explosive situations in marriage with equanimity which will determine whether their marriage will succeed or fail.

Petersen¹⁵² has rightly pointed out some of the causes of marital instability and divorce as follows:

"It is rather the growing complexity and mobility of society combined with urbanization, industrialization and the emancipation of women which have played an important role in the growing rate of divorce".

Although this primarily refers to the white community, it applies with equal force to the Zulu community. Ilobolo as already said cannot be said to be the source of marital bliss

and the windbrake against divorce. Hahlo in fact rightly points out that divorce is not a legal problem, but is rather a social and moral one.¹⁵³

As to the alleged function of ilobolo as compensation of the girl's parents for the loss of the daughter, her earning capacity, her children's ilobolo, and for the money spent in her education and upbringing,¹⁵⁸ it has already been said above that it is impossible for the parents to be adequately compensated for the loss of their daughter, and all the expenses they have incurred in her education and upbringing. The compensation is only psychological. The wisdom or legality of such purported compensation is suspect as it shifts the liability from the place where it rightly falls to somebody not legally liable therefor.

As to the lobolo's use for defraying marriage expenses,¹⁵⁹ it may not be denied. That is why the father is left with very little if anything after the marriage. But this is something which happens incidentally. It cannot be said that it is the purpose with which ilobolo is delivered.

As to ilobolo as a test of the suitor's honest and serious intentions, and his ability of being a future provider¹⁶⁰ it is doubtful whether this is a proper criterion to determine whether a person will be a good husband. It may be that the bridegroom got all ilobolo from his father, or that he got the money from betting on horses. That does not mean that he will be a future provider. Conversely a man may for one or other reason be unable to deliver ilobolo at a time he wants to marry because, for example, he has been a student. That cannot be interpreted to mean that he will not be a future provider. Perhaps these are exceptions.

Another function which is attributed to ilobolo is that it prevents young people from marrying too soon before they are mature.¹⁶¹ It cannot be denied that ilobolo does delay

marriage because it means that before a man has cattle or money for ilobolo he cannot marry. Delaying marriage may have its problems like pre-marital sex and illegitimacy. Marrying before maturity, however, does contribute to divorce.¹⁶²

As to ilobolo as a good African custom deserving to be kept as a distinctive cultural heritage distinguishing him from a white man,¹⁶³ it was pointed out above that it is not peculiarly African. That it is a sound custom may not necessarily be denied, but there are many sound customs which have been abandoned. It means that there is much more than its soundness responsible for its retention. It is because it gives the wife the sense of pride that her husband has given so much for her, and therefore has not "got her for nothing". At the same time it appeals to the man's vanity that he is a real man and has given a lot for his wife. Moreover, in a world of rapidly changing conditions, it is not surprising that blacks do cling to anything which can give them their distinctive cultural identity.

It is an institution which enables more especially the educated blacks to show that despite their education and westernisation they still remain blacks at heart, and they are proud of retaining some of their customs.¹⁶⁴ Others adhere to it because of sentimental reasons although being aware that they derive very little material benefit therefrom.

Upon a closer examination it becomes clear that most of these newly acquired functions resolve themselves into mere justifications for the continued popularity of ilobolo. At most ilobolo is retained because it is a custom of long standing, a custom which it is difficult to abandon because of all the social and psychological implications that go with it.

The resilience of the custom cannot be exaggerated. Although it is legally a requirement for neither a civil nor a customary marriage,¹⁶⁵ this has not deterred people from

practising it on a wide scale. The influence which it still has in the minds of the people is so strong that some women would rather prefer to remain unmarried in spite of having illegitimate children rather than marry without it.¹⁶⁶ This is because in the minds of the people it raises the woman's social status to that of being a wife.¹⁶⁷ In instances where women "marry" without it, and consequently against their parents' wishes, the parents resent it.¹⁶⁸

Seeing that the new functions of ilobolo are more social than legal, the question is whether they should be the concern of the lawyer. The answer, it is submitted, should be in the affirmative. For the legislator it is important to know the feelings or attitude of the people before passing any legislation touching a particular institution like ilobolo. Any legislation aimed at modifying it must take these factors into account. Furthermore any administrator of justice must take into account these recent trends when adjudicating upon matters relating to the institution of ilobolo.

The alleged functions of ilobolo express the Zulu community's legal views of a legally valid marriage. To a Zulu even if there has been compliance with the requirements of a valid civil marriage, if ilobolo has not been delivered or agreed upon there can be no marriage in the true sense. The delivery of ilobolo is therefore concrete evidence that a marriage is intended, and not informal cohabitation.

5.4 THE INFLUENCE OF ILOBOLO ON THE LEGAL STATUS OF A WOMAN

The discussion of the significance of ilobolo prompts the question as to what the influence of ilobolo is on the legal status of a Zulu woman. Legal status is a convenient expression for the rights, duties and capacities which attach to a particular person in a community.¹⁶⁹

According to early missionaries, administrators and anthro=

pologists, ilobolo was interpreted as having the effect of reducing the woman to a slave.¹⁷⁰ Bearing in mind what the legal position of a slave was in Roman law and other ancient legal systems this meant that a woman was the object of a right. This idea has long been refuted. This is not to deny that the position of a woman in traditional society was inferior to that of a man, but that inferiority was not a product of ilobolo.

The idea that a woman should feel that this is lowering her human dignity is a European construction which does not emanate from the blacks themselves. Not only are Zulu women in favour of it, but some men are definitely proud of it.¹⁷¹ Despite the degeneracy in the custom, it does not derogate from the woman's status to a great extent. She is still respected.¹⁷² Although men at times loosely speak of their daughters as "banks" or "father's cattle" this should not be interpreted in any derogatory sense.¹⁷³

To say that ilobolo does not affect the status of a woman in a derogatory sense does not necessarily mean that it may not indirectly affect the status of a woman. But this influence is only incidental to ilobolo and does not stem from it directly. According to traditional Zulu law the capacity of a woman to marry is restricted even though she may be of age.¹⁷⁴ As a result if she wants to marry, she does not have full capacity to marry, and must get the consent of her father.¹⁷⁵ This consent according to customary law is implicit in and conditional upon the father's demanding and receiving ilobolo. This consent may not be withheld unreasonably. The question is whether the father's refusal to grant consent before he has received any ilobolo or before there is any agreement thereto can be regarded as unreasonable. This should be understood in the light of the fact that ilobolo has been removed from the essentials of a customary marriage. It is submitted that such a refusal should not be regarded as unreasonable because ilobolo has always been regarded as

being part of a customary marriage. That no such cases have come before the court is enough evidence of the popularity of the custom. What is more is that even in the conclusion of a civil marriage by blacks in Natal and Transvaal the consent of the woman's father has been a requirement despite her having attained majority.¹⁷⁶ This was an anomaly.¹⁷⁷ This position has been altered by the KwaZulu Act. In terms of s16 of the Act a Zulu person attains majority by reaching the age of 21 years. For a woman who has attained majority the consent of the father is not a requirement.^{177(a)} Although the consent of the father is not required in respect of the marriage of a daughter that has attained majority, s42(2) of the Act protects the right of the person entitled to claim ilobolo. This section, however, does not make ilobolo part of the marriage. The exclusion of ilobolo from the essentials of a customary marriage and the non-requirement of the father's consent for the marriage of a daughter that is a major has further weakened the position of ilobolo. This means that the delivery of ilobolo is dependent on a separate agreement. Because ilobolo is a subject of a separate agreement, a marriage will be regarded as valid without it. Refusal to deliver ilobolo will therefore legally not affect the marriage. Consequently whatever effect ilobolo had on the legal status of a Zulu woman has been obliterated.

Seeing that ilobolo in respect of a civil marriage is not a requirement, but a subject of a separate agreement, the question may well be posed as to what the effect of the father's refusal to give his consent to a civil marriage of his minor daughter on the ground that he has not received ilobolo for her will be. Can the court regard that as unreasonable because ilobolo is not part of a civil marriage? Previously s22 ter(2) of the Black Administration Act provided that the minister could exercise his discretion and give consent to the marriage if the father withheld his consent. Section 22 ter(3) also entitled the judge of the supreme court to grant such consent if it was felt that the refusal was contrary to the interests of the woman.¹⁷⁸ As it was pointed out above

s22 ter of the Black Administration Act has been repealed by s124 of KwaZulu Act. Although the courts might be inclined to regard this refusal as contrary to the interests of the woman seeing that ilobolo is not an essential of a civil marriage, such cases will seldom come to the courts because as has been explained above, even Zulu women are in favour of ilobolo. A woman will therefore never agree to marriage without ilobolo. But were she to agree and the father refuse, the courts would declare the refusal unreasonable.

The plight of a Zulu woman in customary law was further aggravated by the mother of the woman's incapacity to receive ilobolo for her daughter.¹⁷⁹ This meant that in the absence of the father the heir must receive such ilobolo. The position would be more complicated if the woman could not trace any relative who is entitled to receive ilobolo for her.¹⁸⁰ This limitation has been changed by KwaZulu Act. Section 63 entitles certain women to stipulate and to receive ilobolo for their daughters.

Another question is whether ilobolo is not in conflict with the current international concern over the rights of women. Does it constitute "discrimination against women" which is declared by the U N Declaration on the Elimination of Discrimination of Women as being "incompatible with human dignity and with the welfare of the family and society, prevents their participation, on equal terms with men, in the political, social, economic and cultural life of their countries and is an obstacle to the full development of the potentialities of women in the service of their country and of humanity"?¹⁸¹ Although there has been an improvement in the status of a woman it would appear that the retention of the custom does keep the position of a woman subservient,¹⁸² more especially if she is still a minor. As to the lowering of a woman's dignity it has already been said that it does not.

5.6 ADVANTAGES AND DISADVANTAGES CONNECTED WITH ILOBOLO

A few disadvantages of ilobolo will be noted. If the woman's parents demand a high amount of ilobolo, this coupled with the bridegroom's inability to settle the amount in a short time, tends to discourage or delay marriage.¹⁸³ Despite the change in the law theory will for a long time differ from practice. Because of the strong social sanction marriage without ilobolo will not be acceptable. Although this was not the case in the traditional set-up, today ilobolo operating as it does in a money economy tends to acquire more mercenary features.¹⁸⁴ The insistence on full settlement before marriage may frustrate the intending partners and encourage elopements, seduction, concubinage and illegitimacy and consequently moral decadence.¹⁸⁵ Demanding a high amount of money may lead to impoverishment of the male partner and consequent disruption of family life.¹⁸⁶

Despite a number of disadvantages there may be a few advantages attached to it. Some of them have already been referred to. Most of these advantages are for the parents¹⁸⁷ in that it enables them to have a say in the marriage of their daughters. Any material benefit which they derive from it is negligible. Many of the informants interviewed are aware of this. They admit that it has simply become symbolical. Yet despite the lack of any substantial material benefit to be derived therefrom, they do not intend to abandon it. Even some who are against it before marriage, when their daughters marry, they demand it.¹⁸⁸

5.6 SUMMARY AND CONCLUSION

Ilobolo is an accessory of a marriage. It belongs to a customary marriage although blacks demand it indiscriminately irrespective of the form of marriage. It is because it is inconceivable for them to imagine a valid marriage not preceded by the delivery of ilobolo. Yet when the question

is posed as to what the original purpose and function of ilobolo is, one gets various theories. Some of these theories have been based on idealistic and unfounded statements. Others have been based on misunderstanding of the guiding principles underlying the institution.

Besides all the other theories, ilobolo can be regarded as primarily aimed at validating a customary marriage, and thus making possible the procreation of legitimate children. It is also concrete evidence that a marriage rather than an illicit union is intended. The consent of the father is implicit, and made conditional upon the delivery thereof. It also transfers the right of guardianship over the woman from the father to the husband, especially if a woman is still a minor.

Besides the main purpose and function of ilobolo, there are other secondary functions. These are incidental and have been acquired by ilobolo in its constant adaptation to changing conditions. Some of the so-called functions are not really functions, but are mere rationalizations of or justifications for the continued practice of ilobolo. What is obvious is that ilobolo cannot be regarded as a panacea for all the ills of marriage. Because new functions are ascribed to ilobolo it will continue being popular for a long time to come. The idea that it is an African custom makes it all the more tenacious although this tenacity may be attributed to a number of factors.

Because ilobolo is a custom of long standing, it is difficult for the women to regard it as impinging upon their dignity, or constituting discrimination based on sex. They are in favour of it. It is only a few who regard it as unnecessary. Even those are in favour of making it a voluntary gift. Ironically it would also appear that the earlier denunciation and condemnation of ilobolo as a sale may have contributed to its persistence. It is well-known that when an institution

is criticised, the custodians thereof tend to be defensive. As a result the more it is criticised the more they cling to it. Like a tree that grows in a windy area it tends to send its roots deeper and firmer down. The same applies to ilobolo. The unfavourable treatment it received at the hands of westerners may have unconsciously caused blacks to cling to it at all costs with the aim of showing that it is not a sale but a noble institution. Finally it is also well-known that customs die, but they die hard.

FOOTNOTES

1. CL Harries The laws and customs of the Bapedi and cognate tribes of Transvaal (1929) I, says that most of the cases with which a commissioner has to deal are those relating to ilobolo. This is also the case with cases dealt with by the appeal court for commissioners' courts. A survey of the reports of the appeal court will confirm this.
2. Olivier et al 91 avoids discussing the original significance of ilobolo and only deals with the present functions thereof.
3. On the question of legal values in the western society see P Stein & J Shand Legal values in Western Society (1974) 1 et seq; Dias 165 et seq, S Jørgensen Values in law (1978) 9 et seq.
4. JL Comaroff (ed) The meaning of marriage payments (1981) 1 et seq; C Murray "High bridewealth, migrant labour and the position of women in Lesotho" 1977 Journal of African law 79 et seq; JC Muller "On bridewealth and meaning among the Rakuba, Plateau State, Nigeria" 1978 Africa 161 et seq.
5. JL Comaroff "Introduction" in JL Comaroff (ed) The meaning of marriage payments (1981) 19. See also other contributions in this work on diversity of functions attributed to ilobolo - A Strahen "The central and the contingent: Bridewealth among the Melpa and Wiru" in JL Comaroff (ed) The meaning of marriage payments (1981) 49 et seq; D Turton "The economics of Mursi bridewealth: A comparative perspective" in JL Comaroff The meaning of marriage payments (1981) 67 et seq; DB Rheubottom "Dowry and wedding celebration in Yugoslav Macedonia" in JL Comaroff (ed) The meaning of marriage payments (1981) 221 et seq; E Peters "Aspects of Bedouin bridewealth among Camel herders in Cyrenaica" in JL Comaroff (ed) The meaning of marriage payments (1981) 125 et seq; J Comaroff "Bridewealth and the control of ambiguity in

- a Tswana chiefdom" in JL Comaroff (ed) The meaning of marriage payments (1981) 161 et seq; D Parkin "Kind bridewealth and hard cash: eventing a structure" in JL Comaroff (ed). The meaning of marriage payments (1981) 197 et seq; RH Barnes "Marriage, exchange and the meaning of corporations in Eastern Indonesia" in JL Comaroff (ed) The meaning of marriage payments (1981) 92 et seq.
6. MDW Jeffreys "Lobolo is child-price" 1951 African Studies 151.
 7. Jeffreys 151.
 8. Reuter 233.
 9. Reuter ibid.
 10. Modestinus: D.1.23.2 gives the following definition: "Nuptiae sunt coniunctio maris et feminae, et consortium omnis vitae, divini et humani iuris communicatio"; Ulpianus says: "Non enim coitus matrimonium facit, sed maritalis affectio" -32.13.24.1; De Groot 1.5.1 defines marriage as, "een verzameling van man ende wijf tot een gemeen leven, medebrengeende een wettelick gebruick van malkanders lichaen"; E Westermarck Marriage (1920) 5 defines marriage as, "a union between a man and a woman that is sanctioned by society through the performance of a certain ceremony. It may be said that social recognition is everywhere a characteristic of marriage as a human institution"; R Linton The study of man (1936) 173 defines marriage as follows: "Marriage is a socially recognized union between persons of opposite sex. It differs from non-marital sexual relationships primarily through this factor of social recognition and through the increased duration in time which such recognition assumes. It derives its importance as a social institution from the fact that it provides a stable foundation for the creation and organization of a conjugal group"; Hahlo (1975) gives the following definition: "Marriage is the legally recognized union for life in common, of one man and one woman, to the exclusion while it lasts of all others"; see also s35 of Act 38 of 1927.
 11. H Cairns The law and the social sciences (1969) 40-1; Reuter 232.
 12. EO James Marriage and society (1952) 15 et seq; De Clercq 163.
 13. De Clercq ibid.
 14. Some of these similarities can be found among the legal systems of the Germanic peoples and those of the black tribes in South Africa- see also Hahlo (1976) 1 et seq.

15. E Cotran "The changing nature of African marriage" in JND Anderson (ed) Family law in Asia and Africa (1968) 15.
16. Cotran 16; Verloren van Themaat (1968) 48; Myburgh (1963) 61 et seq; HM Maimane "Christian marriage v Bantu marriage" 1942 South African Outlook 89 et seq.
17. GH Joyce Christian marriage: an historical and doctrinal study (1933) 39 et seq.
18. JTR Gibson Wille's Principles of South African law (1977) 87; De Clercq 165; Aquilius "Marriage by proxy - a warning" 1946 SALJ 355; Hahlo (1975) 28 et seq; Frankel's Estate v The Master 1950 1 SA 220 (A).
19. D Pont "Kan 'n minderjarige sonder die toestemming van sy ouers regsgeldig in die huwelik bevestig word"? 1980 THRHR 359 et seq.
20. There are a number of other features which distinguish a customary marriage from a civil one. Some of these will be outlined below. See De Clercq 168; JF Holleman Shona customary law (1969) 153 et seq; TW Bennett The legal status of African women in zimbabwe - Rhodesia Unpublished PhD thesis UCT(1980)69 et seq; Phillips & Morris 9; Cotran 16 et seq; Sila v Masuka 1937 NAC (N&T) 121.
21. Van Apeldoorn (1925) 10 points out that among the Germanic tribes this was also the primary purpose of marriage. But the purpose of marriage was much more than this since equating its purpose merely with the procreation would make it no better than concubinage. See also Harries 4; Reuter says "Naturally and very decidedly so in the case of Africans and their traditional ways, such regular marital unions are sought and contracted for the purpose of raising progeny : liberorum quaerendum gratia. Consequently the most important part of the 'value' of a woman is her child-bearing capacity" (at 224); The idea of reproduction of children as a paramount purpose of the marriage found strong support also among the Jews - Van Apeldoorn 11 et seq; Neufield 97; Reuter 224; Holleman (1969) 149. In fact productivity as being the ultimate end of marriage is not peculiar to the African idea of marriage but it is in accord with natural law - GH Joyce Christian Marriage : An historical and doctrinal study (1933) 16 where he says: "Marriage has a twofold end. Its primary end is the welfare of offspring: for its ultimate purpose is the continuance of the race and the preservation of its material and moral inheritance; and this purpose is identified with the welfare of the child". See also JM Spier An introduction to Christian Philosophy (1966) 200; IO Delano An African looks at marriage (1944) 27 NJ van Warmelo Venda law Part 2 (1948) 265. Delano for

example, says that the paramount purpose of marriage in the minds of most Africans is the production of children. Consequently sexual exercise and social duty are interwoven. This justifies polygamy in the sense that if children do not come as a result of marriage, the man tries another woman and in the majority of cases with the acquiescence of his wife. He advances a number of reasons why Africans regard child bearing as the paramount crown of marriage. Firstly the African's children are his glory and he is proud of their number. They are also his helpers "In bygone days his wives were his investment and his children were his dividends"(27). Although perhaps this attitude has changed, it nevertheless remains that marriage is a means to an end so much that if the marriage is childless it is often not a very happy one. See also Hahlo (1975) 3 who points out that during the fifth century according to the Church dogma the purposes of marriage were the procreation of children and the relief of concupiscence.

22. See below in this chapter.
23. Section 35 of Act 38 of 1927 defines a customary union as "the association of a man and a woman in a conjugal relationship according to black law and custom, where neither the man nor the woman is a party to a subsisting marriage". A marriage, on the other hand, is circumscribed as "the union of one man with one woman in accordance with any law for the time being in force in any province governing marriage, but does not include any union contracted under black law and custom or any union recognized as a marriage in black law and custom or any union recognized as a marriage in black law under the provisions of section one hundred and forty-seven of the Code of Zulu law contained in the Schedule to Law 19 of 1891 (Natal) or any amendment thereof or any other law". See also s22 of the Act on the special preliminaries to the conclusion of a marriage by a Black.
24. Morris and Phillips (1971) 3.
25. 1919 NAC 4 220 222.
26. Lieutenant-Governor of Natal, Keate, as quoted by Welsh (1969) 91-92.
27. Verloren van Themaat (1968) 48; De Clercq passim; Cotran 16.
28. Cretney quoted by KJ Renene "The 'dual' marriage and the 'Transkeian solution'" in AJGM Sanders (ed) Southern Africa in need of law reform (1980) 36 37.
29. s5(6) of the Maintenance Act 23 of 1963; s31 of the Black Laws Amendment Act 76 of 1963.

30. s82 bis of the Children's Act 33 of 1960; s4(3) of the Workmen's compensation Act 30 of 1941; s21 of the Insolvency Act 24 of 1936.
31. It is not a requirement for the latter. Morris & Phillips 4 et seq; see also J Lewin Studies in African Native law (1947) 43.
32. See chapter IV above.
33. Phillips & Morris 6; Delano 27; S Poulter Family law and litigation in Basotho society (1976) 63.
34. See chapter IV above.
35. Among the early Germanic tribes institutions like ilobolo and polygyny were allowed although only the rich could afford the latter. See also G Helander Must we introduce monogamy? a study of polygamy as a mission problem in South Africa (1958).
36. 18.
37. Joyce 19-29.
38. 20.
39. 8.
40. See Transkei Marriage Act 21 of 1978; see also RB Mqeke "The Transkei family system (with specific reference to the traditional African family) in the light of the Transkei marriage Act 21 of 1978" 1980 Institute for Public Service and Vocational Training Bulletin vol 4 No 1 41 et seq; Renene op cit 36 et seq; see also C van Loggerenberg "The Transkeian Marriage Act of 1978 - a New Blend of Family law" 1981 Obiter 1 et seq. On Tanzania see The Law of Marriage Act 4 of 1971; see also JS Read "A milestone in the integration of personal laws : the Law of Marriage and Divorce in Tanzania" 1972 Journal of African law 19 et seq; JCN Paul "The 'modernization' of family law in Africa" 1977 Unpublished manuscript et seq.
41. Ebrahim v Essop 1905 TS 59; R v Nalana (1916) 37 NLR 535 539; Seedat's Executors v The Master (Natal) 1917 A D 302 307 et seq. The supreme court of the Federation of Rhodesia and Nyasaland influenced by the lenient attitude of the English reached a different decision in Estate Mehta v Acting Master, High Court 1958 4 SA 252 (FC), 1958 R&N 570; see also E Kahn "Recognition of foreign polygamous unions" 1960 SALJ 276; MP Furnston "Polygamy and the wind of change" 1961 International and comparative law quarterly 180; PRH Webb "Potentially polygamous marriages and the capacity to marry" 1963 International and comparative law quarterly 672 et seq;

see also E Kahn in Hahlo (1975) 599 et seq. This is an exception to the rule that the lex loci celebrationis determines the essential validity of a marriage - see GC Cheshire and PM North Cheshire's Private International Law 8 ed (1970) 289 et seq.

42. Helander 14. Blacks were puzzled when the early missionaries condemned organized polygamy whereas divorce was permitted. Divorce and remarriage was formerly almost unknown to them. To them this was "consecutive polygamy" which seemed to be more incongruous than the old polyanic institution; see also Read 26.
43. See LC Steyn "Regsbank en regs fakulteit" 1967 THRHR 104; Sila v Masuku 1937 NAC (N&T) 121.
44. Hahlo and Kahn (1973) 372.
45. Supplementary minutes of evidence 518-520.
46. 1937 NAC (N&T) 121 at 122.
47. Reuter 212 says: "Considering the widespread misinterpretations of the custom it is not surprising that its defenders sometimes overstressed their arguments".
48. Bekker & Coertze passim; Simons (1968) 87.
49. Reuter 210.
50. Soga 265; Reuter 210.
51. Reuter 211 says: "Yet on account of European historical analogies with the general African custom of 'payments or gifts made by the groom or his group to the father or group of the bride' the same term admits of so broad a meaning and extension as to include two very different and even opposed kinds of prestations, both of which are connected with marriage and clearly marked as such by the term".
52. See chapter two above; see also Simons (1968) 87.
53. E Torday "Bride-price, dower or settlement" 1929 Man 7.
54. This was mostly the view of the early missionaries some of whom testified before the 1883 Commission; Warner, for instance says; "Marriage ... has degenerated into slavery, and simply the purchase of as many women by one man as he desires, or can afford to pay for". In Maclean CB A compendium of Kaffir laws and customs (1968) 70 et seq. Earlier anthropologists also laboured under the same misapprehension - see Lowie 17; AT Bryant is also so emphatic that ilobolo is a price for the woman. He canvasses a number of reasons to support his argument. It will be illuminating to quote his arguments

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43. See LC Steyn "Regsbank 104; Sila v Masuku 1937 NAC (N&T) 121. regsfakulteit" 1967 THRHR NAC (N&T) 121.
44. Hahlo and Kahn (1973) 322.
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48. Bekker & Coertze passim; Simons (1968) 87.
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extensively. "For the cattle are her true value, and now legally established price without payment of which no girl is possibly obtainable; for the law invariably supports the father in his refusal of consent to a daughter's marriage, even though that refusal be based solely on the non-payment of lobola. But upon the delivery and acceptance by the father or guardian of these cattle, and in exchange therefore, the girl becomes the rightful property of the payer and this until recent years, even though the girl herself were unwilling. The cattle are demanded by the father as the price of his property, and are no more asked as a gift than is the money demanded by a storekeeper for his wares. They are not given nor demanded, as a recompense to the father for his care of the girl during her earlier years; for the fact of his having given or not given this care is not made the condition upon which his right or non-right to claim the cattle depends but only the fact of her being his daughter; and even though the child, from any cause of parental neglect or otherwise, has grown up elsewhere, those who have so cared for her throughout her life do not thereby become entitled to her lobola cattle", Zulu-English Dictionary (1905) 360.

In a further publication he supports this theory and points out that certain questions can only be answered in the light of the transaction being a sale. According to him there is a lot of bargaining and "the decisive element is that bargain is payment". But he concedes that this sale is subject to conditions and obligations on the part of the buyer, to wit, that the latter secures the sole right to the usufruct of the property so long as he wishes, "he obtains a life-base on it, on condition that he treat it well, and on the understanding that he shall not re-sell it to another party". But if he did not care to retain possession of the bride and divorced her or ill-treated her his ownership would be forfeited and she revert to her father - The Zulu people : as they were before the Whiteman came 2 ed (1967) 592 et seq. See also Bekker & Coertze 149 who avers that according to ancient law payment of "dowry" originated as a species of sales or exchange. In primitive patriarchal societies, he continues, the head of the family had the ius vitae necisque over his children, the power to sell them in bondage or to give them in marriage. See also HA Junod The life of a South African tribe (1927) 281.

54. (a) Welsh (1969) 78.

55. 269.

56. Report of 1883 Commission 29 et seq; see also Brookes 119 et seq; Reuter 213; Soga 269.

57. Simons (1968) 88. According to him commercial contracts were relatively unknown in a self-sufficient domestic

economy of the pre-colonial society. The small amount of barter or exchange fell short of constituting anything like an exchange economy. He argues that there is not enough evidence that the concept "sale" in the modern sense of the word had developed; Olivier et al 88; J van Tromp Xhosa law of Persons (1947) 48, GMB Whitfield South African Native law (1948) 2 ed 84; Holleman Shona customary law 148, JB Hartman Die samehang in the Privaatreg van die Changana-Tsonga van Mhala met verwysing na die administratiefregtelike en prosesregtelike funksionering (1975) unpublished D Phil thesis University of Pretoria 275; EE Evans-Pritchard "Social character of Bride-wealth with special reference to the Azande" 1934 Man 172 who says: "Bride-wealth has everywhere an economic value ... Because bride-wealth has productive and exchange value we must not argue that its psychology is similar to the psychology of purchase in our own culture an argument which has only to be stated for its absurdity to be acknowledged by everyone" He further points out that it is expressed in terms of economic value. See further Simons (1968) 92; HPH Junod "Bantu marriage and Christian Society" 1941 Bantu Studies 27.

58. Reuter 223.
59. E Torday "The principles of Bantu marriage" 1929 Africa 275; Holleman (1961) 19. This is still largely the position among the Shona and the Venda.
60. Torday ibid; Holleman ibid.
61. ibid.
62. CK Meek "Marriage by exchange in Nigeria; a disappearing institution" 1936 Africa 64; Reuter 236 et seq.
63. M Hunter Reaction to conquest (1936) 212 et seq; Soga 264; Seymour 143; MG Stafford & E Franklin Principles of Native law and the Natal Code (1950) 146. Perhaps this may be the case with Xhosa law seeing that the return of the woman after she has absconded because of the husband's ill-treatment can only be secured by delivery of at least one beast. The argument is that a lobolo contract has greater binding force than a marriage at common law. In the case of desertion there would be no greater incentive to comply if an order for restoration of conjugal rights was made except the influence of public opinion, religion or conscience on a sensitive soul; see also DWT Shropshire Primitive marriage and European law: a South African investigation (1970) 77 et seq; Olivier et al 88; I Sibiya Contemporary trends in marriage and its preliminaries among the abakwaMkhwanazi (1981) Unpublished MA Dissertation UZ 225 et seq. Van Tromp 48; Hartman 275; Torday (1929) 273; P Becker Tribe to township (1974) 83.

64. 173.
65. 174.
66. On the choice of a partner see I Sibiya Contemporary trends in marriage and its preliminaries among the abakwaMkhwanazi (1981) Unpublished MA Disseration 64-104; De Clercq 172 et seq; Vilakazi (1962) 59 et seq.
67. Sibiya 227.
68. EJ Krige "Changing nature in marital relations and parental duties among urbanized Natives" 1936 Africa 20; Holleman (1961) 17; DWT Shropshire Primitive marriage and European law: a South African investigation (1970) 90 et seq.
69. Phillips and Morris 11.
70. EE Evans-Pritchard "The position of women in primitive societies and in our own" in EE Evans-Pritchard (ed) The position of women in primitive societies and other essays in Social Anthropology (1965) 47.
71. ibid.
72. Sibiya 227.
73. Phillips and Morris 11.
74. I Schapera A handbook of Tswana law and custom (1970) 138.
75. See more of this below.
78. Msimang 266.
79. 1883 Commission Report 30 and evidence of RW Beste at 147; see also Van Tromp 47.
80. Soga 277; Van Tromp 47.
81. Van Tromp 48.
82. Bekker & Coertze 205; Van Tromp 48.
83. Krige 121; Soga 264; Reuter 215; De Clercq 248; Brookes 119; Van Tromp 49; Hunter 190; Lugg 23 et seq; Sibiya 220.
84. Krige 122.
85. HHT Marwede & GG Mamabolo Shall lobolo live or die? (1945) Part 1 4-5.
86. Harries 3.

87. Sibiya 221.
88. Marwede 5.
89. JL Comaroff "Introduction" in JL Comaroff (ed) The meaning of marriage payments (1981) 6.
90. D Turton "The economics of Mursi bridewealth : a comparative perspective" in JL Comaroff (ed) The meaning of marriage payments (1981) 75.
91. Van Tromp 49.
92. Olivier 91; Bekker & Coertze 149; Jeffreys 145; Gluckman (1960) 184; Schapera 139; GJ Ligthelm and JMT Labuschagne "Die vroulike reproduksievermoë as regsobjek in die Bantoereg" 1976 De Jure 318 et seq; FA de Villiers "Die Regsposisie van in owerspel verwerkte Bantoe" Huldigingsbundel Daniel Pont (1970) 29; Bruwer 71 and 75; H Ashton The Basuto 2 ed (1967) 73; Junod 279; Hartman 276 et seq. HPH Junod "Bantu marriage and Christian Society" 1941 Bantu Studies 27; JE Bradley Die Mandlakazi : 'n Onderzoek na enkele kultuuraspekte 1970 MA Dissertation PUCHO 72; JE Mathewson "Impact of urbanization on 'lobolo'" 1959 Journal of Racial Affairs 72; Torday 276. The latter author observes that this fertility payment "becomes illogical if it is remembered among many if not among the majority of Bantu tribes the child never passes into the legal custody of the father or his people but belongs to its mother's clan"; Harris 61.
93. Jeffreys 153 et seq.
94. Ligthelm and Labuschagne 319.
95. Op cit 153 et seq.
96. Jeffreys 151.
97. 150 et seq.
98. Holleman (1961) 156-7 agrees with Jeffreys that ilobolo purchases the woman's reproductive capacity and should be distinguished from the legal validity of the marital union. Where he disagrees with him, however, is in his contention that marriage and ilobolo are not connected at all and his failure to bring out the fact that ilobolo is the inevitable result of a partrilinal and exogamous kinship structure. Reuter 232 shares the same view; See also Gluckman 200.
99. Objections against the theory have been expressed already.
100. JC de Wet and AH van Wyk De Wet and Yeats Die Suid-Afrikaanse kontraktereg en handelsreg 4 ed (1978) 278.

101. 157 & 160. He refers to writers like Whitfield p 209 who for instance says: "If through premature death, barrenness, or for some other cause not her husband's fault, she fails to fulfil her essential function of bearing children the husband need not pay bogadi for her"; He also refers to the Code (s59(1)); Mbonambi v Sibiya 1944 NAC (N&T) 49. Reuter 232, it is submitted, correctly does not uphold the view that in such cases ilobolo exists independently except in the so-called woman-marriage where a woman assumes the role of a husband taking wives in her own right or on behalf of a dead man without male issue, there is always a marriage at stake if only an inchoate one, as in the case of ukungena with a bride for which the lobolo had been paid.
102. Jeffreys 163. This Practice is largely found among the Venda, the Pedi, the Sotho and Swazi. It is also interesting to note that these unions are regarded by those groups who practice them as a marriage. See further on this EJ Krige "Woman-marriage, with special reference to the Lovedu - its significance for the definition of marriage" 1974 Africa 11-36; Reuter 233 referring to such cases says: "So the conclusion might not be unfounded that in these cases of para-marital institutions, including even the initiative aspect of 'woman-marriage', there is no complete or absolute separation of lobolo from marriage which one feels tempted to regard as the basis and origin of lobolo". According to SNC Obi Modern family law in Southern Nigeria (1966) 157 this is not normally a marriage between one woman and another stricto sensu. As his reason he points out the fact that it is not unusual for mothers to make these payments on behalf of their sons, and "Yet anyone is to suggest that in these latter cases the legal husband is not the man on whose behalf the marriage payments were made, but his mother, father, guardian or uncle as the case may be - these being merely benefactors". But in those cases where unmarried women do procure such unions the latter are usually formed in the name of the "woman-husband's father and consequently a so-called ghost-marriage". As a result he comes to the conclusion that there is no difference in kind, although there may be one in procedure, between the so-called "woman-to-woman" marriage and the regular man-to-woman marriage - at 158.
103. 164. He argues rightly so, it is submitted that such a practice is foreign to the African culture and hence there is no African word for it.
104. 165.
105. Reuter 223; Obi 157 et seq. Reuter 233 further says "If we assume correctly that lobolo is bound to

marriage by reason of its origin and continues to operate in connection with marriage in spite of the exception referred to which is, however, aping a marriage, we must further infer that there is no perfect parallelism of "inherent connection" between lobolo and marriage and also no perfect parallelism of independence between them". In any case there is no evidence that this institution was prevalent among the Zulu.

106. Reuter 233.
107. 170-172; Olivier et al 93; Hartman 276.
108. Gluckman (1960) 185.
109. See s94(1) of the Code.
110. Olivier et al 98.
111. Olivier et al ibid.
112. Olivier et al ibid. This was the view held by the informants interviewed. In fact they even pointed out that in many instances this could happen upon the recommendation of the sterile woman. In the case of childless death it is doubtful whether the lobolo would be returned in early customary law.
113. This is the view held by informants interviewed at Mpukunyoni. On the other tribes see Sibiya 224-5; De Clercq 388; Olivier ibid also points out that the husband has no claim against his wife's family for a substitute or divorce and return of ilobolo in the case of sterility and no woman would be forced to be a substitute; see also JD Krige "The significance of cattle exchange in Lovedu social structure" 1939 Africa 393; Reuter 220; EJ Krige "The place of the North-Eastern Transvaal Sotho in the South Bantu complex" 1938 Africa 265.
114. Olivier ibid; Sibiya 225.
115. 172.
116. 174
117. See below.
118. 174.
119. It is, however, taken note of that among the Tswana the return of bogadi is not possible if the woman has borne children.

120. Simons (1968) 90; SN Moeno The urban African family disorganization with special reference to the problem of illegitimacy(1969) Unpublished MA dissertation UZ 90 et seq.
121. 90; Holleman 205; Hunter 186; Bekker & Coertze 101; Bruwer 72; Reuter 224.
122. Moeno 90 et seq.; Sibiya 222.
123. Hunter 190, 213.
124. This is why certain girls have names like Zibuyile etc. On the other hand saying such as "lobolo beget children" and "children are where the cattle are not" which have been used by certain writers to support this theory are not of Zulu origin. Possibly they belong to other tribes.
125. Whitfield 69; Radcliffe-Brown (1950) 80; Gluckman (1950) 184.
126. Whitfield 213.
127. Harries 29, 36, 37; Whitfield 69, see also EJ Krige "Property, cross-cousin marriage, and the family cycle among the Lobedu" in RF Gray & PH Gulliver The family estate in Africa (1964) 163.
128. Whitfield 69.
129. Mhlala v Mohlala 1938 NAC (N&T) 112; Nkambule v Shonge 1941 NAC (N&T) 2.
130. Bekker & Coertze 229; ss 30, 44(2) of the Code.
131. Butelezi v Ndhlela 1938 NAC (N&T) 175; Zulu v Mdletshe 1952 NAC (N-E) 2-3; Mngomezulu v Lukele 1953 NAC (N-E) 143.
132. Butelezi v Ndhlela 1938 NAC (N&T) 175.
133. Whitfield 206.
134. AC Myburgh EzakwaZulu (1943) 227.
135. Reuter 215; Ligthelm & Labuschagne 318-9.
136. Reuter ibid.
137. The observance of a customary rule is accompanied by a psychological element known as opinion iuris.
138. Simons (1968) 90.
139. Shropshire 91 et seq.; Myburgh 227; Evans-Pritchard (1934) 172; Lugg 24.

140. Hunter 190-192; Hoernle (1925) 481.
141. Reuter 224.
142. This information has been confirmed by informants interviewed from Mahlabatini and kwaMpukunyoni.
143. Msimang 264.
144. Myburgh 227.
145. It must be pointed out that such loose unions are uncommon in traditional Zulu society because of the social sanctions against them. Besides ilobolo there were, of course, other requirements. Ilobolo was simply one of them. Hunter 193 remarks that the decay of the ancestor cult has changed the significance thereof.
146. Lugg 25.
147. Bekker & Coertze 133-4; Church (1975) 28.
148. Brookes 119; J Church "Legal position of African women" 1975 Codicillus vol 16 no 2 25; Olivier et al 91.
149. AN Allott "African law" in JDM Derrett (ed) An introduction to legal systems (1968) 153-4. He has correctly summarised the purpose of ilobolo.
150. M Brandel "Urban lobolo attitudes: a preliminary report" 1958 African Studies 34 at 38 says:
- "In fact lobolo is fast becoming a new institution with altogether different functions around which new and different customs and conventions are arising, and from which the people are expecting different need satisfactions".
151. Mathewson 72; E Hellman "Native life in a Johannesburg slum yard". 1935 Africa 52; A Vilakazi Zulu transformation (1962); EJ Krige "Changing conditions in marital relations and parental duties among urbanized Natives" 1936 Africa 1; J Mzibuko "The traditional religion amongst the Zulu-speaking Church members of the Umlazi Township" 1974 Faculty of Theology Bulletin No 4 1; AH Mbatha "The Zulu traditional religion among the church members of Umlazi Township" 1974 Faculty of Theology Bulletin No 4 15 et seq; J Church "'Lobolo' - a critical evaluation" in AJGM Sanders (ed) Southern Africa in need of law reform (1981) 29; Evans-Pritchard 26.
152. Brandel 39. Although Brandel wrote about the urban lobolo attitudes as against tribal or rural ones today,

owing to various factors, it is no longer easy to distinguish between urban and rural lobolo attitudes - see A Vilakazi "Urban lobolo attitudes" 1959 African Studies 81. In investigating the changes one must examine the underlying value system because urban living in the geographical sense does not necessarily imply any changes in values.

153. 94; see also Moeno 98.
154. Brandel 42; Moeno 91.
155. Evans-Pritchard 28-29.
156. JD Petersen "Divorce law reform" 1971 SALJ 478 at 481.
157. HR Hahlo "Can law reform stop the disintegration of family life"? 1954 SALJ 391.
158. Brandel 48; Krige 121; Moeno 93; Sibiya 221-222.
159. Soga 282; Brandel 43; Holleman (1961) 18.
160. Brandel 48.
161. The Marxist view is that the delaying of the marriage of youths perpetuates their dependence on parents and retains their labour services - see Comaroff 22.
162. Petersen 481.
163. Brandel 49; Moeno 94.
164. Sibiya 220.
165. s59 of the Code does not mention it as one of the essential requirements for the conclusion of a valid customary marriage.
166. Moeno 100 et seq.
167. Holleman (1961) 18; Brandel 48.
168. Moeno 100.
169. PQR Boberg The law of persons and the family (1977) 35; JTR Gibson Wille's principles of South African law (1977) 58.
170. Reference has already been to this in chapter 2, when discussing the attitude of the early missionaries to ilobolo.
171. Brandel 41.

172. For a contrary opinion see Junod 28.
173. Brandel 41.
174. TW Bennett "The status of children under indignous law: the age of majority" in AJGM Sanders (ed) Southern Africa in need of law reform (1981) 18 et seq.
175. s59(1) (a) of the Code.
176. s22 ter (i) of the Administration Act.
177. On this see DK Nkadimeng "Consent to African marriages" 1974 Speculum iuris 84.
177. (a) s42(3) of KwaZulu Act.
178. This section is similar to s25(4) of the Marriage Act 25 of 1961.
179. In terms of the Code the woman is a perpetual minor - s27 of the Code. This has been amended by s19 of the KwaZulu Act on the Code 6 of 1981.
180. DWT Shropshire The Bantu woman under the Natal Code of Native law (1941) 5 et seq relates a number of such cases.
181. Declaration on Elimination of Discrimination against Women 1967.
182. DD Nsereko "The nature and function of marriage gifts in Customary African marriage" 1975 The American journal of comparative law 703.
183. Shropshire (1970) 81; Brandel 44.
184. Mathewson 71; Simons 95; Phillips and Morris 10; Holleman (1961) 11.
185. Simons (1968) 95; Brandel 44; Mathewson 74-75.
186. SIMons (1968) 95.
187. Simons (1968) 88, 94-95.
188. idem 94.

CHAPTER VI

THE NATURE AND AMOUNT OF ILOBOLO

6.1 INTRODUCTION

It is intended in this chapter to investigate in historical perspective the nature and size of ilobolo to find out whether changes have been properly accommodated in the modern Zulu law.

6.2 THE NATURE OF ILOBOLO

6.2.1 The original nature of ilobolo

It has already been said above that there was in early Zulu law no fixed medium of ilobolo although quite early cattle came to be the standard one. Not only among the Zulus, but also among other black tribes in Southern Africa and even Africa where cattle were used as ilobolo.¹ If a man could not afford to deliver cattle, he could even count stones which symbolised that he would deliver cattle when they became available.² This was largely the practice during the years after 1896 when the country had been ravaged by a rinderpest epidemic which decimated thousands of cattle.³

The use of cattle for ilobolo purposes is to be attributed to the fact that in an agricultural-pastoral economy cattle were the principal means of exchange, money being practically unknown, and as a result represented the most valuable possession a man could have.⁴ In traditional society they were also of ritual significance.⁵

Besides cattle, other valuables or livestock could be given. These included hoes, grain, sheep or goats.⁶ Among most black tribes, ilobolo cattle are supplemented with sheep, goats, horses and other things for various reasons.

The Sotho, for instance, deliver a horse called "molisana" a shepherd, symbolically implying that the herdboyc will use it in tending ilobolo cattle.⁸ There are areas among the Zulu people where they demand a horse. Although it is not clear whether this is due to Sotho influence, it is clear that such a horse has no symbolical significance among the Zulus as among the Sotho.

Among the Venda the bridegroom has to give a goat called thamu, a "switch" in which case he will be excused from delivering ilobolo cattle himself. In the absence of the "switch" he is obliged to deliver ilobolo cattle personally.⁹ There are certain areas where the Zulus demand goats, but these do not have the same function as among the Venda. Nor does failure to deliver a goat engender an obligation on the bridegroom to deliver ilobolo cattle personally, as among the Zulus this is always done by abakhongi (messengers).

With the introduction of the money economy, the use of money in the place of or together with cattle also grew. This change was also facilitated by the decrease in the number of cattle and other livestock whereas money is just as important if not more so a medium of exchange as cattle, although it lacks the religious magic so closely connected with cattle in traditional Zulu society.¹⁰ A compromise had to be struck between continuing the custom under a new garb or letting it perish in old costum. The use of other media like hoes and grain has practically fallen away. These may only still be demanded as part of ilobolo or as izibizo (literally demands).

6.2.2 The present nature of ilobolo

Section 86 of the Code provides that ilobolo should consist of a "fair average cattle or, their equivalent in other stock or property and for the purposes of any dispute the value of each lobolo cattle shall be regarded as ten rand".

This section is a reflection of general practice in South Africa, to wit that money may be accepted in the place of cattle. This will also apply in the return of ilobolo on dissolution of a marriage, and also when damages are paid for seduction adultery and other delicts.¹¹

In the absence of an express agreement to the contrary, ilobolo will, as is the custom, consist of livestock. The plaintiff may in the alternative pay cash.¹² Especially in the urban areas, and increasingly in the rural areas money has taken the place of cattle although it is still customary to refer to the property so given as "cattle".¹³ This practice has grown out of the custom of delivering ilobolo in cattle so that even after the change to money the traditional idea that it should be cattle remains. In this way money is symbolical of cattle. The use of money can be attributed to a number of reasons : the scarcity of cattle, the high cost of cattle, and the inability to rear cattle in the urban areas.

Although ilobolo may consist of both cattle and money, there is no fixed rule as to what should form part of ilobolo, and the proportion of the components. The parties have complete freedom of choice.¹⁴ Sometimes both livestock and money are given.¹⁵ The parties frequently bargain when fixing ilobolo. If cattle are delivered as ilobolo, they seldom consist only of prime cattle, but of a mixture of small and big ones.¹⁶ Even when money is given some make use of this principle.¹⁷

A look at the practice of some of the black tribes is appropriate. Among the Tswana ilobolo (or bogadi) is almost invariably given in cattle. Sheep may also be given if a man has no cattle, but goats are not acceptable owing to their destructive tendencies.¹⁸ Cattle should include cows that must also be young to facilitate increase.¹⁹ Although cattle may consist of a mixture, bulls should not form part of ilobolo because they portend a disastrous marriage.²⁰ Among

the Zulus there is no rule against the giving of a bull as part of ilobolo. When a cow with a calf is given, the calf is treated as an additional beast.²¹ Oxen and calves may also be included.²²

Although the rules relating to the number and nature of bogadi have a social rather than a juridical significance, for instance the delivery of an uneven number is an evil omen and the delivery of a bull portends a disastrous marriage, the contravention of these rules is not altogether irrelevant for legal purposes. The inclusion of a bull may for instance be regarded as bad faith which may entitle the woman's father to terminate the engagement.²³ Among the Shona, however, the inclusion of a bull is recommended. It is known as gona reddanga "the bull of the herd", and is a medium between the family and ancestors.²⁴ This illustrates the saying that one man's meat is another man's poison.

Among the Shona ilobolo (rovoro) is given in cattle. The size and age of the animals is in the discretion of vakuwasha (a collective name for the bridegroom's group). They should not all be of one kind, but should be mixed to facilitate reproduction.²⁵ Although according to Shona law, rovoro may consist of cattle and a cash amount known as rutsambo, the Shona do not regard the monetary portion as true rovoro because it is not a wife producing potentiality which among them is the main function of rovoro. It is rather regarded as one of the pre-marital expenses which are not returnable once the marriage has been contracted. As a result it does not occur in all marriages. The amount to be given is stipulated by the tezwara (a collective name for the bride's family group), at the time of the demand for rovoro, although it usually precedes the delivery of rovoro cattle. The rutsambo is returnable or not returnable, as the case may be, when an engagement is breached, according to who is the guilty party.²⁶

Among the Shangaan-Tsongas, ilobolo consists basically of cattle although other articles of value could be given especially in the past.²⁷ At present ilobolo may consist either of cattle or of money, but not of horses, goats, sheep, pigs or any other goods. It seldom happens that ilobolo consist only of money. When cattle are delivered, there is no rule relating to the type and sex of the cattle except that one of them the ku pfala hlahla - beast must be a bull.²⁸

The composition of the cattle is determined by the father of the bridegroom. The bride's father has the right to reject the offer made if he is not satisfied therewith, and may stipulate how the lobolo should be composed. He also has the right to reject ilobolo offered only in cash, and is entitled to fix the proportion between the money and the livestock portions thereof.²⁹

According to Venda law, ilobolo may consist of livestock, elephant tusks or money. Although sheep and goats were used earlier on when cattle were scarce, they are today no longer used.³⁰ Hoes and other valuable articles could be used by those without cattle. In times of famine and rinderpest food could also be given,³¹ while for girls of royal blood ivory could also be used.³²

From this brief comparative survey it is clear that the main means of ilobolo is cattle although other livestock or even valuables could be used in the past during times of famine or epidemic. Today cattle or cash are used in settling ilobolo demands. There is no general rule as to the proportion of the livestock and cash components of ilobolo, the parties being free to agree on anything. This practice is commendable in that it prevents rigidity and allows the parties to agree according to their means.

In the Cape it has been decided that it is in the father of the bride's discretion to stipulate whether ilobolo will

consist partly or completely in cash.³³ His wishes will prevail since failure to comply therewith will entitle him to withhold his consent to the marriage.³⁴

In Msimang v Sitole³⁵ it was decided that s86 does not give the woman's father or guardian the option of electing whether to receive cattle or their monetary value as ilobolo, but it will only be where cash has been paid instead of cattle and where a dispute arises as to what number of cattle is represented by such cash, that the section will apply. The option of delivering cattle or paying cash was said to be the bridegroom's. It has also been said that the R10 equivalent will also apply on dissolution of a marriage and when damages are paid for seduction and adultery.³⁶

The decision in Msimang's case is not in accord with what happens in practice. According to research done, the woman's father either insists on cattle being given or that at least half should consist of cattle and the other half in cash. In some areas the father requires at least two head of cattle on the hoof with a view to the slaughter for festivities. In other instances the woman's father accepts what the bridegroom offers. The tendency for the woman's father to stipulate the composition of ilobolo is particularly strong in rural areas.³⁷ Although the bridegroom may resort to legal action, he seldom does this because it may sour relations, and he simply complies.

The demand to deliver cattle may be highly unreasonable where the bridegroom comes from an urban area where cattle are not obtainable. When this issue was raised with some informants from KwaMpukunyoni, their reply was simply that he should come to their area when there is an auction sale and he will obtain them. This attitude is still characteristic of the traditional Zulu practice of treating the intending bridegroom with lack of sympathy until ilobolo has been settled. They even say expressly that "We are the ones who are loved and a

person who wants something must be prepared to pay the price".

Obviously if a dispute came before the court, the court would in following Msimang's case decide that the bridegroom should pay cash. There is much to be said in favour of this ruling. It enables a bridegroom who is unable to obtain cattle to settle ilobolo demands and hence facilitates marriage. It also limits the power of the woman's father in unreasonably insisting on ilobolo being settled in livestock. Its value is, however, limited as few bridegrooms will be willing to sue their fathers-in-law.

The insistence on ilobolo being settled in cattle has economic and religious undertones. It was pointed out above that cattle were in the past largely used for purposes of communicating with the dead ancestors. This idea has not completely died out among traditionalists. While cattle have increased fifty fold in value, money has decreased. If one for instance demands R1000 as ilobolo for his daughter, it may appear to be too high an amount. Yet in comparison with ten head of cattle on the hoof, that is relatively meagre. One can hardly come by a head of cattle for anything less than R200. But to demand the actual value per beast in the area would psychologically shock and financially ruin the bridegroom. One informant revealed that when he settled ilobolo for his wife he never paid anything less than R200 per beast. Moreover, people in the rural areas are afraid of demanding money because of the wrong interpretation of s86 of the Code.³⁸

It is doubtful whether in deciding that the bridegroom is entitled to deliver livestock or to pay cash the court would be prepared to take these factors into account. It is submitted that the court should not entirely ignore these considerations. Whether or not a man should deliver part of ilobolo in livestock should depend on the availability of cattle, the religious beliefs of the father of the bride, the ability of the bridegroom to buy cattle and the degree of

acculturation of the parties, it being assumed that a more sophisticated person would not necessarily insist on cattle.

Settlement of ilobolo in cash has been standardised in other parts of the country,³⁹ and this is more suitable to the urban areas.⁴⁰ Yet the change from cattle to money has affected the value of ilobolo. It has injected the economic element into ilobolo and as a result defeats the purpose thereof.⁴¹ Moreover, money is easily dissipated, and fails to serve the purpose of being an expression of the husband's good faith. This inclines traditionalists to look upon payment in cash with disfavour because money is quickly consumed. Among the traditionalists there is still the belief that a father should retain a few head of cattle obtained for his daughter which will then serve to remind him of her.

Besides this, if the wife is the party at fault in the dissolution of a marriage, it will be a futile exercise for the husband to reclaim monetary ilobolo as it is immediately consumed after the marriage.⁴² Money is also adversely affected by inflation. Ilobolo delivered in cash is pervaded by the spirit of commercialism and it is liable to escalate.⁴³ As the money is usually contributed by the husband himself, the traditional checks and balances have disappeared because, it is said, the kinship group no longer feels responsible to exercise pressure on the couple to behave with due decorum.⁴⁴

It is, however, doubtful whether the responsibility which the kinship group had was motivated purely by its contribution to ilobolo. The solidarity of the kinship group must have been responsible for this. The disintegration of the group owing to individualism has therefore resulted in the weakening of such solidarity and consequently the ineffectiveness of the group in exercising restraint on the spouses.

Among the Shona a man who is unable to obtain property for purposes of ilobolo can contract what is called kugarire, a

"service-marriage" whereby he obtains the wife against a long-term service contract in the employment of his father-in-law. This type of marriage has two forms. The one is where the bridegroom would enter the father-in-law's service for an unspecified time. Meanwhile he may marry the woman and have children from her although he might regain his freedom if he obtained sufficient cattle. He, however, will not be able to acquire guardianship over his children while he, himself, is under the guardianship of his father-in-law. He will only acquire guardianship over them when he regains his freedom. The other form of marriage is where a man of rank adopts his servant or poor young man, and gives him his daughter as wife in return for his faithful and full-time services. This one is a lifelong obligation and cannot be transformed into a normal rovororo marriage.⁴⁵ This type of marriage is unknown to Zulu law although it was known among the early Jews. Even among the Shona it is rare.

The change in the nature of ilobolo is however, irreversible. Cattle and other stock are now difficult to come by. As a result money will effectively supersede livestock as a medium of ilobolo, especially in urban areas.

6.3 THE AMOUNT OF ILOBOLO

6.3.1 The original amount of ilobolo

It has already been indicated that in early Zulu law ilobolo was not fixed, but depended on the bridegroom's ability to provide although the initial delivery of four or five cattle did not mean the lobolo had sufficiently been settled because ilobolo was indeterminate according to the principle that the bridegroom is a log (isigodo sokuqhuzula).⁴⁶ It is logical that if the bridegroom gave many cattle as ilobolo before marriage his father-in-law would not easily come to him for aid later except under exceptional circumstances.

The escalation of ilobolo demanded led to its limitation by legislation.⁴⁷ The provisions were subsequently included in the codified Zulu law.⁴⁸ The change of the indeterminate character of ilobolo according to which gifts had to pass to and fro between the two family groups for as long as the marriage relationship had to last, has been lamented in that it made ilobolo a "fixed price" and was contrary to the spirit of customary law.⁴⁹ However, well meaning this criticism may be, it is submitted that such an original practice could not continue indefinitely because it would be economically wasteful. When people became greedy for gain they might economically ruin a young man intending to marry. This practice could not be continued despite the disappearance of the guiding principle which has earlier on motivated it.

In its traditional setting this principle was quite equitable and flexible. It made ilobolo dependent on the means of the bridegroom so that a man who did not have many cattle was enabled to marry after giving a few head of cattle. At the same time it created a relationship of friendship between father-in-law and son-in-law. One cannot, however, restore that practice without the moral base on which it rested. That is sufficient justification for its limitation.

The limitation of ilobolo raises all sorts of questions. One of them is whether it has done away with the idea of umkhwenyana (bridegroom) being isigodo (a log) - In other words can the father-in-law later on come to his son-in-law after marriage and ask for a beast or two? Should the bridegroom comply with this request, can he later reclaim them as part of ilobolo? Obviously the limitation of ilobolo did not do away with this traditional principle. It has, however, limited its application. As to what was the effect of this practice in the past, there is no easy answer from informants because they reiterate that divorce in traditional society was unknown. But under present Zulu law a person who gives a few head of cattle after the marriage cannot regard them as forming part

of ilobolo unless they are delivered as the balance of ilobolo. If he should purport to claim them back, he would not succeed. This is because ilobolo contract is concluded before marriage and must be deemed to have been properly performed if cattle are delivered in terms of the agreement concluded. A later delivery may be regarded as a separate contract of loan or donation. If the cattle were given as a gift, the bridegroom cannot reclaim them. If they were given as a loan it means that if the bridegroom can prove that, he is entitled to reclaim them, but he cannot purport to reclaim them as part of ilobolo.

6.3.2 Present amount of ilobolo

6.3.2.1 Ilobolo given in livestock

The amount of ilobolo given in livestock varies from tribe to tribe. In some there is none fixed. In others it is fixed by custom, and in yet others it is fixed by agreement.⁵⁰

The number of ilobolo cattle among the Zulus is today fixed by statute.⁵¹ It differs according to the rank of the bride's father in accordance with the earlier law.⁵² Exceeding the prescribed limit is an offence.⁵³ The absence of limitation in respect of chiefs has been regarded as a reward for the task of policing the observance of the earlier marriage law.⁵⁴ There is, however, no uniform method of fixing the monetary value of each beast. This depends entirely upon agreement between the parties to negotiation.⁵⁵ The numbers provided for in s87 of the Code are maximum numbers, and the parties are free to agree to fewer cattle.⁵⁶

In practice most Zulus keep to the maximum although the maximum is understood to mean the usual or even the minimum. There are a number of reasons for this tendency. Firstly, some do it because of a misunderstanding of the provisions of the Code. Secondly it has become standard practice to demand the maximum. Thirdly, every father regards his daughter as

being worthy of the maximum. In addition the maximum in Zulu society denotes "intombi egcwele", a "full maiden" which means that if a father demanded less than the maximum number of cattle it would imply that she has either been seduced or has already given birth to a child. The limitation of ilobolo is obviously contrary to traditional Zulu law.

The select committee on the legal disabilities of Zulu women expressed the opinion that s88 of the Code which makes it an offence to exceed the limit had been abrogated by disuse, and was at the best of times unenforceable.⁵⁷ To this the then Secretary for KwaZulu Department of Justice reacted by pointing out that this section served to protect the bridegroom because if his father-in-law demanded the amount in excess of the prescribed limit he would be warned to refund it or else the bridegroom would be advised to take legal action against him if he failed to comply. The insurmountable problem in preventing the exploitation of the suitor was, however, his fear of suing his father-in-law,⁵⁸ the secretary said.

Despite the objection of the erstwhile Secretary, there is much to be said in favour of the repeal of s88 of the Code. The fact that it is difficult to sue one's father-in-law in black society is proof enough that it is a dead letter because even if it is contravened on a daily basis there is no way of ensuring that those who contravene it are brought to justice.

The statutory limitation of ilobolo has not solved the problem of the escalation of ilobolo. Although the father may technically limit himself to the prescribed maximum if ilobolo is delivered in livestock, this is not so if it is settled in cash. Moreover, he may defeat the intention of the legislator by demanding izibizo which are not regarded as part of ilobolo.⁵⁹ The bridegroom is therefore entirely dependent on the good faith of the parents-in-law. An ameliorating factor is that parents are also in favour of their child's marriage. They

are aware that if they are unreasonable in their demand the marriage of their daughter may be frustrated. A further ameliorating factor is that ilobolo may not necessarily be settled in full before marriage, but instalments are allowed.

A number of rules can be extracted from the courts' interpretation of s87 of the Code. The parentage of a girl decides her rank for purposes of assessing the maximum ilobolo prescribed by the Code, and not that of her guardian at the time of the celebration of the marriage if the father is deceased.⁶⁰ For a daughter of a chief between twenty and forty head of cattle will normally be sufficient, except for the chief of the highest rank.⁶¹ To obviate any friction it is essential that the agreement must be expressly concluded before the marriage as to the number of ilobolo cattle to be delivered. By the chief of the highest rank is obviously meant the paramount chief.

A person who has been promoted to the rank of induna cannot demand that ilobolo given for his daughter before the promotion be increased from ten to fifteen.⁶² This is logical because before the marriage he was not yet induna. The rule is that ilobolo is determined by the status of the father at the time of the delivery of ilobolo and not thereafter. Until his office has been terminated an induna is entitled to receive fifteen head of cattle as ilobolo.⁶³ Where he is demoted, and his daughter subsequently marries, he can only demand the amount of ilobolo due to a commoner.⁶⁴ This is also in accordance with what has been said above. At the time he demands ilobolo he is no longer induna. There is no rule that for purposes of ilobolo, once induna always induna. Consequently there is no reason why after demotion a person should enjoy the benefits of the office from which he has been demoted.

In the case of Mkize v Mdunge⁶⁵ the court held that as the

plaintiff was no longer an induna at the time of his daughter's marriage he could not claim fifteen head of cattle. In this case the father had been induna, but the court found that his services had been terminated.⁶⁶

This decision was, however, not followed in Mngadi v Ngcamu⁶⁷ where the court decided that once the parentage of a daughter has raised her ilobolo "value", she retains that "value" even if the father subsequently loses his rank or position. In this case the father had been a chief's deputy, but before his death he had resigned from his office, and the daughter had married after his death. It is submitted that the decision in the case of Mkize v Mdunge⁶⁸ is to be preferred to that of Mngadi v Ngcamu.⁶⁹ It is in accord with sound logic. If the view is that the parentage of the girl determines the number of ilobolo to be given for her, one cannot in the same breath say that even if the rank of the father has changed she should retain the lobolo value due before the demotion of her father. If this principle were to be followed consistently it would mean that once the lobolo to which a man is entitled has been fixed at a particular moment, it is immutable. As a result it would not be raised if a commoner was raised to the status of an induna. Furthermore it is in conflict with earlier decisions⁷⁰, and flouted the stare decisis rule. The limitation applies to both a civil and a customary marriage.

In the case of the marriage of a virgin, ingquthu beast is also due in addition to the lobolo⁷¹, but all additional payments are deemed to constitute ilobolo.⁷² What happens is that in many cases the parents of the woman simply demand eleven head of cattle as ilobolo. This prima facie is the exceeding of the maximum but in actual fact the eleven head of cattle include the ngquthu beast without its being said in so many words. In other instances, however, the mother's beast is singled out in particular if it is to be cash because its value will mostly be higher than that of the other

cattle.⁷³

If there is a doubt as to the status of the bride's father the amount of ilobolo may not exceed ten head of cattle.⁷⁴

The limitation, however, does not apply to Zulu and other blacks living outside Natal even though the bridegroom may be from Natal.⁷⁵ This is because the Code is meant to apply in Natal and KwaZulu and not outside.

If there has been agreement to deliver a lesser number of cattle than the prescribed maximum, no one will later on be entitled to claim that the bridegroom should have delivered a higher amount stipulated in the Code because the basis of the obligation to deliver cattle is the agreement between the parties.⁷⁶ This principle is acceptable for to hold otherwise would be to make ilobolo a subject-matter for constant litigation.

An interesting question arises where there is doubt as to the parentage of the girl before delivery of ilobolo, but after delivery thereof it becomes clear that the father was entitled to more. Can the receiver of ilobolo claim the balance? It has already been said above that the number of cattle to be delivered depends on the agreement, and thus no person can claim a higher amount than the one agreed upon. In this particular case then, one cannot claim more just because more information has become available since the agreement has already been concluded. The numbers fixed by the Code are maximum numbers. The Code does not provide for the minimum number to be delivered before the marriage can be concluded. This is entirely dependent on the parties. In some places they are prepared to conclude the marriage only after the delivery of six head of cattle.⁷⁷ The delivery of an odd number of cattle is regarded by some traditionalists as an insult to the woman.⁷⁸

Despite the fact that the number of cattle to be delivered is dependent on agreement between the parties, the court has been

prepared to stipulate what constitutes a reasonable number of cattle to be delivered. In the case of Mkwanazi v Mdletshe⁷⁹ it was sought to recover eighty head of cattle for a chief's daughter. It was not proved that there had been an agreement to deliver eighty head of cattle. In the absence of such an agreement, the court held that it would determine the number of cattle that would constitute a fair and reasonable ilobolo, taking into account the rank and position of the father of the bride. In this particular case the court held that the number of 32 head of cattle which had already been delivered, was more than sufficient in the circumstances. It is doubtful whether the court was competent to determine the amount of ilobolo due. This was in any event not in accord with Zulu law,⁸⁰ nor with the provisions of the Code. Yet it solved a practical problem.

In terms of the Code the lobolo to be given for a widow or divorced woman is usually ten head of cattle less one head of cattle for every child which the woman has previously borne.⁸¹ The limitation of five head of cattle only applies to those cases where the former husband has been deprived of all ilobolo given to him. This limitation prevents the girl's father from receiving two amalobolo for one woman. The husband is being punished by being deprived of the cattle. Although the father is not entitled to benefit, it is only fair that the second husband also should not. In settling the disputes the commissioner should take the following points into account:

- (a) how many of the first ilobolo cattle were expended by the father in connection with the first marriage, for example cattle slaughtered for the ceremony;
- (b) what cattle, if any, are still owing on the former marriage, and whether any of these are likely to be recovered for it is possible that the first husband had died and had left no estate;
- (c) the number of children already born to the woman. The father's right still to claim the balance of ilobolo from the divorced husband is not affected by s87(3).⁸²

If ilobolo is delivered in livestock, the parties have to keep within limits prescribed by statute. Where more ilobolo is voluntarily given and not registered, the excess amount cannot be reclaimed. Neither can cattle given after registration be reclaimed. In this case the parties are regarded as being in pari delicto, and cannot rely on the law for assistance.⁸³ On the other hand where the father of the woman had demanded more ilobolo than the amount permitted, and the bridegroom delivered it under protest, he can claim for the refund of the excess amount.⁸⁴

Where there has been an increase in the number of cattle before marriage to such a degree that the number due is exceeded, the husband is entitled to a refund of such excess.⁸⁵ In practice, however, this will seldom happen. The relations between the two parties are delicate. It will be arduous for the bridegroom to claim such a refund. Above that, he may be afraid of "losing face" if he sues his father-in-law for the refund, and this might in turn affect the subsequent happiness of the marriage.

If, on the other hand, a contract was concluded outside Natal, and in this contract the parties had agreed to a number of cattle higher than the statutory number, such a contract remains valid and enforceable in Natal. The rule is that where the law of the plaintiff's domicile is different from that of the defendant nothing prevents the parties from concluding an agreement for ilobolo fixed by custom at plaintiff's place of residence.⁸⁶

The practice among other black tribes may now be investigated. Among the Tswana there is no bargaining over the number of cattle to be given. The bridegroom's parents give what they can afford.⁸⁷ The bride's group cannot reject this or demand more in court although they may insist on more if they feel that the bridegroom is unreasonable.⁸⁸ At least this was the practice in traditional Tswana law. Negotiations

before the marriage only relate to the securing of the consent of the parents of a woman. The intention to deliver bogadi is assumed since a marriage without it is regarded as incomplete. Moreover, not only is the question of bogadi not raised during negotiations "but it is considered bad taste to demand that it should be paid after the marriage has been consummated". The reason for this is that "bogadi is never made a subject for reminders".⁸⁹ If cattle are delivered the number must be even because an odd number is an indication that the woman's group should ask for an extra beast.⁹⁰ Among the Zulus, on the other hand, ilobolo is expressly agreed upon. The question of marriage is not mentioned in so many words. It is simply inferred from ilobolo negotiations. The fixing of the date for the wedding is only agreed upon when ilobolo or a part thereof has been delivered. There is no customary rule in Zulu law that ilobolo will be agreed to impliedly by simply starting to negotiate about the marriage.

Among the Xhosa there is no limit to the number of cattle given as ikhazi. Usually the woman's family demand a beast after the birth of every child. To get more cattle they resort to the custom of ukutheleka⁹¹ (impounding a woman). Although the idea among the Zulus was that umkhwenyana yisigodo, it never entitled the bride's parents to detain the woman with the intention of eliciting more ilobolo. That would be reprehensible conduct. Owing no doubt to the force of custom and the social sanction, the bridegroom would not refuse unless he did not have cattle at all.

The number of bohali (Sotho name for ilobolo) cattle among the Basotho is determined by agreement between the two family groups.⁹² Although the courts are empowered to curb the tendency on the part of the girl's father to demand an exorbitant amount, the girl's father has a decisive say in the negotiations and bargaining on bohali.⁹³ The courts will only intervene if the girl's father has exceeded the "conventional scale".

The "conventional scale" consists of: twenty head of cattle; ten sheep or goats known as setsiba (loin-cloth or trousers) symbolical of the old idea that their skins could be used as clothing by the bride's father; one horse named molisana (shepherd), and one ox, moqhoba, (the driver), given to the women who accompany the bride to her husband's home.⁹⁴ The alternative total number of bohali cattle may be 23 head of cattle.⁹⁵

Although the "conventional scale" is high, this is offset by the fact that it is not settled all at the same time. Instalments are allowed, and as prescription does not apply to ilobolo claims, the obligation may continue from generation to generation.⁹⁶

The scale of bohali among the Basotho has risen over the years.⁹⁷ Although the "conventional scale" has stabilized, and in some instances gained legal recognition, there is no legal rule that it must always be followed. The courts have declared that this is dependent on agreement. But where there is difficulty in proving the amount agreed upon, they have accepted the conventional amount.⁹⁸

The Shangaans customarily demand a minimum of twelve head of cattle as lovolo (Shangaan name for ilobolo). But the amount is dependent on negotiations. Factors to be taken into account are, the status of the father of the woman, and in recent times the educational qualifications of the woman. Although the number of ilobolo given for daughters of chiefs is higher, the amount given for daughters of izinduna is, unlike among the Zulus, the same as for a daughter of a commoner.⁹⁹

Among the Shona the number of rovororo cattle is also determined by agreement.¹⁰⁰ There is also statutory limitation. Unlike among the Zulus no significant difference exists between ilobolo given for the daughter of a chief or for the daughter of a commoner.¹⁰¹ Factors which influence the reduction of ilobolo are the giving birth to children by a woman from

another man, her physical appearance and age, the rate of survival of her children and the moral character of the woman.¹⁰²

The Venda have no fixed scale of thakha. In the past they demanded only four or six head of cattle. Today it is eight head of cattle for commoners and ten for princesses.¹⁰³

From this brief comparative survey it is clear that among most black tribes ilobolo is fixed by agreement. Although there may be no legally fixed maximum among some, the conventional practices of the people gradually stabilize, and they become accepted as the norm to be followed. In others statutory limitations exist.¹⁰⁴ Most of these statutory limitations are invariably based on the general and acceptable practices of the people. Another feature of the fixing of the amount of ilobolo is that the woman's father has the last say as to the eventual amount of ilobolo to be delivered. Of all the tribes the approach followed by the Tswana is to be preferred. According to this approach ilobolo is dependent on the ability of the bridegroom's group. This was the early practice of the Zulu people. It is, however, regrettable that reversion to the original practice will hardly be feasible for reasons stated above.

As it has been pointed out above, cash today is taking the place of livestock as a medium of ilobolo. It is therefore imperative to consider the legal significance of the use of money in settling ilobolo demands.

6.3.2.2 Ilobolo sounding in money

Just as there is generally no uniformity in the fixing of the size of ilobolo among South African black tribes, there is no uniformity in fixing the average market value of livestock.¹⁰⁵ Obviously livestock will consist of varying sizes.¹⁰⁶ In Natal and KwaZulu s86 of the Code applies although its provisions are sometimes misunderstood. The misconception relating to section

86 is based on the idea that it is taken to fix the amount per beast.¹⁰⁷ To illustrate this misapprehension, in the 1979 session of the KwaZulu Legislative Assembly, a member proposed a motion calling upon the Legislative Assembly to consider the amendment of this section of the Code and to provide that the amount per beast be not less than R80 and the umqhoyiso beast (another name for ingquthu beast) be not less than R100.¹⁰⁸

This matter had in 1978 been referred to a select committee.¹⁰⁹ This committee found that parents charged between R200 and R900.¹¹⁰ As a result the committee recommended that his section be amended and the amount be made dependent on agreement between the parties. Furthermore, it recommended that the agreement be reduced to writing to facilitate proof.¹¹¹

In a memorandum¹¹² to the Minister of Justice, the erstwhile Secretary to the Department of Justice correctly pointed out that the value of ilobolo cattle is not fixed by the Code, and that the R10 equivalent is only relevant when there is a dispute about the monetary equivalent agreed upon. He pointed out that an attempt years before to increase the value per beast was abortive because the request had been based on a misinterpretation of the provisions of the Code. He further expressed the view that it was not in the interests of the Zulu society to fix a monetary value per beast as there would be a tendency to exploit suitors by automatically demanding the maximum value for the beast just as parents automatically demanded the maximum number of cattle whereas people agreed to less than ten head of cattle before. This, as he further pointed out, would increase the number of illicit unions as suitors would not be able to afford ilobolo demanded.¹¹³ As a result the same section was retained in the KwaZulu Bill on the Code,¹¹⁴ although when the Act was passed the R10 amount was changed to R100. Considering the current value per beast this is relatively meagre. Yet it is far better than the ridiculous amount of R10. But because of its limitation in a few years to come the legislature will have to review it. It is also interesting to note that the present section is identically

worded with s86 of the Code. This means that the R100 equivalent will apply in case of a dispute. For other cases the amount depends on agreement.

Despite the cogency of this argument, it is submitted that the fear of the parents' automatically demanding the maximum value per beast was no sufficient excuse for the retention of the R10 amount mentioned in the Code. In fact there will be nothing against demanding the maximum as long as the maximum amount per beast is reasonable. Despite the absence of the fixed monetary value per beast parents do not necessarily charge exorbitant amounts. The fixing of a reasonable monetary value per beast would induce them to keep to it. This has been the case in the number of cattle claimed. The fact that R10 appears too negligible invariably leads to parents ignoring it. Furthermore, the provisions of this section have caused confusion which needs to be cleared by legislative intervention. In the black society it is easier to know what the law on a particular point is when it has been incorporated in an enactment than when the law has been decided by a court of law.

Although the courts have correctly interpreted the section, this has not effectively cleared the confusion in the black community.

From research done it appeared that there is no uniform amount demanded per beast. According to some the same amount is demanded for all ilobolo cattle. Others take into account that ilobolo cattle are of unequal sizes. A few cases from research will illustrate this.

According to one case the father of the woman demanded R100 per beast. This came to R1400 including the mother's beast. In another case the father demanded R60 each for five head of cattle and R80 each for the remainder of ilobolo cattle. In yet another case the father demanded R100 each for eight head

of cattle. For the ninth beast which he called inkomo yezimbuzi (a beast for the goats) he demanded R150 which stood for five goats at R30 each. For the tenth beast he demanded R200 calling it a horse with its saddle bridle and towel. For the mother's beast he demanded R160.

In yet another case the father of the woman demanded two head of cattle on the hoof, and the rest of ilobolo given in cash ranged as follows: six head of cattle or their monetary equivalent of R200 each; and the remaining three consisted of R300 each. Although examples could be multiplied, these sufficiently illustrate the disparity in the fixing of ilobolo.

It is also noteworthy that the girl's parents usually start by informing abakhongi of the number of cattle which they are entitled to demand and alternatively their monetary equivalent. This shows that when they demand ilobolo they do consider that there should be no great disparity between the value of ilobolo cattle and the market value of cattle in the area although they usually do not demand the amount for prime cattle, but the amount for average ones. The eventual amount agreed upon also depends on the ability of abakhongi to negotiate for the reduction of the amount per beast.

This also illustrates that although informants were aware of the amount of R10 mentioned in the Code, they did not necessarily adhere to it. It also shows that if the view would be that the amount of R10 mentioned in the Code were regarded as the value per beast, this would unavoidably lead to flagrant contraventions of the provision and consequent lack of respect for the law."

The courts have correctly decided that it is only where cash has been paid instead of cattle and where a dispute has arisen as to what number of cattle is represented by cash that this section will apply.¹¹⁵ There ought to be a dispute as to the value of cattle, and not merely a dispute concerned with ilobolo such as the liability to refund.¹¹⁶

The confusion surrounding this section owes itself to inelegant draftsmanship. The section provides as follows:

"Lobolo shall consist of fair average cattle or their equivalent in other stock, money or property and for purposes of any dispute the value of each head of lobolo cattle shall be regarded as ten rand".

In Nzuza v Kumalo,¹¹⁷ Menge P, expressed this as follows:

"Unfortunately the meaning of this section is, like so many provisions of the Code, far from clear. What is the effect of the words "for the purpose of any dispute"? Gramatically the word dispute must be about the value and not ... about liability to pay or refund lobolo. Otherwise strange results might follow: for instance, in action for the return of lobolo a defendant may in his plea admit the receipt of say six head of cattle valued at £20 each and deny liability for the refund. If then the word "dispute" in section 86 relates to any dispute connected with the lobolo, including a dispute as to liability for a refund, this very denial of liability would - in spite of the admission as to the value - preclude the plaintiff obtaining more than £5 for the animal".

"But even if the 'dispute' relates to the value of lobolo cattle anomalous results must follow. Suppose that in the foregoing example the plaintiff had paid to defendant, perhaps at the latter's special request, instead six head of ordinary cattle, two very fine stud cows fairly valued at £60 each. Defendant may realise that he has no defence to a claim for the refund of this lobolo; but he can nevertheless virtually defeat the plaintiff's claim by merely disputing the value. He need merely allege that the value is say, £50 per head in order to have the plaintiff's claim reduced ipso facto to - £5 per head. It seems to be impossible to make sense of this section unless one reads into it after the words 'five pounds' some qualification as 'in the absence of proof of or agreement on the value' ... In

other words the value assigned by a party to lobolo cattle may not by virtue of the provisions of s86 be disputed if it does not exceed £5".

The non-fixing by the legislator of the amount per beast may be commendable in that it allows scope for flexibility so that parties would be free to agree on this amount without the legislator now and then revising the amount by legislation. If it was simply based on an agreement, the parties themselves would be in a position to determine what the current price per head of cattle would be. There is also no limitation placed by the Code on the maximum amount per beast.

Despite the decision in Nzuza's¹¹⁸ case, the position still remains unsatisfactory. The provision does not solve the problem where, as it was pointed out in this case, ilobolo had been settled in livestock and after some time refund of ilobolo was claimed. It has been decided that in an action for dissolution of a customary marriage the husband is entitled to ask for the return of specific animals.

Specific performance should not be understood to mean the delivery of the exact cattle delivered as ilobolo, but that if livestock had been delivered as ilobolo, livestock can be reclaimed. A contrary construction would equate ilobolo before marriage with its legal position after marriage which is contrary to s 85(1) of the Code. Where specific performance is no longer possible, he can fix a money value of R100 per beast which cannot be disputed and need no evidence.¹¹⁹ Such a decision may not be entirely equitable under all circumstances. It will undoubtedly be inequitable where, as in the example mentioned above, a person delivers livestock as ilobolo and after a year or so the marriage breaks down and ilobolo is to be reclaimed. To say that if there is a dispute relating to the value per beast the value should be fixed at R100 is clearly inequitable. The ameliorating factor in this issue is that the use of cattle as ilobolo is fast decreasing.

The courts have decided that it will only be where ilobolo is in issue that the value will be regarded as R100 per beast. For other purposes the value must be established by evidence in court.¹²⁰ The value of cattle for purposes other than for ilobolo had in earlier cases been assessed by the court. For this the market value of the cattle as well as the lobolo value had been taken into account.¹²¹ As it was pointed out above the position remains unsatisfactory. It would have been better if the legislator had made the amount per beast to be dependent on agreement, and that in the event of a dispute the average market value per beast in the area be made the value of each ilobolo beast. Support for this is to be found in the fact that when the Code was promulgated R10 was the average market value per beast. The legislator cannot be presumed to have intended that an unrealistic amount of R10 per beast be demanded. The fixing of the value per beast by agreement dependent on the average value would prevent the need for resorting to legislation now and again for updating the amount per ilobolo beast. At the same time confusion and misunderstanding would have been eliminated.

If it is felt that making the amount per beast dependent on current market prices would lead to the demand for high amounts, and it did appear from interviews as illustrated above that parents do not necessarily demand the monetary equivalent of the current market value for cattle, then the legislator would have to fix what would appear to be a reasonable amount, say R100. This is what KwaZulu legislative assembly chose to do, although it is not completely above criticism.

If cattle have been given as ilobolo for a contemplated marriage that did not materialise, s86 will not apply because the cattle are still regarded as sisu cattle and not

yet as ilobolo.¹²² This means that even if there is a dispute relating to the value of those cattle the provisions of s86 should not apply. As a result the value per beast should be proved by tendering evidence. On the failure of such tender, the average market value per beast in the area should be used in fixing the value per beast. This reasoning is based on an artificial distinction between cattle given for ilobolo purposes before marriage and their position after the marriage.

If a girl has been seduced and has become pregnant, her ilobolo value diminishes. In that event the court will allow a set-off for seduction and pregnancy fees of two cattle calculated on the value stipulated in s86 against money paid as imvulamlomo, izibizo and ubikibiki fees.¹²³

In other tribes there is no bar against the parties to an action from accepting a value other than the standard value for livestock for the purpose of their case.¹²⁴ In a dispute relating to ilobolo a plaintiff must prove that the alternative monetary value of livestock is higher than the standard value accepted by the court. The criterion will be the market value at the time the action is brought, and not at the time the transaction was entered into.¹²⁵

According to Hartman¹²⁶ the value per beast fixed by the courts among the Shangaans is R10. He points out that although it is unrealistic to place the value per beast at R10 that is the amount which the plaintiff in any lobolo action can claim in court. The fixing of the R10 monetary equivalent is convenient for the courts because it saves them the hardship of proving the value per beast. This appears to be an unjustifiable extension of the application of the provisions of the Code to the Transvaal. The better approach is to make the value dependent on average market value per beast.

An important factor influencing the amount of ilobolo given is that

the goodwill between the bridegroom and his parents-in-law is not necessarily secured by a high amount of ilobolo given. As it was also said above, the size of ilobolo does not have a decisive influence on the treatment of the wife by her husband. At most it can lead to unrealistic expectations by the husband from his wife.

It was established from some informants that the more reasonable the amount given by the husband, the more indebted he will be to his parents-in-law. One informant had been asked to give only R220 as ilobolo for his wife. He regarded this amount as modest. When asked as to his attitude to his wife and parents-in-law, he was of the view that this has not caused him to underrate his wife. Indeed it had made him grateful to his parents-in-law. As a result he is always willing to help them even without their asking for such help as a way of paying them back for their kindness. This confirms the earlier customary practice of the bridegroom being regarded as a helper. The wrong impression must not be created, however, that the smaller the amount, the more indebted the bridegroom will be to his parents-in-law. This depends on the means of the bridegroom. What is important is that the bridegroom must not feel that he is being exploited. What makes him grateful is to realise that his parents-in-law are doing everything to the best of his interests.

This view was confirmed by another informant who related his own experience. According to this informant his parents-in-law did not ask for the conventional ilobolo, but they reached an agreement with him according to which they had to share the marriage expenses. Because of their attitude towards him, he said this had generated a lot of goodwill on his part towards them. As a result, whenever he pays them a visit he brings them a gift, and whenever they need help he is willing to offer it voluntarily. This type of attitude makes the bridegroom feel that he is a son rather than a debtor to his father-in-law. This contributes towards

marital stability, and is more in accord with the saying that "umkhwenyana yisigodo sokuqhuzula".

Before leaving the subject of the amount of ilobolo, one of the recent developments is worthy of mentioning. It was noted above that the rank or status of the father of the bride determines the number of cattle to be given for her ilobolo. There is a tendency found among non-traditionalists of considering not only the status of the father but also the qualifications of the woman. Higher educational qualifications increase the woman's ilobolo "value". This is aimed at reimbursing the parents for expenses incurred in the education of their daughters. This practice is not possible when ilobolo is delivered in livestock because no commoner is entitled to exceed ten head of cattle. It will only be where ilobolo is settled in cash that the personal qualifications of the woman will inflate her ilobolo "value". Usually after qualifying, the woman augments the family income. When she marries that income is lost, and the father would like to be compensated therefor.¹²⁷

According to one extreme case the father demanded in addition to ilobolo R1 500. The reason was, as he put it, that his daughter was earning R300 a month. That money would after the marriage go to the bridegroom. Furthermore he had incurred a lot of expense educating his daughter. She had spent four years at University, obtaining a B A degree plus a one year postgraduate teacher's diploma. This R1 500 was, as he expressed it, a personal request from him to his son-in-law to "ukungikhalela" meaning to console him or assuage his feelings. This was based on the assumption that the conventional ilobolo is supposed to come from the father. There is no evidence that this practice has become widespread. It is also doubtful whether, if a dispute came before the court relating to that agreement, the court will sanction that purported agreement.

This shows the abuses to which ilobolo is liable under modern circumstances. This was not the case in traditional Zulu society where the education of a woman was free and informal and was not for a profession. Today that education costs money. Parents who are poverty-stricken cannot be blamed if they resort to dubious tactics because they feel let down when their daughters marry soon after acquiring education for which the parents have paid so much without enjoying the fruits thereof.

6.4 SUMMARY AND CONCLUSION

Although ilobolo is not a purely economic consideration, it had to be accommodated into the traditional economy. The use of cattle as a medium of ilobolo had some religious, economic and legal implications. Cattle were the chief means of exchange and the delivery of cattle in anticipation of marriage legalised marriage in its religious and legal sense.

Cattle today are on the decrease and money is more and more taking its place as a medium of ilobolo, and in the urban areas it has completely superseded cattle. Ilobolo today being settled in cash cannot escape the evils to which money is exposed. As a result it tends to be commercialised. Money is subject to inflation. More emphasis on the commercial features of ilobolo has resulted in the atrophy of the religious and legal significance of ilobolo. Ilobolo in KwaZulu and Natal is an essential requirement of neither a customary nor a civil marriage. The traditional religion is on the wane. In this way ilobolo has been able to adapt itself to the changed economic and social circumstances.

The limitation on ilobolo settled in cash is a problem. Although the legislature has placed the value per beast at R100, in the event of a dispute, this is relatively meagre compared to the current price per beast. The escalation of ilobolo is also caused by the parents taking into account the educational qualifications of their daughters. This is undesirable because it will tend to discourage marriage. Moreover, it tends to make ilobolo a "price" for the woman.

FOOTNOTES

1. On the position among aother black tribes see Schapera 139; I Schapera "A handbook of Tswana law and custom" in E Cotran and N Rubin (ed) Readings in African law (1970) 146-7; Ashton 71; S Poulter Family law and litigation in Basotho society (1976) 86 et seq; Oliver et al 57 et seq; RD Coertze Die familie-, erf- en opvolgingsreg van die Bafokeng van Rustenburg (1971), Maclean 55, 70, 71; JF Holleman Shona customary law (1969) 161; Van Tromp 44; TD Ramsay "Tsonga law in the Transvaal" 1947 African Studies 148; Hartman 278-80; Bekker & Coertze 150-151; NJ van Warmelo & MD Phophi Venda law (1948) 99 et seq; on the Kenyan tribes see E Cotran "The law of marriage and divorce" in AN Allott (ed) Restatement of African law (1968) 15 et seq; JO Ibik Restatement of African law: 3 Malawi (1970) 16 et seq; G Harris "Taita bridewealth and affinal relationships" in M Fortes (ed) Marriage in tribal societies (1962) 55 et seq; Krige (1964) 164.
2. This was also the position among the Sotho, Poulter 100.
3. Poulter 100; van Warmelo & Phophi 101.
4. The position among the early Germanic tribes was similar, see Hahlo & Kahn (1973) 334.
5. Parkin 197.
6. Sibiya 201.
7. Olivier et al 59; Bekker & Coertze 151; Breytenbach 178.
8. Bekker & Coertze 151; Poulter 91; P Duncan Sotho laws and customs (1960) 23.
9. Van Warmelo & Phophi 107.
10. Poulter 99.
11. Olivier et al 59.
12. Bekker & Coertze 151.
13. Maphasa v Mbongwe 1946 NAC (C&O) 48; Majongile v Mpikeleli 1950 NAC (S) 260; Olivier et al 57; Bekker & Coertze 151; Holleman (1961) part III 16; Hellman 53; Brandel 35; Van Tromp 43; Breytenbach 178; Hunter 193; Hartmen 278.
14. Olivier et al 57.
15. Bekker & Coertze 151; Olivier et al 57; Breytenbach 178.

16. Olivier et al ibid; Hartman 279.
17. Sibiya 206.
18. Schapera 139; Z K Matthews "Marriage customs among the Barolong" 1940 Africa 14.
19. Schapera 140; Matthews 14; Swanepoel 31.
20. Schapera 140.
21. Schapera ibid, Coertze 227; Swanepoel 31.
22. Schapera ibid, Coertze ibid; Swanepoel ibid.
23. Schapera 140; Coertze 228; Swanepoel 32.
24. Holleman (1969) 168.
25. Holleman idem 167.
26. Holleman idem 156-7; B Goldin & M Gelfand African law and custom in Rhodesia (1975) 134-5; Bennett 71.
27. Hartman 278-279.
28. Hartman 279.
29. Hartman 280.
30. Van Warmelo & Phophi 99.
31. Van Warmelo & Phophi 101.
32. Idem 103.
33. Majongile v Mpikheleli 1950 NAC (S) 260.
34. Olivier et al.60. On the position outside Natal and KwaZulu, see Olivier et al 60-62.
35. 1940 NAC (N&T) 33.
36. Mkhwanazi v Mncube 1933 NAC (N&T) 8; Mazibuko v Shabalala and another 1953 NAC (N-E) 243.
37. This is so in areas like Mahlabatini, Nongoma, Mtubatuba and even KwaDlangezwa.
38. They are of the view that R10 stands for the value per beast.
39. Bekker & Coertze 151.
40. Hellman 54.

41. Hellman ibid; Brandel 35.
42. Hellman ibid.
43. Brandel 35.
44. Hellman 54.
45. Holleman (1969) 124 et seq.
46. Gluckman (1960) 185; A Vilakazi Zulu transformations (1962) 63; Krige (1974) 121; Krige (1964) 164.
47. Marriage Law 1 of 1869.
48. s87(1) of the Code.
49. Vilakazi (1962) 63; Sibiya 204.
50. Bekker & Coertze 151; Olivier et al 63 et seq ; Van Warmelo 103; B A Marwick The Swazi (1940) 120; Harries 14; Holleman (1969) 101 et seq ; Soga 267; Hunter 191-2; Ramsay 7; 13; Hartman 280 et seq.
51. s87(1) of the Code. The corresponding section in the KwaZulu Act is 65(1).
52. The marriage Law 1 of 1869 which was subsequently incorporated into the codes of Zulu law.
53. s88 of the Code and s66 of the KwaZulu Act.
54. Simons (1968) 25.
55. Bekker & Coertze 152; Olivier et al 65.
56. Olivier et al 66; Mkwanazi v Mdletshe 1954 NAC (N-E) 140.
57. 1978 Report of the Select Committee on the legal disabilities of Zulu women 39-40.
58. Memorandum to the Minister of Justice 1978 at p 4. The solution to the problem of exploitation sought by the secretary could not be obtained from the Cabinet and this section was subsequently enacted in the KwaZulu Act as it is in the Code.
59. The writer knows of a number of instances where the parents of the woman have demanded up to R500 or more by way of izibizo, in addition to ilobolo. This happens easily today where the parents for instance may inter alia demand an electric stove or a refrigerator all of which cost in the region of R700 each.

60. Rulumende v Majwabu 1903 NHC 27; Magwaza v Kanyile 1940 NAC (N&T) 5; Mngadi v Ngcamu 1944 NAC (N-E) 117.
61. Mkwanazi v Mdletshe 1939 NAC (N&T) 155.
62. Xolo v Pehlukwayo 1948 NAC (N&T) 10.
63. Mkize v Mtimkulu 1944 NAC (N&T) 14.
64. Mkize v Mtimkulu 1944 NAC (N&T) 14;
65. 1951 NAC (N-E) 283.
66. Mkize v Mdunge 1951 NAC (N-E) 283.
67. 1955 NAC (N-E) 117.
68. 1951 NAC (N-E) 283.
69. 1955 NAC (N-E) 117.
70. Mkize v Mtimkulu 1944 NAC (N&T) 14; Mkize v Mdunge 1951 NAC (N-E) 283.
71. s96 of the Code and s71 of the KwaZulu Act.
72. Bekker & Coertze 151; Olivier 66.
73. This was the tendency in Bulwer where the writer was umkhongi.
74. s87(2) of the Code and s65(2) of the KwaZulu Act; Shezi v Shezi 1954 NAC (N-E) 137.
75. Nzimande v Dhlamini 1935 NAC (N&T) 18; Thela v Nkambule 1940 NAC (N&T) 113; Mtshali v Nkosi 1942 NAC (N&T) 44; Shoyisa v Dhlamini 1953 NAC (N-E) 9.
76. Xulu v Magwaza 1954 NAC (N-E) 140.
77. De Clercq 257.
78. De Clercq 258.
79. 1939 NAC (N&T) 155.
80. Olivier et al 66.
81. s87(3) and s65(3) of the KwaZulu Act.
82. This is logical since the father of the woman should not be prejudiced by the misconduct of the husband.
83. Mdhluli v Zuma 1938 NAC (N&T) 164.
84. Magwaza v Khanyile 1940 NAC (N&T) 5.

85. Mzimela v Mkwanzazi 1941 NAC (N&T) 12.
86. Nzimande v Dhlamini 1935 NAC (N&T) 18.
87. Schapera 138; Coertze 227; Swanepoel 25; Matthews 13.
88. Schapera 140; Coertze ibid; Swanepoel ibid.
89. Matthews 13.
90. Schapera 140; Coertze 227; Swanepoel 30.
91. Van Tromp 43; Hunter 120-1; Soga 266; Olivier et al 67.
92. Poulter 90.
93. Poulter 90-91.
94. Poulter 91-92.
95. Poulter ibid.
96. Poulter 92.
97. Poulter 93-95.
98. Poulter 95-99 on the discussion of the approach followed by the courts in Lesotho.
99. Hartman 280-281.
100. Holleman (1969) 162.
101. Holleman (1969) 165.
102. Holleman idem 166.
103. Van Warmelo 103. On the position among the Swazi see Marwick 120, 124 and among the Pedi see H O Mönnig The Pedi (1967) 132-133.
104. s86 of the Code and s65 of KwaZulu Act.
105. Msimang v Sitole 1940 NAC (N&T) 33.
106. Bekker & Coertze 151.
107. JE Bradley Die Mandlakazi: 'n Onderzoek na enkele kultuuraspekte (1970) Unpublished M A dissertation PUCHO 76 says that among the Mandlakazi this provision was contravened because the actual monetary value of cattle rises whereas for ilobolo purposes it remains constant. Already in 1935 the question arose for discussion in a meeting of chief at Nongoma (RSA Department of Bantu Administration and Development. BAC

Court Nongoma File 1/6/2 1935). In this meeting chiefs and important Zulu leaders which was convened for the purpose of determining the amount equivalent to ilobolo cattle. One of the izinduna objected to the amount of R10 averring that it was too high (at that time the annual salary of a male was about R20 - see Bradley 76). This therefore was too burdensome for the bridegroom). He was supported by a Chief. Who added that young cattle were preferable and that the amount of R10 was too high for such a beast. A contrary opinion was expressed by an avangelist. - see Bradley 76. From 1935 even experienced magistrates advocated the revision of the value per beast to be made dependent on current prices. Yet these efforts came to nought - see A J Turton "Raw deal for kings and chiefs" ... In search of racial harmony ...". 18 March 1980 Natal Mercury p 7. He says that there was a feeling that an increase in value would result in overstocking - There is still a lot of uncertainty as to the fixing of the value per head of ilobolo cattle. For this reason many prefer ilobolo given in livestock - Bradley 77.

108. See Ilanga 30 May - 2 June 1979 1.
109. Select Committee on legal disabilities of Zulu women 1978.
110. Report of the Select Committee 39. From our research it appeared that people charged from R200 to R2 500 as ilobolo.
111. Report 39.
112. Memorandum on proposed amendments to the Code, Legislative Assembly Resolution 23/78.
113. Memorandum p 3 et seq.
114. s75 of KwaZulu Bill.
115. Msimango v Sitole 1940 NAC (N&T) 33.
116. Nzuza v Kumalo 1958 NAC (N-E) 78.
117. 1958 NAC (N-E) 78 at 80.
118. 1958 NAC (N-E) 78.
119. Nzuza v Kumalo 1958 NAC (N-E) 78.
120. Mkwanazi v Mncube 1933 NAC (N&T) 8; Mazibuko v Shabalala and another 1953 NAC (N-E) 243.
121. Xakaza v Tshabalala 1943 NAC (N&T) 50; Ncube v

- v Makanya 1948 NAC (N&T) 8.
122. Xakaza v Tshabalala 1943 NAC (N&T) 50.
123. Mtetwa v Lembede 1937 NAC (N&T) 30.
124. Bekker & Coertze 152; Poulter 99-101; Olivier et al
67 et seq
125. Bekker & Coertze ibid.
126. Hartman 283-283.
127. One extreme case was where the father besides the
normal ilobolo made a special request for an additional
R1 500 - see also Vilakazi (1962) 61 et seq.

CHAPTER VII

DELIVERY OF ILOBOLO

7.1 INTRODUCTION

The delivery of ilobolo is a subject on its own that merits separate treatment. Whereas ordinarily ownership passes on delivery, the delivery of cattle for ilobolo purposes does not transfer ownership until the celebration of the marriage.¹ It is therefore proposed to investigate the reasons behind this rule. This will, however, not be done in isolation, but together with other aspects relevant to delivery of ilobolo cattle.

7.2 TO WHOM DELIVERED

Although the girl's father is primarily entitled to receive ilobolo for his daughter, he is free to designate anyone to receive ilobolo on his behalf. It is not genitorship which entitles a man to the lobolo for his daughter, but the fact that he married her mother by delivering ilobolo for her, and consequently acquired guardianship over her and her children. The father does not lose this right through his failure to maintain his daughter. The person who maintained her up to the time of the marriage can claim isondlo for her, but not her ilobolo.²

Where a woman grows up at a place of the person who is entitled to her lobolo, this person may give her in marriage. The presumption is that they are father and daughter.³ As to who is entitled to receive ilobolo for a woman who is staying at a place other than that of her father or guardian, there is difference of opinion.⁴ Whatever the position is among other black tribes, according to Zulu law no man can receive ilobolo for another man's daughter without his permission. If the custodian is approached with an eye to initiating negotiations, this man must inform the father of the girl.⁵

His failure to do so will, however, not invalidate an ensuing marriage.⁶

If the custodian receives ilobolo cattle, he is expected to deliver them together with their increase to the woman's father.⁷ He will not be liable for cattle which have died or were lost owing to no fault on his part. He is entitled to reimbursement for reasonable expenses incurred in the maintenance and wedding outfit of the woman.⁸ He will forfeit the reimbursement if, though he was able, he did not obtain prior approval of the guardian or father, in other words, if he did not act in good faith.⁹

In Mtimkulu v Mtimkulu,¹⁰ the court did not find any direct authority from Zulu law in support of this proposition. Nor did the court make use of the advice of assossors, but relied upon Cape decisions for its ruling.

In a Transkeian case it was decided that if the custodian has failed to report to the guardian of the girl that he had received ilobolo, or having reported, had failed to inform him of any death or loss among ilobolo stock which may occur from time to time, he is liable when accounting for and delivering ilobolo cattle, to replace any beast he may allege subsequently to have died or been lost.¹¹

In the case of Mdakane v Kumalo¹² it was decided that good faith is the touchstone of the custodian's entitlement to deductions, when accounting for ilobolo received, for expenses incurred in the support and marriage of the woman.

It was held that if there is good faith, he may deduct one beast for isondlo, another for the wedding outfit, and yet another for the beast slaughtered for the marriage ceremony. If this beast had formed part of ilobolo, he may merely account for it. But if it was one of his own cattle, he may deduct it when giving account. In addition he may deduct any reasonable

amount for small stock slaughtered for the girl's puberty ceremonies. In this case a man gave full ilobolo in order to take the illegitimate daughter of his bride together with the bride. The court held that the extra ilobolo was part of the necessary expenses in preparing the girl for marriage and is a set-off against the lobolo received by him for the daughter. The question of the illegality of the deal by the inclusion of the child in the lobolo given for the mother fell away because the claim was not directly based on the contract.

In a similar case where the man "bought" an illegitimate daughter when marrying her mother, when after the marriage of the daughter the man attempted to recover his expenses for arranging the celebrations, the court discovered that he was entitled to do so because he genuinely believed that he had been entitled to the lobolo of the daughter or else he would not have incurred such considerable expenses. The expenses could easily be separated from the illegal aspect of "buying the child".¹³

In another case it was decided that an heir who is entitled to the lobolo of a girl is liable to refund the custodian who supplied the ukuhehla and ukuncamisa beasts. The hlambisa and mbeko beasts, however, were held not to be refundable.¹⁴ The reasoning of the court in this case was that it was imperative to give ukukhehla and ukuncamisa beasts, but it was optional to give the ukuhlambisa and mbeko beasts. It is submitted that this judgment does not entirely reflect the position in the Zulu society. Ukuhlambisa is as important as ukuncamisa. The court should have taken into account whether the element of good faith was present, and then refunded the two other beasts as well. To refuse them was therefore prejudicial to the temporary guardian. It is hoped that the courts will not follow this decision in future.

If the woman's father is dead, then the heir of the house to which she belongs, will receive the cattle. If on the other

hand, this girl has been allotted to a particular son or if her ilobolo had been pledged to a particular house, the lobolo goes to that son or house as the case may be.¹⁵ Generally, however, the heir is entitled to ilobolo. Any person claiming entitlement thereto must prove it.¹⁶ The same applies to a divorced woman.¹⁷ Section 89 of the Code was undoubtedly aimed at preventing the delivery of ilobolo to the woman's father who in turn has to give it to the heir of the late husband. This might occasion unnecessary litigation should the father use the cattle for his own ends and then fail to deliver them to the rightful heir. In such a case the heir would have to sue him, a practice that could have been circumvented by direct delivery to him.

An heir who is entitled to receive ilobolo for a woman does not inherit the woman as property, but succeeds to guardianship of the woman, and in accordance with customary law he is liable to liquidate any debts incurred regarding ilobolo questions concerning her.¹⁸ He must therefore refund ilobolo delivered for another contemplated marriage which fell through.¹⁹ The heir can only be held liable for estate debts to the extent in which he inherited. Where the girl's father on his death leaves neither ilobolo cattle nor any other cattle in his estate, such ilobolo cattle cannot be claimed from the son and heir. The underlying reason is that the girl is not property in an estate, but her lobolo, while claimable by her guardian, renders him liable to liquidate any debts incurred in connection with her lobolo.²⁰

It has also been decided that ilobolo for a girl accrues to the holder of the estate at the time of the marriage, and not at the time of her birth.²¹ In this case it was alleged that a sister had been allocated to a brother to secure ilobolo for his wife.

According to Zulu customary law a mother is not competent to

receive ilobolo for her daughter. The heir or nearest male relative of the father has to do this.²² This may be disadvantageous if there is no close relative or heir.

This inability is attributable to the woman's incapacity at customary law to be a guardian because she herself is under the guardianship of her husband.²³ It was, among other things, for this reason that there was a need for improving the status of Zulu women. As a result the KwaZulu Act has done away with the perpetual minority of the woman.²⁴ Consequently certain women are entitled to stipulate and receive ilobolo if there is no heir.²⁵ This is a healthy development. Even in other tribes there is a growing tendency for the mother to be involved in marriage negotiations, especially if there is no close male relative.²⁶ Ilobolo given for an illegitimate daughter belongs to the mother's guardian before she married, and not to her husband even if he has given full ilobolo for the mother or has entered into an agreement to "buy" the daughter.²⁷ This purported purchase is contrary to public policy and consequently invalid.

According to Tswana law, the bogadi is primarily given to the bride's father. He is expected to share it with his relatives especially those who contributed to the bogadi given for his sons.²⁸ These are the bride's maternal uncle, paternal uncle and paternal aunt.²⁹ There is, however, no legal obligation on these relatives to contribute, nor is their claim to share in bogadi received, actionable.³⁰ This is not so in Zulu law. According to Zulu customary law the woman's father is the sole owner of ilobolo. The only time when he can give it to somebody else is when he is liquidating a debt for ilobolo for his wife or one of his son's wives.

Although there has been statements to the effect that in the distant past ilobolo cattle could also be claimed by other male relatives of the father, this has not been confirmed by empirical research. According to information obtained by

Sibiya among abakwaMkhwanazi, ilobolo cattle have never been distributed among members of a bride's lineage.³¹ If a chief's court gives an order that a judgment must be satisfied out of the lobolo to be received for a daughter, it does not mean that the judgment creditor is entitled to the property rights in her. The chief is not competent to order the delivery of ilobolo to a third party, but only to the guardian of the woman.³²

The responsibility to see that ilobolo is delivered to the rightful person rests on the guardian, but the court can on evidence declare who the rightful person is by stating that a certain person is entitled to the property rights in the girl in question.³³

7.3 TIME PLACE AND METHOD OF DELIVERY

There is no uniformity at present among the Zulus as to the method and time of delivery of ilobolo. The same applies to other African tribes.³⁴

The parties can enter into an agreement as to the time, place and manner of delivery. In the absence of an agreement as to place of delivery, it is effected at the place of the person who has to make the delivery.³⁵ Constructive delivery is also recognized.³⁶ What usually happens in practice, is that if ilobolo is delivered in livestock, abakhongi count the number of cattle. Then a day is agreed upon where the woman's father or guardian will go to see them (ukuyobona izonkomo). The cattle will then be brought into the cattle kraal and umkhongi will point them out one by one.³⁷ If ilobolo consists of money or partly of money and partly of livestock the men go into the house to have the money counted and placed on the floor³⁸ or, among non-traditionalists, on the table.

The actual pointing out of cattle constitutes constructive delivery.³⁹ For ilobolo purposes this operates within limits.

The Code provides for the delivery of ilobolo on the day of the celebration of the marriage unless a contrary agreement has been made.⁴⁰ This is not in accordance with Zulu customary law. The day of the celebration of the marriage is a festive occasion. It would be impossible on that day to deliver cattle at the same time. According to Zulu custom these cattle are delivered in advance. Traditionally their delivery is accompanied by ceremonies. There cannot be agreement on the day for the celebration of the wedding unless there has been delivery of at least part of ilobolo.

It is occasionally agreed that the remainder of ilobolo given will be settled from the lobolo given for that person's daughter. That ilobolo can only be claimed after delivery of the daughter's ilobolo. But the man remains liable even in the absence of a daughter or if for whatever reason the marriage fails.⁴¹ Where, as it usually happens, the daughter is taken to be brought up at her mother's home and she stays there until she marries, ilobolo given for her extinguishes the debt owed by her father.⁴²

Although physical delivery is not indispensable, identification being sufficient, ilobolo cattle may also be delivered physically.⁴³ If only part of ilobolo has been delivered, it must be agreed upon in the presence of witnesses when the balance will be delivered. This according to Zulu custom is done at the time of ukuthetha ubulanda (a time for discussing ilobolo delivered and still owing on the wedding day). Occasionally a certain period may be fixed after; the father may approach his son-in-law⁴⁴ after this time has elapsed.

Among the Tswana there is no fixed time for delivery of bogadi.⁴⁵ In some tribes delivery takes place at the time of marriage. In others it is rarely delivered until the birth of children of the marriage.⁴⁶

7.4. OWNERSHIP OF ILOBOLO

The passing of ownership in ilobolo cattle is another area where customary law has been modified by legislation. Delivery is usually the method of transferring ownership.⁴⁷

It means therefore that on delivery, be it constructive or actual, the father of the woman becomes the owner of ilobolo cattle.⁴⁸ In the case of ilobolo, however, this principle operates in a qualified form.

Cattle delivered before the celebration of the customary marriage, are regarded as sisa cattle, and ownership in them passes to the bride's father only after the conclusion of the marriage.⁴⁹

Section 85(1) of the Code which regulates the passing of ownership provides that in the absence of an agreement to the contrary, ownership in ilobolo cattle delivered before the marriage will not pass. This means that parties are free to stipulate that ownership will pass on delivery even before the celebration of the marriage. In accordance with the provisions of the Code cattle delivered before the celebration of the marriage are regulated by rules relating to ukusisa.⁵⁰

There is no decided case where parties had agreed that ownership in ilobolo cattle would pass on delivery. Nor was any information to this effect obtained from informants. The reason is obvious. People take this for granted. As a result they do not regard it as necessary to enter into separate stipulations on the passing of ownership. There are few cases where the transferor agreed to the cattle being used by the transferee.⁵¹ Differences of opinion are expressed on the position at customary law. This was quite clear from research done among abakwaMkhwanazi of Mpukunyoni. De Clercq⁵² points out correctly, it is submitted, that the idea of regarding ilobolo cattle delivered before marriage as sisa cattle, is contrary to customary law. The view also that

provisions of the Code. But when the informants were asked about the original customary law rule relating to the passing of ownership in these cattle there was difference of opinion. Section 85(1) was therefore aimed at solving a practical problem.⁵⁶

Although there are similarities between sisa cattle and ilobolo cattle, to regard them as identical is, to say the least, imprecise.⁵⁷ In practice, these cattle are not regarded as sisa cattle although in the failure of the marriage they have to be returned to the person who delivered them as if they were sisa cattle.⁵⁸ There are nevertheless, obvious differences between sisa cattle and cattle delivered in anticipation of the marriage. Firstly the very purpose of delivery of these cattle differs.⁵⁹ Another difference between ukusisa and ukulobola is that ukusisa cattle have to be returned after the expiry of the time agreed upon and there is no question of the relationship between the two parties being upset. But the return of ilobolo delivered is something that is fortuitous, and not pre-arranged. It only takes place on the breach of an engagement. The return of those cattle is an attempt to restore the status quo ante. The treatment of ilobolo cattle in the same way as ukusisa is purely accidental, but the breach of an engagement does not give rise to a fictitious ukusisa contract.⁶⁰ The very fact that it is customary to pass these cattle on to another person even before the celebration of the marriage, without the transferor objecting thereto shows that the transferee is having a stronger claim according to customary law, than a sisa holder. If these were according to customary law regarded as ukusisa cattle, then the practice would have developed whereby the transferor would be granted the right of access in order to inspect them as in the sisa contract. No similar practice has developed in customary law. This further supports the argument that to regard those cattle, as sisa cattle is inappropriate.

the increase or loss will accrue to the person who delivered them, is accordingly foreign to customary law. The reason is that usually a lot of time elapses after the delivery of ilobolo and before the conclusion of the marriage. If the agreement is in the meantime broken, the person who delivered them will lose the increase. Consequently they cannot be regarded as sisa cattle.⁵³ Among the Xhosa, as well, such cattle remain the father of bridegroom's before marriage.⁵⁴

Ilobolo delivered for a customary marriage may be passed on for other marriages before the first marriage has been celebrated. According to s85 these ilobolo cattle are regarded as sisa cattle. This creates a lot of confusion when the first marriage does not take place.

Ordinarily the person to whom they were first delivered, is liable to the first man who delivered the cattle. If the first man who delivered the cattle actually agrees to the cattle being passed on to a third person, they cease to be sisa cattle, and become a loan. By giving his consent to their disposal, the owner abandons his proprietary rights to and loses dominium in them.⁵⁵

One of the informants at Kwampukunyoni related a similar case heard before the chief's court. In this case, however, the first receiver had simply passed the cattle on for his son's ilobolo without the consent of the first giver, which is regarded as normal practice. The first marriage fell through, but the second one materialised. The first giver reclaimed his cattle. The chief's court decided that they had to be recovered from the second receiver. As a result the latter's daughter married without ilobolo. Only eight head of cattle were returned because three had already died. When the plaintiff further claimed the balance, he lost the case because he was supposed to bear the loss as well.

It is obvious in this case that the court applied the

This misconception stems from the inability to grasp the flexibility of customary law. The original promulgators of the Code being themselves trained in the Western legal tradition could not apprehend this. Holleman points out that these cattle belong to the wife's family and are treated as their property. If with the agreement, express or implied, of the wife's family, none or only a small portion of ilobolo has been given, children born of such a marriage already belong to the family of their mother's husband.⁶¹ On the conceptual misunderstanding he says:

"It is this flexibility which so often eludes western jurists who are trained to expect a closer connection between contractual performance and counter-performance ... It is also the reason for the erroneous, but firmly entrenched attitude of the Cape Division of the N.A.C. with regard to the ownership of 'betrothal' cattle transferred before the consummation of the marriage; or for that matter, for the wrong application of the 'sisa' concept under the Natal Code (s85) with regard to pre-paid lobolo.

"For part and parcel of the same conceptual flexibility which in Bantu law leads to the confident anticipation of ultimate results is the fact that once this good faith has been destroyed, the impact of this reaches back to the very root of the affinitation agreement... Flexibility then operates retrogressively; the view is then held that ... the lobolo cattle changed hands on false premises and therefore never really changed ownership".⁶²

The application of the principle laid down in the s 85(1) may lead to serious problems. If, as it usually happens, the father of the woman delays the marriage, the man will be prejudiced if in the meantime cattle die. If there is the increase he may theoretically, reclaim that increase, but in practice that will not easily happen.

The legal position in respect of ilobolo cattle in Natal is the same as elsewhere.⁶³ If a person (the father or relative of the bridegroom) delivers those cattle, he retains ownership in them. Ownership will go directly to the father or guardian of the bride on celebration of the marriage.⁶⁴ The

increase therefore belongs to the owner.⁶⁵ Since the cattle are regarded as sisa cattle, any increase is regarded as additional ilobolo, and the owner can reclaim the increase if the number is more than the number required. But if there was an express agreement that ownership would pass, then they are regarded as a loan. The transferor will not be entitled to reclaim the increase.⁶⁶ The person who delivered these cattle is the one entitled to reclaim them.⁶⁷

If cattle have been delivered as ilobolo for a son's future wife, they cannot be attached for his debts because ownership does not pass to the son. This is in line with the rule that ilobolo is provided by the father.⁶⁸ The father is free to withdraw his offer of providing ilobolo for his son, and can refuse to deliver them at any time before the ceremony has taken place.⁶⁹ This is in accordance with the comprehensive paternal power at customary law. The giving of ilobolo for a son depends on the loyalty of the son to the father. Disloyalty to the father may disentitle the son to provision of ilobolo by his father.

This, however, operates in a moderate form, because after he has delivered the cattle the father can no longer reclaim them. This also shows that the sisa idea is untenable. If these cattle were sisa cattle the father would be entitled to reclaim them.

In Shandu v Shandu⁷⁰ it was decided that a son has no locus standi to sue an heir for house property which has been pointed out as ilobolo by their father to the father of the prospective bride. If the marriage between the son and the bride has not yet been concluded, the cattle remain "engagement" cattle, and the father of the bride can only sue for them after the celebration of the marriage.

In a chief's court the heir succeeded in claiming ilobolo cattle which had been delivered to a younger brother. On appeal the judgement was substituted for one of awarding the

property rights in the sister to the heir. Because the marriage had not been celebrated, the court found that the younger brother only held the cattle in terms of sisa.⁷¹

In Mbanjwa v Mbanjwa⁷² the plaintiff claimed ownership of a certain heifer, averring that his father had given it to him for ilobolo purposes. The parties agreed that the case should be remitted to ascertain whether the beast had been an out-right gift or whether the passing of ownership had been dependent on the plaintiff's marriage. It has also been decided that an allocation by a father of cattle to a son for a customary marriage which has not yet been celebrated is not an allocation for a specific purpose or an unconditional donation. As a result the son cannot sue for the cattle.⁷³

In the case of Gazu v Ngcobo⁷⁴ where certain cattle delivered as ilobolo were wrongly appropriated, in an action for delivery of the increase of the cattle, the contention that such an action was debarred by section 150(2) was not allowed. The sisa-holder may not set off deaths unless he has notified the deaths, or otherwise accounted for them.⁷⁵ The onus of proving that he has reported the death of cattle delivered as ilobolo lies on the receiver. Where he stated that he had reported the death, but failed to offer the skin, the court held that he had failed to discharge the onus, and that he must bear the loss.⁷⁶

In another case⁷⁷ the receiver of the lobolo cattle did not report the deaths immediately and did not produce the skins promptly. The court held that the receiver must bear the loss because he did not act reasonably throughout, and because there is no obligation on the owner to call for the skins.

It is clear that the principle of treating ilobolo cattle before the celebration of a customary marriage as sisa, has been firmly entrenched in case law. What is more, in the case of

Msibi v Sibanyoni,⁷⁸ the court simply applied the provisions of the Code without convincing reasons, to the Transvaal.

The practice of regarding ilobolo cattle before marriage as sisa cattle is confusing and artificial. It prejudices the bridegroom if the father of the woman delays the celebration of the marriage, and cattle in the meantime die. It would further be inequitable to apply this rule if ilobolo is delivered, and for whatever reason there is a protracted delay before the celebration of the marriage. If the marriage is finally celebrated after say five years, as the cattle delivered are regarded as sisa, it means that any deaths have to be restored by the bridegroom. Although the bridegroom is entitled to reclaim the increase if the cattle are now more than the required number, the delicate relationship between him and his father-in-law makes this an arduous task. It is also unreasonable to expect the father of the woman not to use these cattle because, although the rule is that they are sisa cattle, in practice he takes them as his as he usually does not foresee that the marriage will be abortive, although he could circumvent this by having the marriage celebrated soon after delivery. The better view is that ownership should pass on delivery.

Finally it is important to point out that s 85(1) of the Code only refers to the passing of ownership of ilobolo cattle. It is silent on the position where ilobolo is settled in cash. Obviously the rules applying in the case of ilobolo delivered in cattle cannot apply here. It is perhaps the increasing use of money instead of livestock that will result in the problems caused by s85(1) of the Code not assuming alarming proportions.

7.5 DEATHS WITHIN FOURTEEN DAYS

Section 85(2) of the Code fixes the period of fourteen days as the time during which deaths in ilobolo cattle will have

to be made good by the contributor. The reason behind this is that it gives rise to a presumption that those cattle had some latent defect. The receiver of the cattle will, however, still have his remedy under s 149(3) of the Code, if he can prove that death was due to some latent defect. The fixing of fourteen days saves the receiver the necessity of proving the presence of latent defects.

7.6 SUMMARY AND CONCLUSION

It is the father of the bride as guardian who is entitled to receive ilobolo for her, even if he did not bring her up. The person who brought her up may only claim isondlo and not her ilobolo. The lobolo is the exclusive property of the father.

Ilobolo cattle delivered before the celebration of the marriage are regarded as sisa cattle, and their increase or decrease accrues to the man responsible for their delivery. This poses some problems if these cattle are used by the receiver and the marriage proves to be abortive.

Although there are objections to these cattle being regarded as sisa cattle the principle has been entrenched in the decisions of the court in their interpretation of s 85(1) that no amount of argument will alter the legal position.

FOOTNOTES

1. Section 85(1) of the Code and s62(1) of the KwaZulu Act.
2. Sibiya 212-213.
3. Midakane v Kumalo 1938 NAC (N&T) 219.
4. Olivier et al 83-87. The one view is that the custodian can accept ilobolo without further ado, the other that he cannot.
5. Olivier 83; Bekker & Coertze 166.
6. Bekker & Coertze ibid.

7. ibid.
8. Mdakane v Kumalo 1938 NAC (N&T) 219.
9. Mdakane v Kumalo 1938 NAC (N&T) 219; Mtimkulu v Mtimkulu 1959 NAC (N-E) 7.
10. 1959 NAC (N-E) 7.
11. Manunga v Yekiso 1936 NAC (C&O) 87. A subsequent case was decided differently - Mpengula v Mnhase 1950 NAC (S) 257. This decision has been criticised by Bekker & Coertze 167-8 as being unclear.
12. 1938 NAC (N&T) 219.
13. Xulu v Zulu 1951 NAC (N-E) 343.
14. Qwabe v Qwabe 1940 NAC (N&T) 15.
15. Stafford and Franklin 148.
16. Mfukulelwa v Qakaza 1917 NHC 163.
17. s89 of the Code. See also Sibiya 214.
18. Ngcobo v Mkize 1950 NAC (N-E) 249.
19. Ngcobo v Mkize 1950 NAC (N-E) 249. The court held that s116 of the Code does not protect the heir in such a case. S 116 provides that an heir succeeding to property whether general or house or personal, becomes liable for debts in respect thereof only to the extent of the assets to which he succeeds. This section limits the universal liability of the heir as was the case in early customary law and even early Roman law.
20. Hlatshwayo v Buthelezi 1977 ACCC (N-E) 252.
21. Mpungose v Mpungose 1946 NAC (N&T) 37.
22. Mogidi & another v Ngomo 1948 NAC (N&T) 18. This was a Transvaal case and relates to Ndebele law, but the principle is the same among the Zulus. On Zulu law see Ngwenya v Ndlovu 1965 NAC (N-E) 47; Clivier et al 87. This principle is the same among other black tribes; see also Sibiya 214.
23. s11(3), of Administration Act; s 27 of the Code.
24. s16 of the Act; The Age of Majority Act 57 of 1972.
25. s63 of the Act read with s29(2)(4) of the same Act.

26. Magadla v Gwabe 1940 NAC (C&O) 69; Maphela v Seshea 1943 NAC (C&O) 25.
27. Ndlela v Butelezi 1941 NAC (N&T) 38.
28. Schapera 142; Matthews 14.
29. Schapera ibid.
30. Matthews 15.
31. Sibiya 214.
32. Cili v Ntombela 1941 NAC (N&T) 16.
33. Zulu v Zulu 1957 NAC (N-E) 6.
34. Olivier et al 68.
35. s147(1) of the Code; s112(1) of KwaZulu Act.
36. s147(2) of the Code; s112(2) of KwaZulu Act.
37. Vilakazi (1962) 65.
38. Vilakazi ibid.
39. Bhulose v Nzimande 1951 NAC (N-E) 331.
40. s85(1) of the Code; s53(1) of KwaZulu Act.
41. Mcunu v Mcunu 1946 NAC (N&T) 48; Ximba v Ximba 1959 NAC (N-E) 18. See also Krige 121; s 146(2) of the Code.
42. Olivier et al 70.
43. Olivier 47-48; De Clercq 262.
44. De Clercq 263.
45. Schapera 141; Matthews 14.
46. Schapera 141. On the other tribes see Ramsay 17; Van Warmelo 107; Poulter 90; Ashton 66,67; Hartman 287-290; Olivier et al 68-70.
47. This method was also used among the Romans. For traditio to transfer ownership there had to be the physical transfer coupled with the iusta causa and the intention to transfer ownership - see JAC Thomas Textbook of Roman law (1976) 179. This was followed by Roman-Dutch law - Goldinger's Trustee v Whitelaw and son 1917 AD 66. This principle applies in customary law.
48. Olivier et al 48.

49. Section 85(1) of the Code; s62(1) of the KwaZulu Act; Magwaza v Magwaza 1937 NAC (N&T) 3; Nene v Xakaza 1938 NAC(N&T) 96; Mtembu v Mngwaba 1940 NAC (N&T) 67; Bhulose v Nzimande 1951 NAC (N-E) 331. Nxumalo v Ndwandwe 1956 NAC (N-E) 79.
50. See s1 of the Code; s150 of the Code; Olivier 552; CJ Davel and JMT Labuschagne "Die sisa-kontrak" 1979 De Jure 277 et seq.
51. Sibiya v Mkwanaase 1925 NHC 1; Ntuli v Nala 1925 NHC 23.
52. 264.
53. This view seems to be correct. The reason is as pointed out, that in customary society there was usually a long space of time between delivery and the celebration of the marriage. If the increase and loss were to accrue to the person who delivered them this would cause a lot of litigation which was not the case in tribal society.
54. Van Tromp 44; Koyana 8 et seq ,however, relying on decided cases holds a contrary opinion; see also Dyomfana v Klassie 1910 NAC 95; Swanepoel 94.
55. Sibiya v Mkwanaase 1925 NAC 1; Ntuli v Nala 1925 NHC 23.
56. Some said that ownership passed on delivery and others held a contrary view.
57. Olivier et al 17.
58. Breytenbach 172.
59. In the one case it is with purpose of marriage whereas in ukusisa the purpose may be for helping a poor neighbour for use and enjoyment or in some cases they may be given with the aim of eliminating too many cattle from one kraal.
60. Breytenbach 173.
61. Holleman (1960) 156.
62. ibid.
63. Olivier et al 15-18.
64. Magwaza v Magwaza 1937 NAC (N&T) 3; Mzimela v Mkwanaazi 1941 NAC (N&T) 12; Myeni v Myeni 1956 NAC (N-E)89.
65. Mzimela v Mkwanaazi 1941 NAC (N&T) 12.
66. Ntuli v Nala 1925 NHC 25; Sibiya v Mkwanaase 1925 NHC 1

67. Bhulose v Ndimande 1926 NHC 23; Magwaza v Magwaza 1937 NAC (N&T) 3; Gazu v Zulu 1951 NAC (N-E) 307.
68. Skolozu v Moya 1908 NHC 60.
69. Ndhlovu v Kumalo 1938 NAC (N&T) 101.
70. 1967 BAC (N-E) 10.
71. Zulu v Zulu 1957 NAC (N-E) 6.
72. 1964 BAC (N-E) 121.
73. Shandu v Shandu 1964 BAC (N-E) 63.
74. 1941 NAC (N&T) 4.
75. s150(3) of the Code.
76. Ndhlovu v Zondi 1938 NAC (N&T) 84.
77. Mpanza v Shezi 1950 NAC (N-E) 169.
78. 1940 NAC (N&T) 28.

CHAPTER VIII

THE PROVISION OF ILOBOLO

8.1 INTRODUCTION

When the lobolo-holder demands the balance of ilobolo due, the question arises as to who is liable therefor. It is therefore necessary to know who bears the responsibility for providing ilobolo, and who is liable for the balance. Various ways of assisting in the provision of ilobolo will also be investigated with the purpose of determining their position under modern circumstances.

8.2 PERSON TO PROVIDE ILOBOLO

The question of who is responsible for the provision of ilobolo poses no problems in those tribes that practise ukutholeka.¹ Among other tribes the obligation to deliver ilobolo is enforced by way of legal action. As a result the question of who is liable for the settlement of ilobolo is of great importance to the guardian of the wife. This liability arises from contract and is not incurred by the operation of customary law.² At customary law this might not be very problematic, but South African law being technical, it is particularly significant who is sued for ilobolo.

When a king or chief marries his great wife the tribe has customarily to furnish ilobolo for her. As a result she will be regarded as the "mother" of the tribe. The son born of this marriage is the heir because he is regarded as the child of that group.³ This lobolo is settled in full because the woman's guardian would have difficulty in suing the whole tribe. Moreover, it would be contrary to custom to sue the chief.

Although according to custom the father has to provide ilobolo

for the first wives of his sons, today the person who is liable to deliver ilobolo for all his wives is the husband.⁴ The Code provides for various ways whereby ilobolo can be provided.⁵

Section 91(1) provides as follows:

"Younger sons are usually assisted by the kraalhead in paying the lobolo for their first wife and younger brothers are usually assisted by the eldest brother or heir to their house with the approval of the kraal head".

According to the traditional set-up among blacks, the son had to stay with his father until he had established his own homestead, which he did after either the first marriage or the subsequent one.⁶ Because of this the family head was entitled to the earnings of all his sons or inmates of the homestead.⁷ The basis of this was the Zulu saying that "inyoni ishayelwa abakhulu" literally a bird is killed for the seniors, which means that whatever a young person gets, he must give that to his parents. As a result everything in the homestead belonged to the family head who could deal with it as he pleased,⁸ although today the Code limits the powers of the family head in that he has to use the property for the benefit of the house providing it.⁹ Because everything belonged to the family head, the inmates, including his sons, entirely depended on him for the provision of their needs, including furnishing them with ilobolo for their first wives.

The circumstances under which the Zulus lived before the coming of whites, precluded sons from acquiring property of their own except in rare instances. With the coming of whites, and the consequent opening up of employment opportunities, the son would secure employment in the industrial areas, but the traditional relationship between father and son remained for a long time undisturbed. Although the son contributed his earnings to the homestead, the father paid for his needs, and was responsible for his delicts.¹⁰ As an average

tribesman in early Zulu society had few cattle, a young man being unable to acquire property through lucrative employment naturally looked up to his father, elder brother or even uncles for the provision of ilobolo for his first wife.¹¹ Consequently a strong customary obligation developed that the father has to provide ilobolo for the first wife of all his sons. Similarly he had to initiate negotiations for the delivery of ilobolo. As the person who had the capacity to do so, the presumption arose that he is a party to the lobolo agreement until the contrary is proved.¹² Should the father not have sufficient cattle, he would ask for assistance from his brothers.

Even today among traditionalists the presumption is that the father is primarily responsible for providing ilobolo for his sons' first wives. When they marry subsequent wives they have to provide ilobolo for themselves. The presumption is rebuttable. The onus rests on the father. He may rebut it by showing that at the time of the conclusion of the marriage he had expressly disassociated himself from or repudiated liability for his son's marriage and ilobolo, or by showing that neither he nor his lawful representative took any part in the marriage.¹³ This repudiation will be an extraordinary step which rarely happens in practice. In traditional Zulu society there are procedures for effecting reconciliation. No man will risk marrying without the participation of his father.

Among the Tswana, ilobolo (bogadi) for the man's first wife is provided by the parents of the man, especially the father, although the son has no action against him. The relatives also contribute after being informed of the marriage. The contribution will be sought especially from the bridegroom's maternal uncle. The paternal aunt and uncle may assist if they can, but there is no legal obligation on them to contribute. Nor is there any duty resting on the son to contribute.¹⁴

No similar practice has developed among the Zulus. When the relatives contribute to the lobolo of a person, they do it upon the request of the father and that will create a debt which will have to be repaid by the person on whose behalf ilobolo is delivered.

The father's non-liability to deliver ilobolo for his son may be difficult to prove if the son was, at the time of the marriage negotiations, resident at his homestead, and he had delivered part of ilobolo. It may be different if he had been staying away from his father's homestead.¹⁵ The staying away creates the presumption that he is not under the control of the father, and that he is not contributing to the maintenance of the homestead.

The courts have decided that the obligation resting on the father to deliver ilobolo for his son's wife is only a moral and not a legal one.¹⁶ Moreover, a mere reminder by the father to his sons to provide ilobolo for the younger brothers, does not impose a legal but only a moral obligation.¹⁷ There is also no duty resting on the father to provide lobolo for the son's further wives even though he may involve himself in negotiations, unless he so expressly binds himself.¹⁸ This is so because obviously a second wife is a luxury rather than a necessity. As a result the son has no right of action against the father for the delivery of ilobolo.¹⁹ The son as bridegroom remains liable for the lobolo despite the fact that the father might be responsible and mostly the father and son are sued jointly for the delivery of the outstanding lobolo.²⁰

It is submitted that the provisions of the Code and the decisions of the court are in line with the traditional practice. It would be inconceivable in traditional society that a son could sue his father. The relationship between father and son was always that of obedience and respect. Because of the in-built social checks and balances, the father would

not take his responsibility of providing ilobolo for his son's first wife lightly, nor would he easily evade this liability.

The Code, however, qualifies the non-obligatory nature of the father's liability. Provision is made to the effect that if a son has consistently contributed towards the support of his mother's house under an agreement with his father that in due course he would be provided with a wife or assisted in obtaining or delivering ilobolo for her, then in the event of refusal or failure of the family head or his heir to implement the agreement, the son is entitled to recover a reasonable portion of the earnings so contributed.²¹

This creates the impression that in the absence of an agreement there is no legal obligation resting on the father to help his son with the lobolo or to repay a reasonable portion of the earnings contributed.²² The section requires an express agreement to that effect, otherwise the son might be able to say that there was an implied understanding that the father would provide ilobolo. This would be reasonable because in the recent past when a young man gave his earnings to his father a practice developed whereby the father would buy cattle for his son therewith. Although the father was virtually the owner and could use the cattle so bought for any purpose, there would always be an understanding that the cattle would be used for his son's ilobolo purposes. This is so because a son could not buy cattle himself, more especially because he would be away from home being at work most of the time. Nor would he dare to buy cattle through an outsider. This might be a serious undermining of the authority of the family head. At the same time the idea of banking among the Zulus had not taken root. In addition the belief was still prevalent that cattle are a better "bank".

A strict interpretation of this section, however, would not entitle a son to reclaim the contribution unless there

was an express agreement to that effect. This would really be prejudicial to the young man if he had consistently contributed to the upkeep of the family with the hope of being helped in delivering ilobolo.

This subsection was aimed at trying to reconcile the traditional set-up of the father being responsible for the lobolo for his sons' first wives, and the changed circumstances when young men have to contribute to the homestead. Even in the early Zulu society young men assisted the father in running the home, building huts and kraals and looking after cattle. When they had to hunt, whatever they got went to the father. The father in turn maintained them and provided ilobolo for their first wives. The father was therefore an "employer in miniature".

It has rightly been pointed out that if the son has done no more than his duty to help the father, and has in return benefitted from the family head, by way of maintenance and residence at the homestead, he cannot expect any refund either in the form of ilobolo or in cash. It will only be where he has done more than that that he will be entitled to compensation. Although the obligation is said to rest on an agreement, the court will in all probability infer an implied agreement when substantial contributions have been made by the son in the hope of ilobolo being provided.²³ This liberal interpretation is to be preferred. It does not do violence to the traditional principle. Nor does it totally leave the son without a remedy.

The court has decided in a number of cases that the inmate has an obligation to contribute to the homestead, and that it is customary that help in providing ilobolo be granted, especially if the son or inmate of the homestead has contributed his earnings to the homestead, but this is not enforceable.²⁴ If at all the son reclaims the portion he has contributed, he is entitled to no more than a reasonable

portion. If the father has contributed a portion of his ilobolo, he has duly discharged his obligation.²⁵ It is not a requirement that he contribute the whole.

In Masuku v Ndaba²⁶ where the plaintiff had agreed to work for the defendant and that the defendant would deliver his ilobolo when he married, on the failure of defendant to honour his agreement, plaintiff sued him for eleven head of cattle and succeeded. It was decided that the plaintiff was not suing in terms of the provisions of section 91(2) of the Code, but based his action on damages for breach of contract. It has also been decided that the father is free to revoke his promise to deliver ilobolo for his son before the conclusion of the marriage.²⁷

It is unlikely that a father will conclude an agreement as contemplated by s 91(2) with his son.²⁸ As a result the onus to prove an agreement rests on the son.²⁹ Any allegation to that effect must be supported by strong evidence, otherwise it will not be acceptable.³⁰ It is the traditional relationship between father and son in the Zulu community which makes it improbable to conclude that he should be bound by that agreement. Although he might have pointed out the cattle to be used for ilobolo, this does not pass ownership to his son or even to the bride's father, and if the marriage did not materialise he can reclaim them from him. After the marriage has been concluded, however, the son has the power to reclaim the cattle.³¹

The father usually provides cattle for ilobolo for his son from family property, which raises no obligation for the return of the same property except if the family head had publicly declared to the contrary.³² He may provide it from house property obtained from one house to another which must be returned³³ or by the allocation of a girl from the same house as the son who is being assisted. This is a gift, and no debt is created.³⁴

Cattle so provided by the father or elder brother for the lobolo of a wife for his son or brother as the case may be are a gift, and not a loan unless it has been publicly declared to the contrary at the celebration of the marriage.³⁵ If the cattle have been given as a loan, the loan is payable from the lobolo of the eldest daughter of the wife when that daughter marries.³⁶

Although the balance of ilobolo may be recovered by legal action, it is not clear whether the family head by the mere fact of associating himself either directly or indirectly, with the initial delivery of ilobolo for a son's first wife, without expressly repudiating liability for any balance outstanding, is thereby held implicitly to bind himself to deliver the balance. It is quite certain, that where the evidence shows that he did so intend to bind himself, he is liable for any balance outstanding.³⁷

The usual practice by which the father can provide ilobolo for his son is by allotting a girl to a particular son.³⁸ The primary source in traditional society of a son's ilobolo was ilobolo delivered for his sisters which belonged to his house and would be inherited by the eldest brother. To prevent any disputes and to protect the interests of younger sons, the father would link the lobolo among the sons of the house or allot each of his daughters to a particular son. As a result a special relationship existed between the brother and his linked sister, and when she married he could claim ilobolo given for her.³⁹ This allotment, however, does not have the effect of transferring ownership of the cattle to the allottee. The father still retains the ownership in those cattle, and may use them for any purpose including providing ilobolo for the other inmates of his homestead.

Although individual ownership of property is a recent development alien to customary law, the old set-up is still contained in s 35 and s 91 of the Code.⁴⁰ The custom is usually

for the father to allocate one of many daughters to a younger brother of the same house.⁴¹ This custom is usually resorted to where there is more than one son in a house with several daughters. Where there are many daughters and one son this action is unnecessary.⁴²

Whether an illegitimate girl was allocated with her mother to a brother is a question to be dealt with on its own merits regard being had to what was said by the girl's father or guardian at the time when the allocation was made, and the circumstances attending such allocation.⁴³ Any person who alleges the allotment must prove it.⁴⁴ If a family head is alleged to have made an allocation, the allegation must be supported by clear evidence that there was public announcement of the allocation in the presence of interested parties and inmates of the homestead.⁴⁵

In the case of Mpungose v Mpungose⁴⁶ an allegation was made that a sister had been allocated to a brother to secure ilobolo for his wife. It was held that the registration of the cattle for dipping purposes in the name of the brother some nine years before the attachment was sufficient corroboration.

Although the girl has been allocated, the son does not automatically become entitled to the right of ownership in the cattle delivered for her ilobolo. The son only has a spes that the lobolo he needs when he marries will be provided from the cattle delivered for the girl in question.⁴⁷ But the son cannot sue his father during the latter's lifetime for the lobolo due for his sister who was allotted to him.⁴⁸ Nor is a brother entitled to more of his allocated sister's lobolo than he needs for his lobolo purposes.⁴⁹ As a result the creditors of the father can claim the lobolo received for an allocated daughter. The brother to whom the sister was linked is only entitled to claim the cattle for ilobolo purposes that remain after the creditors have been satisfied

and if he marries.⁵⁰ This means, it is submitted, the son is not a creditor of his father which is in accordance with Zulu customary law. It means also that the creditors enjoy preference to any claims by the sons.

The case of Mpungose v Mpungose⁵¹ deviated from the previous decisions, and decided that the cattle received by a brother as ilobolo delivered for his allotted sister and dipped in his own name and in which he exercised rights of ownership for a number of years, and their offspring which were not delivered as ilobolo for his wife were not executable for the debts of his brother, the house heir. It is doubtful whether this case is good authority to be followed in later cases of this nature.

Unless the father has specifically allotted some of the cattle to a younger son, the heir is entitled to inherit all the lobolo cattle delivered for his full sisters.⁵² If the father, allots a sister and her lobolo to a younger brother in the same house, no debt is created towards the house heir.⁵³ Although ownership remains in the father, after the father's death the brother to whom a sister has been allocated, and not her guardian, is the appropriate person to sue for the delivery of her ilobolo.⁵⁴

In Bafokazana v Mabiwana⁵⁵ plaintiff provided ilobolo for his first wife out of other sources. After the father's death plaintiff sued for the lobolo to be received for his allocated sister in another house. The court did not allow this claim because it would only induce future litigation between the parties. This decision does not seem to be good authority.

What happens if ilobolo has been delivered for a girl in a house having no heir? The court has decided that the cattle become general property and the general heir is entitled to use it as he pleases. Should he promise to donate it to another inmate for purposes of ilobolo, he is thereby bound.⁵⁶

In this case plaintiff claimed certain cattle given as ilobolo for a certain girl allocated to him by his late father which allocation, he alleged, defendant subsequently ratified. The girl was in the fourth house, in which there was no son, and defendant was the general heir. It was contended that the alleged disposition, even if it could have been made by the late father, could only be operative if given effect to by him during his lifetime, and the property rights in the girl would be house property, and the use of her ilobolo cattle for someone outside the house would have created a debt in favour of the house. The court, however, decided that the disposition, if carried out in the lifetime of the father of the parties may or may not have been a valid one, but, after his death, the property rights in the daughters of the house became the family property of defendant, and he could use their ilobolo as he pleased, so that he was entitled to donate the lobolo to plaintiff which donation he had to implement.

In short, according to traditional customary law the father is liable to deliver ilobolo for his sons' first wives, but for later wives the sons bear the responsibility. He may use the property derived from general property of the homestead or from the house where each son belongs. In addition, if there are many sons and daughters, he may link each son to each daughter so that when the daughter marries ilobolo received for her may be used to deliver ilobolo for the brother to whom she was allocated. As the father has only a moral and not a legal obligation to provide ilobolo for his sons, the sons cannot sue him even for the lobolo received for the allotted daughters. It will only be where the father has entered into an agreement with his son to contribute towards the maintenance of the house in return for the provision of ilobolo for his wife, failure of which will entitle him to a refund. Should the father not be able, the elder brother may help a younger brother with the provision of ilobolo. This is the position according to customary law as codified. Times

have changed, and also the practice. It must be pointed out however, that the changes are not uniform although they are definitely increasing by the day.

Today because of the changed economic and social conditions even among the traditionalists the duty of providing ilobolo has shifted from the father to the bridegroom himself. The reason is that today when a young man has grown up he has to work for his living, and does not simply wait upon his father to provide for his needs. The homestead is no longer a self-sufficient self-supporting economic unit. Although among the traditionalists a son is still expected to contribute towards the maintenance of the house to which he belongs, the responsibility of getting cattle for ilobolo is upon him. Where the traditional element is still strong he may ask his father to buy cattle for him. In other instances he will save money for himself. The idea that the father is entitled to the earnings of his sons still remains and the father will help him with ilobolo if he has contributed his earnings. The son, however, still has formally to ask his father to start marriage negotiations and even if he has bought the cattle for himself he still has, as a formality, to ask for those cattle from his father thereby showing due deference to him. Because of this tendency today, the parents have a lesser say in the matter of whom the man should marry although they are free to air their views.

It may still happen that a father provide for the lobolo for his son's wife in particular if he is a well-to-do man, and if he feels that the son has been of assistance to him. The trend therefore is that the father will provide ilobolo as an expression of appreciation. Where the young man cannot provide ilobolo, the father may still feel obliged to provide it. But what usually happens today is that the father may contribute one or two head of cattle to his son as a gesture of goodwill, but the son himself is responsible for the rest. This is largely so because cattle are fewer these days, and

the father will mostly be dependent upon his son unless he has some remunerative employment. Even if he may be working, his income is channelled to other social and economic challenges like the education of children and the maintenance of the family. As a result very few establishments are polygynous today,⁵⁷ because polygyny besides being a social problem, is also an economic burden.

Because of the gradual disappearance of polygyny, it means that few men can therefore have many sons and daughters to be linked to each other. As a result the practice of allotting sisters to brothers is also gradually falling into disuse. No right-minded son can today depend on the contingency of his sister getting married so that he can obtain ilobolo for his wife. Furthermore, marriage today among blacks is expensive so that the father will hardly have anything left. What usually happens is that he himself has to pay something extra. There will therefore be no lobolo left from which to deliver ilobolo for his son except in rare instances where ilobolo was delivered in livestock, for money is quickly dissipated in paying marriage expenses. The idea therefore that ilobolo obtained for the sister is meant to enable the brother to get a substitute in her place has now only remained a fiction. The father today regards himself as being entitled to ilobolo and can use it as he pleases.

In short, today the responsibility for providing ilobolo rests on the bridegroom. The father of the bridegroom may merely help. As a formality he may be involved in marriage negotiations without implying that he is liable for ilobolo. This is definitely the norm among non-traditionalists although the position relating to traditionalists is malleable.⁵⁸

Yet another recent development in the provision of ilobolo is the practice of a young wage-earning woman who gives her lover part of the salary for purposes of settling ilobolo demanded. This practice, however, is still rare and is confined mostly to

non-traditionalist women.⁵⁹ It is doubtful whether these cases will ever come before the courts because the woman would not like to divulge that.

This practice is frowned upon by both traditionalists and non-traditionalists. It is as good as if the woman has married without the delivery of ilobolo. But the purpose of giving ilobolo by the woman herself is aimed at attaining, in proper fashion, the enhanced status of a married woman; to fulfill her obligation towards her own family, and to assert her independence as a wage-earner, wife and mother, should the man fail her as a husband and father of her children. For, as Holleman states, "he would indeed be a bold man who, having received lobolo for his wife from her own hands, would pursue a claim for its return or for his right to the children should the marriage later fail".^{59(a)} This practice has been criticised as being a perversion of the very idea of ilobolo. It has been regarded as not being an extension of the scope of ilobolo, but a contradiction of it.^{59(a)} But as it was pointed out that ilobolo raises the status of a woman to that of a wife, a woman whose intending spouse is unable to provide ilobolo cannot be blamed if she transgresses the rule of custom if that will mean her assuming wifehood whether by fair or foul means. What is obvious is that because public opinion is against it, this practice will not spread or become widely known.

The basis for the provision of ilobolo by the father was also the traditional communal responsibility of the lineage, the idea being that the woman is marrying the lineage and not simply the individual. The individualistic tendency has undermined this traditional approach. Consequently the man is primarily responsible for his ilobolo as the woman now marries him and not the lineage group.

Before leaving the question of who is responsible for providing ilobolo, it is important to deal with the case where the father or son is unable to provide cattle from general

property of the homestead and has therefore to resort to a loan, known as ukwethula.

8.3 THE UKWETHULA CUSTOM

The discussion above has been largely concerned with the various ways whereby ilobolo can be provided by the father of the bridegroom. To further emphasise the collective responsibility for ilobolo, other relationships could be created from which to obtain ilobolo. Ukwethula is the one.

The practice of ukwethula is defined by the Code as "the custom whereby an obligation is imposed upon a junior house to refund lobolo which may have been taken from a senior house to establish such junior house. The lobolo of the eldest daughter of such junior house is usually indicated as the source from which the liability is to be met but the custom is not recognized as extending to the handing over of the 'ethula' girl herself as a pledge of payment".⁶⁰ Furthermore, the Code provides: "Assistance rendered by a kraal head from kraal property to any son in obtaining a wife by contributing the whole or portion of the lobolo is a gift and creates no liability to the indlunkulu unless it be clearly stipulated to the contrary at the time of the celebration of the union".⁶¹ If property is used for this purpose an obligation rests upon the house established by such union to refund.⁶² But if the family head uses property belonging to the homestead in general for establishing a house there is no obligation for refund resting on the house so established, unless a contrary intention was declared at the celebration of that marriage,⁶³ in which case an obligation to refund rests on the house so established.⁶⁴ The debt is payable from the lobolo delivered for the first daughter of the house so established.⁶⁵

The word ukwethula as used in the Code is not known among certain tribes. Those tribes make use of the term ukwetsheleka which means a loan.⁶⁶ According to what De Clercq⁶⁷ found

among the Mzimela tribe, ukwethula had to do with the seniority structure of the homestead whereby the senior position of the family head or his successor was recognized and respected. By this practice the head could take the first-born son from any house and put him in the indlunkulu. He would then for all practical purposes belong to that house and would inherit property from it. It served as a symbol of respect by the inferior houses to indlunkulu. By virtue of this practice indlunkulu would have a claim on the first born children on the inferior houses, and they would acquiesce when it exercised the power. Through this practice it could happen that the ndlunkulu could get a number of daughters and consequently bring in a lot of cattle by way of ilobolo. Because ilobolo cattle fell into common property the family head could use it as he saw fit. Consequently the use of the term ukwethula in the Code is regarded as incorrect. The ukwethula custom has, however, fallen into disuse.⁶⁸ The correct word therefore seems to be ukwetsheleka and this one is wider although the courts have used ukwethula because of the influence of the Code.⁶⁹

Informants from kwaMpukunyoni on the other hand were of the opinion that ukwethula is as is described by the Code. Although the term ukwethula may not be as generally accepted as ukwetsheleka, it will be used here because it has been generally used by the courts.⁷⁰

Although the position relating to ukwethula has been regulated by the provisions of the Code, the views obtained from empirical research are to the effect that the family head in customary law had unlimited power over family property as it belonged to him and the use thereof did not create a debt to be refunded. Thus if the family head took property from one house to be used in another house, it did not create an obligation to refund.⁷¹ As the position is today regulated by the Code,⁷² it is important to analyse the provisions of the Code in the light of decided cases. But before doing

that, it is necessary to look at the creation of ukwethula relationship. The Code simply defines ukwethula and the obligations created thereby without relating the manner of its creation.

As ukwethula is usually concluded between persons who are related and therefore well-known to each other, it is concluded without the intercession of messengers. Yet because obligations created will endure for a long period of time, and because any or both of them may die before the liquidation of the debt, it is necessary to have witnesses during the conclusion thereof although it will also be made public on the day of the celebration of the marriage.⁷³

Ukwethula relationship may arise in the following instances, namely:

- (a) Where the family head takes property belonging to one house with the purpose of delivering of ilobolo for a further wife for himself;
- (b) Where the head of the homestead delivers cattle from the property of one house to another house for purposes of ilobolo of the son of the latter house.
- (c) Where ilobolo that will be delivered for a specific daughter in a house has been indicated as a source from which a son in another house will derive ilobolo for his wife.
- (d) Where the family head takes cattle from one house for purposes of paying a debt owed by another house.⁷⁴

It has been pointed out above that a person's father is according to customary law primarily responsible for the ilobolo of his son's first wife. According to customary law every person before marriage is regarded as a minor and has to be under the control of his head. When he is married he is legally a major and can establish his own homestead. When he wants to marry another wife he must therefore provide

ilobolo for himself. It is where a man wants to provide ilobolo for his son's first wife that he has to resort to a loan.

8.3.1 Family property used as ilobolo

In line with the provisions of the Code the courts have decided that family property used as ilobolo is not subject to refund.⁷⁵ As a result any assistance which the family head renders towards the settlement of his son's ilobolo is primarily regarded as a gift, unless the contrary intention is publicly expressed.⁷⁶ Similarly, cattle advanced from an heirless house as ilobolo for a wife of the general heir himself, does not create an obligation.⁷⁷ The property rights in a girl born to a house where there has been a failure of male issue, and which has not been affiliated to any particular house accrue as general property and may be used by the family head for founding other houses in the homestead.⁷⁸

In Manqele v Manqele⁷⁹ the plaintiff had given eight head of cattle to his cousin, the defendant. The defendant had lived with plaintiff's father, and had handed his earnings to him on the promise that he would assist him with ilobolo. After his death, the plaintiff gave defendant eight head of cattle which he reclaimed from the lobolo of defendant's daughter. The court decided that plaintiff was under no obligation to carry out his father's promise, and was entitled to the return of eight head of cattle advanced.

In the case of Butelezi v Butelezi⁸⁰ ukwethula was due by the khohlo in favour of the ndlunkulu. The lobolo for the eldest daughter of the khohlo had gone directly to the family head who had given some as ilobolo for the khohlo heir. The court decided that the definition of house property given in s 1(1) refers to property of the house in the homestead established by the family head and does not refer to houses in the father's or other ancestral homestead. Any property that an heir inherits from his father either by way of house or

family property becomes family property in so far as his own homestead is concerned. Where the family head uses this property to lobola a wife for himself, no obligation arises to return it unless there had been a clear indication to the contrary in terms of section 92(3). The court consequently held that the family head had used his own family property, and in the absence of a declaration at the wedding of the khohlo heir, the lobolo is not refundable.

8.3.2 House property given as ilobolo for sons of same house

Section 92(2) was promulgated having in mind house property used as ilobolo for the sons of another house. Consequently it does not apply to a situation where house property is advanced for the son of the same house.⁸¹ If an obligation to refund ilobolo delivered on behalf of a brother in the same house is engendered, this obligation will only arise out of a specific undertaking to do so or when it was specifically declared at the time of the delivery of the lobolo that it was a loan and not a gift.⁸²

In Mhlungu v Mhlungu,⁸³ however, a different view was expressed. The court held that a gift of house property as ilobolo for a younger brother in the same house needs clear proof of a public declaration. This statement was only made obiter, and it is doubtful that the courts will follow it.

It need be said, however, that according to research done at Mpukunyoni, the informants were of the opinion that an obligation arises whenever a father advances ilobolo on behalf of his son, unless he declares to the contrary at the celebration of the marriage. Whether this is the original customary rule was not clear from interviews. It is probable that the rule is of later development, and it owes its origin to the latest development that unlike in the past the man is primarily responsible for ilobolo for his wife, and his father is only liable in a secondary capacity. Although this is a progressive

step towards the recognition of the primary responsibility of the bridegroom in providing ilobolo, as the courts have shown reluctance to adapt customary law to changed circumstances, doubt still exists on what the courts will decide. It is submitted that the courts should follow this new trend.

If the father has advanced ilobolo for a younger son in the same house, and ilobolo has actually been given, and there is proof that the younger son had contributed his earnings for the maintenance of the homestead, the gift is regarded as a donation and the father may not revoke it.⁸⁴ This seems to restrict the power of the father, but in the light of the present circumstances it is necessary that the power of the family be limited in the interests of the son. To allow him to revoke the donation with impunity would undoubtedly prejudice the son who has contributed his earnings with the hope of being provided with ilobolo.

8.3.3 House property used as ilobolo for sons of other houses

It has been observed that house property used as ilobolo for the sons of the same house is a gift. But house property used to provide ilobolo for sons of another house creates an obligation on the house so established to refund that property.⁸⁵ It is immaterial that a public declaration was not made at the time of the celebration of the marriage.⁸⁶

The ndlunkulu does not automatically have the right to claim ilobolo of the eldest daughter in each house affiliated to it except if cattle have been advanced by the ndlunkulu.⁸⁷ At the same time the family head does not have power to donate house property for ilobolo purposes to a son of another house.⁸⁸ On the other hand, cattle advanced from a house having no heir as ilobolo for a younger son in another house in the lifetime of the family head, is deemed to be family property and does not create a debt.⁸⁹

In Shandu v Shandu⁹⁵ the family head utilised cattle belonging to indlunkulu to settle ilobolo for the heir of the khohlo house. During his lifetime the family head had received ilobolo given for a girl of the khohlo house. The court held that the cattle received by the family head belonged to him and not to the heir of indlunkulu. Consequently it could not be set off against cattle which were advanced by the family head.

8.3.4 Person responsible to pay debt

The proper person from whom to claim after death of the family head is the heir of that house. Should the heir still be a minor, he must be assisted, but the action is not directed against his guardian, but the general heir only.⁹¹ The eldest son, however, is not entitled to sue his father during his lifetime for cattle utilised as ilobolo by a son of another house. The action only accrues to the heir after the death of the father or if the son is dead, to his heir.⁹² If the elder brother of the husband had assisted him in negotiations, he is not liable for the refund of a loan made as ilobolo to the husband.⁹³ The fact that the heir of an indebted house had paid the balance of ilobolo owing in respect of the mother of the ukwethula girl, does not exempt him from the debt.⁹⁴

8.3.5 Time when debt due

The general rule is that ilobolo advanced for a son is only due to be repaid from the lobolo of the son's eldest daughter when she marries unless there was another agreement to the contrary. It cannot be set off against a claim by the son for delivery of cattle belonging to him which are running at his father's homestead.⁹⁵ Any action that purports to reclaim cattle advanced as ilobolo before the marriage of the daughter is premature, unless some agreement for prior payment was reached.⁹⁶

In the case of Mtembu v Mtembu⁹⁷ plaintiff sued defendant for return of ilobolo cattle which he had lent for the customary marriage of the defendant's brother on the understanding that they would be repaid from the lobolo of the first daughter of that marriage. The wife had had no children for five years and had also then deserted him. The plaintiff had not alleged that the parties had been divorced or that it had been impossible for her to have children. The court held that the action had been brought prematurely.

In another case plaintiff had instituted an action for the refund of ilobolo advanced where the woman had subsequently been divorced. The court held that evidence should have been led as to whether a daughter had been born. The maxim lex non cogit ad impossibilia could only be applicable if the court found that there is no daughter. It is the duty of the father to plead that the loan is only refundable when his eldest daughter marries, and plaintiff should not have taken premature action unless there were exceptional circumstances which he had to allege and prove.⁹⁸

Although the action should not be brought prematurely, claims of ancient origin should be treated circumspectly if there is no valid excuse given for the protracted delay in bringing the action.⁹⁹ Convincing reasons must be furnished why action was not taken when the cattle were appropriated by the girl's father because ukwethula cattle ought to be replaced when the girl marries.¹⁰⁰ In any claim where the subject-matter upon which it is based arose many years before the action was instituted, the court will require clearest proof that the action is well grounded, that it is supported by good and sufficient reasons for the delay in the issue of process, and that it is clear that the delay has caused no prejudice to the other party.¹⁰¹ Although according to customary law debts do not prescribe, it is desirable that claims should be brought within a reasonable time, otherwise they will present difficult problems of proof.

8.3.6 The scope of liability

The liability to refund an advance continues though no daughters have been born to the house. The heir pays the debts up to the value of the estate.¹⁰² The provision that an heir of a house continues to be liable for a debt does not completely override s116 of the Code which provides that an heir becomes liable for debts only to the extent of the assets to which he succeeds. Section 92 provides that a debt should specifically be met from ilobolo of a descendant of the marriage whether of the wife so married or of the daughters of any son of the son of the house, should there be a failure of daughters in the house itself. It does not burden an heir with this liability from any other source of income if he has inherited nothing from the estate.¹⁰³

If the first daughter of the house which owes the debt dies unmarried, the debt can be discharged from the lobolo of an illegitimate daughter of the deceased daughter. The claim can also be satisfied from the lobolo of the other daughters of the house.¹⁰⁴ The heir of a house in whose favour an ukwethula debt has been created is only entitled to the actual number of cattle advanced and not to all the lobolo received for the eldest daughter of the indebted house.¹⁰⁵

8.3.7 The settlement of the debt

When it comes to the settlement of the debt, the question is whether it is permissible to pledge the girl from whose ilobolo the debt will be liquidated as security for the payment thereof. According to Zulu customary law if a girl had been indicated as an ukwethula one, she would be transferred to the senior house to which the debt was owed, and for all practical purposes she would be regarded as a daughter of that house. As a result the eldest son of that house would prepare her for the marriage and would receive ilobolo to be delivered for her. This would be enforceable in court.¹⁰⁶ If the woman is not transferred in this manner to the creditor,

the father still retains a right into her ilobolo, but naturally the father remains liable for the repayment of the debt.¹⁰⁷

The Code, although it recognizes the custom of ukwethula, does not condone the pledging of a woman in security of payment.¹⁰⁸ Section 146(1) of the Code further stipulates that black women, despite any property rights connected with the customary marriage, should not be treated as chattels. Yet the mere indication of a woman or girl as a source from which, through her ilobolo, a debt or obligation is payable shall not vitiate the contract based on customary law.¹⁰⁹

On several occasions the Court has decided that the pledging of the expected ilobolo for the daughter as security for the payment of the debt is in accordance with the traditional African law, and is also not in conflict with public policy or contra bonos mores. On the other hand the transfer of the woman can under certain circumstances amount to a "trafficking" in children. In this case the court decided that where a woman is transferred with the aim of transferring her guardianship to the creditor, this is trafficking in children and is therefore null and void ab initio. But if the implication is that the father should retain guardianship over her while the creditor becomes merely entitled to her ilobolo, the fact that she has gone to stay at his homestead is not contrary to public policy. It only represents the transfer of the right to her ilobolo.¹¹⁰

The position in Natal and KwaZulu therefore is that the transfer of the woman to the creditor as a pledge for the debt is not permissible.¹¹¹ The provisions of the Code and the decided cases were undoubtedly influenced by world reaction to slavery in particular the Western world.¹¹² The practice of transferring an ethula girl was obviously mistaken with "trafficking in children". Yet, it is submitted, the customary law idea was not motivated by mercenary

considerations. It was simply a practice of showing the seriousness on the part of the debtor and in any case the "pledgee" did not treat the girl as a chattel, but as his own child. Nevertheless it cannot be denied that this practice just like ilobolo, operating in a money economy, could not escape the abuses to which ilobolo was open. It was a good idea therefore that while recognizing the institution of ukwethula, the position of the woman be safeguarded.

8.3.8 Registration of the custom

Provision in the Code is made for the registration of ukwethula.¹¹³ In Shabalala v Shabalala¹¹⁴ it was decided that registration of customary marriages had been in force in Natal for many years and there is no excuse for any person who advances ilobolo or for the heir of any house from which cattle are taken for ilobolo in another house, not to take steps to protect the interests of the house making the advance. The court decided that the whole object of registration is to protect all interested parties. Any dilatoriness on the part of an interested person must recoil him if he, at a later time, finds it difficult to prove the advances made by his house. The registration is therefore for purposes of proof and is not a requirement for the validity of the transaction.

8.3.9 The practice among other black tribes

Various other tribes have a similar practice of providing ilobolo as the Zulus. The Xhosa have ukwenzelela and ukufakwa.¹¹⁵ Ukwenzelela is a practice that is also evidence of the communal involvement in the provision of ilobolo in traditional Xhosa society. According to this practice relatives may contribute to ikhazi (ilobolo in Xhosa) of a man. This contribution creates an obligation for the refund thereof when the first daughter of the marriage marries.¹¹⁶

Among the Shangaan-Tsonga group the way in which the father provides ilobolo for the first wives of his sons is similar to the Zulu.¹¹⁷ This includes the linking of sisters and brothers from the same house. The practice similar to the ethula custom is only found in those areas which have been under the strong influence of Zulu law.¹¹⁸ The system of linking sisters and brothers for ilobolo purposes known as cipanda is also known among the Shona.¹¹⁹ But among the Shona this may not only be confined to close brothers and sisters, but may even include half-brothers and sisters to emphasize the unity and interdependence of the group.¹²⁰

In the Sotho-Tswana group voluntary contributions towards ilobolo are regarded as gifts, and are not refundable unless there was a special agreement to that effect. If the marriage is dissolved and ilobolo returned the contributors are entitled to their contributions.¹²¹

In Venda law the father or uncle or mother may provide the thakha with which the son has to mala a wife. If the mother provided the thakha, the woman so mala'd is known as tshiozwi. Brothers who do not have anyone to provide ilobolo for them often club together for purposes of helping each other to obtain ilobolo to mala a wife.¹²² But the debt owed for the mother's thakha cannot be liquidated from the thakha received for the daughter because the rule is that a girl cannot bring her own mother into the family, but only a mother's co-wife or brother's wife. The father would rather borrow cattle from relatives to liquidate the debt.¹²³

From this brief comparison it is clear that although there are similar practices for providing ilobolo among black tribes, these practices differ from each other in material respects. Yet the existence of these practices attests to the fact that in these communities ways of assisting in the provision of ilobolo and the refund of the debt created thereby were clearly worked out. These ways were quite suited to the

self-sufficient agrarian communities. They were also suited to a polygynous establishment, but they are unsuitable to modern conditions owing to economic and social changes. As a result most of them are fast disappearing.

8.3.10 The present position of ukwethula

The ways of providing assistance for ilobolo in Zulu law are the vestiges of the traditional communal responsibility for marriage. The family head, as a representative of the group, had to provide ilobolo for the inmates of his homestead. If he could not afford to do that, arrangements could be made to provide ilobolo. If these came to nought a man could get a wife on the understanding that her ilobolo would be settled from the lobolo of his eldest daughter.¹²⁴ Inability to deliver ilobolo, therefore did not preclude anyone from marrying. The institution of ukwethula is evidence of this.

Among the non-traditionalists, however, the institution of ukwethula and related practices have practically disappeared. Even among the traditionalists this is fast fading away. A look at the reported cases also attests to this. There is hardly more than two cases of the sixties and none of the seventies. There are various reasons for this.

The institution of ukwethula was more suited to the self-sufficient community where the acquisition of gain was not a primary consideration. Because of changes in the economic situation, it has become obsolete. It also had its basis in the collective involvement in matters of marriage in a tribal society. Today the emphasis is more on the two individuals to the marriage. This individualistic approach has therefore weakened the communal involvement in the marriage. In addition this institution was compatible with a polygynous establishment, where a man had a number of houses where he could play with property from one house to another. With the gradual disappearance of polygyny the institution

automatically fades away.

The custom ukwethula is not a profit-making enterprise. Its aim is to benefit the borrower and not the lender. This is because historically this took place within the extended family circle. As a result there would be no claim for increase or interest.

Today because of the money economy, no one, not even brothers, would be prepared to give away cash or cattle for an indefinite period without expecting anything in return by way of interest whereas he could have invested that money and gained interest and cattle would have multiplied. Moreover, it is difficult today to visualise a situation where a man might have enough cattle for his personal use and to spare because today there are more challenges which require money than yesterday. Custom also depends on the psychological make-up of the people concerned. The mental attitude among the Zulu has also changed. Today no man will easily give his daughter away on the hope that he will get ilobolo when his daughter's daughter marries, because by that time he may be dead. Furthermore to depend on the marriage of a person as a source from which the debt will be liquidated, is a risk because she may not marry and the situation will further be complicated.

It needs but a moment's reflection to realise that the waning of this institution poses some problems for a young man wanting to marry but unable to provide ilobolo. This may be off-set by the fact that today there are employment opportunities, and a man has to work before he can get a wife. Furthermore, it may be ameliorated by the agreement not to deliver the whole amount at once, but to give a certain portion and then to marry on the understanding that the balance will be settled in instalments. From interviews it appeared that very few people settle the whole ilobolo before marriage. This in itself may be disadvantageous to the marriage because when the parties start in marriage they are already saddled

with a big debt. This may also encourage litigation.¹²⁵

In short the custom of ukwethula had salutary effects in that it enabled a man to marry even though he might not be capable of delivering ilobolo. Yet it is obvious that it is an institution of a bygone age, and has completely vanished among non-traditionalists while it is fast disappearing among traditionalists. As a result any Zulu who wants to marry must be prepared to pay the price.

8.4 SUMMARY AND CONCLUSION

According to the customary law of not only the Zulus but also of other black tribes, the father was primarily responsible for the provision of ilobolo for the first wives of his sons. This he had to do because he was legally the owner of all family property, and because he had the necessary legal capacity which a son never had until he married.¹²⁶ He might contribute a portion or the whole of it. If he was not able to provide ilobolo from family property, he might pair sons and daughters of the same house. If there was a son or sons and no daughters in a particular house, he might use property from another house to provide ilobolo for that son or sons. This had to be refunded from the lobolo of the daughter of the marriage.

Although a strong customary obligation for the father to provide ilobolo for his sons' first wives developed, the Code and the courts have held that this is a moral and not a legal obligation. Today, because of the change in the economic and social conditions, among non-traditionalists the bridegroom is primarily responsible for ilobolo. Even among the traditionalists the bridegroom is usually the breadwinner and the father merely helps where he can.

This has given rise to a new rule that even among the traditionalists, the primary responsibility for providing ilobolo

for his wife or wives rests on the bridegroom. As a result where a man avers that his father is responsible for ilobolo for his first wife, it is submitted that this must be proved. The success thereof must depend on whether the son has contributed substantially to the upkeep of the homestead under an understanding that he will be provided with ilobolo for his first wife; or this should be so if the father is a well-to-do man and where he can provide ilobolo whereas the son for one or other reason cannot. The social background of the parties should also be a determining factor in this respect. The practice of ukwethula has fallen into disuse among non-traditionalists, and is fast fading away among traditionalists. Yet ilobolo continues.

FOOTNOTES

1. Bekker & Coertze 159. This is the position among the Xhosa and Venda. - Van Warmelo 97-99. On the position in Zimbabwe see Holleman (1969) 172, although Goldin and Gelfand 136 say that this has changed.
2. Bekker & Coertze 159.
3. Gluckman (1960) 184.
4. Bekker & Coertze 159; Harris 64.
5. s91 of the Code; s68 of the KwaZulu Act.
6. De Clercq 250; Olivier et al 70.
7. s35 of the Code; s21(1) of KwaZulu Act.
8. See also s36 of the Code; s22 of KwaZulu Act.
9. s35(2) and (3) of the Code; s21(2) of KwaZulu Act.
10. Olivier et al 71; Bekker & Coertze 159.
11. Simons (1968) 93.
12. Bekker & Coertze 159; Olivier et al 71; De Clercq 250; Van Tromp 44 says that among the Xhosa the father is legally obliged to help his son to lobolo his wife.
13. Bekker & Coertze 159; Olivier et al 71; Van Tromp 44; Schapera 140; Harries 10; Hunter 122-3; Marwick 126.

14. Schapera 140; Matthews 14, Coertze 225.
15. Olivier et al 71; Bekker & Coertze 154.
16. Mketengo v Ncatshana 1903 N H C 23; Langa v Langa 1930 NAC (N&T) 39. These decisions were given under the 1891 Code and this Code did not contain a provision similar to s 91 but these decisions are in accordance with this section - See also later decisions - Fyn v Fyn 1937 NAC (N&T) 99; Mangele v Mangele 1940 NAC (N&T) 71; Dhludhla v Dube 1937 NAC (N&T) 1; Dubazana v Dubazana 1953 (N-E) 154.
17. Faya v Faya 1924 NHC 28.
18. Bekker & Coertze 160; Olivier et al 72.
19. Langa v Langa 1930 NAC (N&T) 39; Fyn v Fyn 1937 NAC (N&T) 99.
20. Olivier et al 72.
21. s91 (2) of the Code - s68(2) of KwaZulu Act.
22. Stafford & Franklin 153; Olivier et al 73.
23. Stafford & Franklin 153.
24. Mangele v Mangele 1940 NAC (N&T) 71; Langa v Langa 1931 NAC (N&T) 39; Fyn v Fyn 1937 NAC (N&T) 99; Dhludhla v Dube 1937 NAC (N&T) 1; Dubazana v Dubazana 1953 NAC (N-E) 154.
25. Dhlamini v Dhlamini 1934 NAC (N&T) 21; Biyela v Biyela 1935 NAC (N&T) 1; Mtetwa v Mtetwa 1944 NAC (N&T) 51; Masuku v Ndaba 1954 NAC (N-E) 128.
26. 1954 NAC (N-E) 128.
27. Ndhlovu v Kumalo 1938 NAC (N&T) 101.
28. Dhludhla v Dube 1937 NAC (N&T) 1.
29. Mtetwa v Mtetwa 1944 NAC (N&T) 51.
30. Dhludhla v Dube 1937 NAC (N&T) 1.
31. Ndhlovu v Kumalo 1938 NAC (N&T) 101.
32. s92(1) of the Code; s69(1) of KwaZulu Act.
33. s92(2) of the Code; s69(2) of KwaZulu Act.
34. s92(3) of the Code; s69(3) of KwaZulu Act.

35. Ngcobo v Ngcobo 1931 NAC (N&T) 48; Ngema v Ngema 1950 NAC (N-E) 213; Nkosi v Tenjekwayo 1938 NAC (N&T) 94.
36. Mcunu v Mcunu 1946 NAC (N&T) 48; Mhlongu v Mhlongu 1950 NAC (N-E) 377; Dubazana v Dubazana 1953 NAC (N-E) 154; Hlongwane v Hlongwane 1956 NAC (N-E) 86.
37. Bekker & Coertze 161.
38. S 92(3) of the Code; see also Van Tromp 44.
39. Simons (1968) 93. The Shona call the linking of a sister to a brother cipanda. Not only close brothers and sisters, but even half-brothers and sisters may be linked. Should the young man raise his own rovoro he has a potential claim against the estate of his father: Holleman 169 et seq; Goldin and Gelfand 131.
40. Nkosi v Tenjekwayo 1938 NAC (N&T) 94; Sibiya v Sibiya 1932 NAC (N&T) 1.
41. Sitole v Sitole 1943 NAC (N&T) 17.
42. Nkosi v Tenjekwayo 1938 NAC (N&T) 94.
43. Majozi v Majozi 1963 BAC (N-E) 57.
44. Mngadi v Mngadi 1931 NAC (N&T) 53; Mtembu v Mtembu 1943 NAC (N&T) 65; Kumalo v Kumalo 1953 NAC (N-E) 4.
45. Sitole v Sitole 1943 NAC (N&T) 17; Mtembu v Mtembu 1943 NAC (N&T) 65.
46. 1947 NAC (N&T) 37.
47. Magwaza v Magwaza 1937 NAC (N&T) 3; Nkosi v Tenjekwayo 1938 NAC (N&T) 94; Xulu v Langa 1940 NAC (N&T) 117; Radebe v Tshopa 1948 NAC (N-E) 36; Mahlobo v Mahlobo 1947 NAC (N&T) 31.
48. Gumede v Gumede 1950 NAC (N-E) 171.
49. Mahlobo v Mahlobo 1947 NAC (N&T) 31.
50. Radebe v Tshopa 1948 NAC (N-E) 36.
51. 1947 NAC (N&T) 37.
52. Mtembu v Mtembu 1943 NAC (N&T) 65.
53. Sitole v Sitole 1943 NAC (N&T) 17.
54. Makaye and another v Ngubane 1943 NAC (N&T) 83.
55. 1920 NHC 69.

56. Gwala v Gwala 1955 NAC (N-E) 50.
57. It may not be possible to say with precision but at Mahlabatini for instance it may be said that at one out of ten marriages may be polygynous.
58. Vilakazi 62 et seq; Sibiya 210-11.
59. Sibiya 212.
59. (a) Holleman 1961 Part III 18.
60. s1 of the Code; s1 of KwaZulu Act.
61. s92(1) of the Code; s69(1) of KwaZulu Act.
62. s92(2) of the Code; s69(2) of KwaZulu Act.
63. s92(3) of the Code; s69(3) of KwaZulu Act.
64. s92(4) of the Code; s69(4) of KwaZulu Act.
65. s92(5) of the Code; s69(5) of KwaZulu Act.
66. Breytenbach 185 says the word ukwetsheleka among Usuthu is unknown; De Clercq 255 among abakwaMzimela found a different meaning being attached to ukwethula. Ukwethula as used in the Code is known there is ukwetsheleka.
67. 255 et seq.
68. De Clercq 256.
69. Shandu v Shandu 1956 NAC (N&T) 134.
70. Breytenbach 185.
71. See also De Clercq 253; Sibiya 210.
72. s92 of the Code; s69 of KwaZulu Act.
73. Breytenbach 186.
74. Olivier et al 542; Lighthelm and Labuschagne 322.
75. Mangele v Mangele 1940 NAC (N&T) 71.
76. Ntuli v Ntuli 1946 NAC (N&T) 58.
77. Mapumulo v Mapumulo 1913 NHC 8.
78. Mvundhla v Mvundhla 1940 NAC (N&T) 72; Mfeka v Mfeka 1917 NHC 174. But in Mvelase v Mvelase 1928 NHC 1 it was decided that where a head of the homestead uses

cattle belonging to one house for the benefit of a son in another house, that ipso facto creates an obligation upon the son eventually to repay the cattle to the house from which they were taken and no declaration to that effect by the head of the homestead need be proved: see also Mangele v Mangele 1940 NAC (N&T) 71.

79. 1940 NAC (N&T) 71.
80. 1942 NAC (N&T) 74.
81. Sitole v Sitole 1943 NAC (N&T) 17; Kumalo v Kumalo 1953 NAC (N-E) 4; Ntuli v Ntuli 1946 NAC (N&T) 58.
82. Ngema v Ngema 1950 NAC (N-E) 213; Kumalo v Kumalo 1953 NAC (N-E) 4.
83. 1950 NAC (N-E) 192.
84. Kumalo v Kumalo 1953 NAC (N-E) 4.
85. Sitole v Sitole 1940 NAC (N&T) 115, Tshozi v Tshozi 1941 NAC (N&T) 92; Qwabe v Qwabe 1945 NAC (N&T) 101; Mhlungu v Mhlungu 1950 NAC (N-E) 192; Shandu v Shandu 1956 NAC (N-E) 134. A debt is created even if ilobolo is given to the general heir or other son of indlunkulu by another house.
86. Ntombela v Ntombela 1930 NAC (N&T) 42. This decision was, however, given under the 1891 Code which contained no provision similar to the present s 92(2) but it was, it is submitted, correctly decided.
87. Mtetwa v Mtetwa 1943 NAC (N&T) 15. This decision is apparently contrary to the position in customary Zulu law.
88. Mhlungu v Mhlungu 1950 NAC (N-E) 192.
89. Mvelase v Mvelase 1928 NHC 1. A different view was expressed in Mvundhla v Mvundhla 1940 NAC (N&T) 72 with reference to the situation where the father is deceased.
90. 1964 BAC (N-E) 63.
91. Mfanenkulu v Msipana 1920 NHC 42; Butelezi v Butelezi 1944 NAC (N&T) 26.
92. Tshozi v Tshozi 1941 NAC (N&T) 92.
93. Mtembu v Mtembu 1951 NAC (N-E) 377.
94. Shoyisa v Shoyisa 1951 NAC (N-E) 309.
95. Sibisi v Sibisi 1950 NAC (N-E) 188.

96. Mcunu v Mcunu 1946 NAC (N&T) 48; Ximba v Ximba 1959 NAC (N-E) 18;
97. 1951 NAC (N-E) 377.
98. Mhlungu v Mhlungu 1950 NAC (N-E) 192.
99. Ndhlela v Ndhlela 1939 NAC (N&T) 91; Manyate v Manyate 1941 NAC (N&T) 7.
100. Ndhlela v Ndhlela 1939 NAC (N&T) 91.
101. Dhlamini v Dhlamini 1934 NAC (N&T) 21; Mbata v Mbata 1940 NAC (N&T) 85.
102. Bulose v Bulose 1916 NHC 164; Ngcobo v Ngcobo 1946 NAC (N&T) 14.
103. Ngcobo v Ngcobo 1946 NAC (N&T) 14.
104. Madhlala v Madhlala 1945 NAC (N&T) 40.
105. Mtetwa v Mtetwa 1928 NHC 17; Shezi v Shezi 1954 NAC (N-E) 137.
106. Lighthelm and Labuschagne 324; Olivier et al 79.
107. Olivier et al 79.
108. s1 of the Code; s1 of KwaZulu Act.
109. s146(2) of the Code; s111(2) of KwaZulu Act.
110. Mgombane v Magula 1920 NHC 25; Qwabe v Qwabe 1932 NAC (N&T) 5; Cili v Ntombela 1941 NAC (N&T) 16; Mkize v Dhlamini 1951 NAC (N-E) 313. Masondo v Masondo 1938 NAC (N&T) 182.
111. Lighthelm and Labuschagne 324. For the position outside Natal see Lighthelm and Labuschagne 325; Olivier et al 541
112. Lighthelm and Labuschagne 318.
113. s92(5) of the Code; s69(4) of KwaZulu Act.
114. 1953 NAC (N-E) 35.
115. Van Tromp 45; Olivier et al 74, . 80 et seq, 543; Lighthelm and Labuschagne 325; Bekker & Coertze 326-8.
116. Bekker & Coertze 336-7; Olivier et al 543.
117. Hartman 283-287.
118. Bekker & Coertze 326.

119. Holleman (1969) 169; Goldin & Gelfand 131.
120. Holleman (1969) 170.
121. Schapera 145; Poulter 141, 144-146.
122. Van Warmelo 111-13. There is no similar practice among the Zulus.
123. Van Warmelo 119. This is just the opposite of what is the position among the Zulus.
124. Myburgh (1943) 227.
125. From interviews it appeared that some are no longer in favour of agreeing to the payment in instalments because some bridegrooms promise and do not settle the balance. Even the woman will be defensive when the balance is demanded.
126. Sibiya 209.

CHAPTER IX

THE LOBOLO CONTRACT AND THE ENGAGEMENT

9.1 INTRODUCTION

The subject-matter of this chapter is the nature, conclusion and enforcement of ilobolo contract, as well as the relationship thereof to the engagement. To speak of ilobolo contract presupposes that the relationship created by the demand and delivery of ilobolo is contractual. The question is therefore whether ilobolo is a contract and if so, what type of contract.

9.2 IS UKULOBOLA A CONTRACT?

Whether or not ukulobola is a contract depends on whether the concept contract in the modern sense, is known in Zulu customary law. By a contract is meant an agreement concluded with the intention to create legal obligations.¹ The 1883 Commission defined ukulobola as a contract between the father of the woman and the intending husband of his daughter whereby he promises his consent to the marriage of his daughter in return for a valuable consideration, partly for such consent and partly as a guarantee of the prospective husband's good treatment of the daughter.² This means that the Commission regarded ukulobola as a contract. A similar view was taken in the case of Nbono v Manoxoweni.³ Seymour⁴ similarly regards ilobolo as a contract, valid and enforceable, provided it has been made for a lawful purpose.

Simons⁵ on the other hand does not recognize ilobolo as a contract that depends on a voluntary bilateral act between the parties and independently of the law. According to him, liability flows automatically from the marriage agreement, and does not arise from a separate contract. Although this view may be true of Tswana law where ilobolo is not even mentioned during marriage negotiations,⁶ it is not true of Zulu law.

But even in Tswana law it may be implied because no marriage takes place without it.

It would be simplistic to regard Simons as a supporter of Maine's progressive societies that move "from status to contract"⁷ where by status he refers to the personal relations that derive from privileges attaching to a family, but excluding those that derive "even remotely from agreement".⁸ It is for other reasons that Simons denies that ilobolo is a contract. It is because the size of ilobolo is in many tribes fixed by custom which allows little, if any, scope for negotiation. In others, although there is room for bargaining on the number of cattle to be delivered, the husband may deliver an indeterminate number after the marriage. For these reasons Simons prefers to consider ilobolo as an invariable component of a marriage relationship where the contractual element occurs only in the agreement between the guardian of the girl and the prospective bridegroom or his guardian, to arrange a marriage.

These objections do not constitute cogent grounds for not regarding ukulobola as a valid contract. It is quite common practice today to enter into ante-nuptial contracts. Despite their dependence on marriage, this does not detract from the fact that they are contracts. Moreover, the phenomenon of standard form contracts is well-known, so that the fact that there are certain fixed features of this relationship does not deprive it of its contractual nature.⁹ Similarly it is common practice for the state to fix the price of certain items either in the sense of a maximum or a minimum or a specific price. It cannot be seriously suggested that the fact that the price of such an item or service is fixed, will deprive the agreement pertaining to the sale of such an item or the rendering of such service from being regarded in law as constituting a contract irrespective of its form be it emptio et venditio, locatio conductio operis or locatio conductio operarum. There seems little doubt that upon evaluation, the objections raised by Simons, are of no real substance.

The determining factor whether ilobolo is a contract, is whether its features comply with the requirements for contractual liability. The temptation is almost irresistible to establish the contractual nature of ilobolo according to the principles of the South African law of contract. This is because the principles of the South African law of contract have been clearly spelled out, whereas that is not so in customary law of contract. But if the point of view is taken that these are principles enabling a scientific study of a phenomenon, to determine whether it is a contract or not, there is no harm. It must, however, be remembered that ilobolo is a customary law institution,¹⁰ and its features are bound to differ in some respects from western institutions. Consequently, its analysis in the light of South African legal science should not lead to the arbitrary forcing of this into western legal categories. Where differences exist, these must be pointed out. Care must also be taken to distinguish fundamental differences from merely peripheral ones.

Theories pertaining to the origin of contract are sometimes bound up with economic doctrines according to which society has passed through three stages, namely barter, money and credit. The latter stage depends on the ability to rely on the promises of others. Although to attempt a generalization on the trend of the development of contract is presumptuous, it would seem that the first stage in the evolution of contract is ceremonial exchange whereby every gift requires a counter-performance.¹¹ Although the law of contract in traditional Zulu law had not developed to its ultimate stage, it cannot be regarded as an exaggeration to say that a contractual notion existed in Zulu customary law. Even Maine does concede that: "Neither Ancient Law nor any other source of evidence discloses to us society entirely destitute of the conception contract".¹² Later historians have, however, wrongly assumed that primitive societies were incapable of understanding the nature of a contract.¹³ Moreover, Zulu law at the time of first contact with Roman-Dutch law cannot be

regarded as being primitive¹⁴ even if it was less developed than western law.

It is therefore essential to mention the requirements for contractual obligation and to assess whether ilobolo does comply therewith. The following are the generally accepted requirements for contractual obligation to come into existence.

- (a) There must be consensus;
- (b) The contracting parties must have the necessary capacity to contract;
- (c) The conclusion of the contract, the nature thereof and its performance must be lawful;
- (d) Performance must be possible; and
- (e) There must be compliance with the necessary formalities, where prescribed.¹⁵

A detailed analysis of these requirements is not called for, but only a few brief remarks in relation to ilobolo will suffice.

It is often said that consensus is the basis of contractual obligation.¹⁶ Most modern legal systems recognize consensual contracts which only require mutual agreement between the parties. African law on the other hand, does not recognize obligation based on a mere agreement, but agreement coupled with performance or part-performance, that is in terms of a real contract.¹⁷ Ilobolo must therefore as a general rule be agreed upon. This is not to ignore the fact that among certain tribes ilobolo is not expressly agreed upon, but it has been said above that one can, even in those tribes, imply an agreement to deliver ilobolo. In Zulu law in particular, ilobolo must be expressly agreed upon. The agreement relates to the amount and the composition of ilobolo, that is whether cattle or money or both, the manner of provision of ilobolo as well as the time place and manner of delivery thereof. Although it is conceded that in some tribes ilobolo is fixed by custom, there must be agreement as to the

delivery thereof. Ilobolo therefore represents the counter-performance by the one party, the quid pro quo in fulfilling his obligations under the contract, and this serves "in concrete form as restoration of the equilibrium disturbed by the transfer of the limited right of authority over the woman from her group to that of her husband".¹⁸ Although perhaps earlier on the legal enforceability of ilobolo was doubtful, this is not a serious objection because even in modern South African law the phenomenon of unenforceable contracts or naturales obligationes is well-known.¹⁹ In any case in terms of present law ilobolo agreement is enforceable and no court can declare it contrary to public policy provided it is concluded for a lawful purpose.²⁰ This even includes ilobolo concluded for a civil marriage.²¹

As to the question of capacity, it must be pointed out that ilobolo is concluded between two family groups, and not individuals to the agreement,²² at least that was the position in early customary law. Today, however, the contract is concluded between the bride's father and that of the bridegroom or the bridegroom himself. Earlier the fathers of the two parties were acting on behalf of the group, but today only the form remains while the substance has changed. The reason why the father of each partner had to conclude the contract was because it was the father as a family head that had full capacity to contract.²³ Majority in customary law, unlike in South African law, is not determined by age, and consequently there is no age at which a person is regarded as a major, but it is rather marriage which entitles a person to establish his separate family, and to have the status of a family head.²⁴

Although today the bridegroom's father may initiate negotiations for the delivery of ilobolo, this he does out of custom, and not because the bridegroom does not have the capacity to do so.²⁵ The reason why the woman's father continues to negotiate for the delivery of ilobolo is, because he is the one entitled thereto. The woman is not a party thereto, and is not

entitled to it.

As majority in customary law is reserved for men only, women cannot be party to a lobolo agreement.²⁶ As a result if a widow arranges her daughter's marriage, and accepts ilobolo for her during the minority of the son who is heir, the marriage will be voidable until ratified by the son on coming of age.²⁷ Although the bride-to-be is never a party to the agreement, she can appear as a witness if need be, and the outcome of a dispute relating to ilobolo may affect her status or the legitimacy of her children.²⁸

As to the question of legality, it was pointed out above that in earlier decisions the courts were inclined to brand ilobolo as immoral per se, but this attitude changed later on to regarding ilobolo as unlawful when given in contemplation of a customary marriage whereas when it was given in anticipation of a civil marriage it was regarded as valid.²⁹ Understood properly, and the object thereof clearly established, there is nothing inherently immoral in ilobolo. It is only a misunderstanding of the purpose and function of ilobolo which may lead to the conclusion that it is contrary to public policy. As a result, if given for a lawful marriage, which includes a lawful customary marriage, ilobolo is valid and no court is competent to declare it contrary to public policy or natural justice.³⁰ It is only where ilobolo is given for a marriage concluded during the subsistence of a civil marriage that it will be regarded as unlawful, and as a result not recoverable in a court of law.³¹

As to the requirement that performance must be possible, nothing more is required than to state that the demand for ilobolo must involve something that is objectively possible of performance even if subjectively it may not be. In other words the fact that the bridegroom does not have cattle or money for ilobolo, will not invalidate ilobolo contract. But if the father were to demand that the bridegroom must touch

the moon as a form of ilobolo, that would obviously be invalid.

No legal formalities are required for the conclusion of a valid contract of ilobolo. The traditional procedure in the opening of ilobolo negotiations is not an essential requirement for the conclusion of ilobolo contract.³² Although it may not have been followed, it will have no effect on the validity of ilobolo contract. In fact one criticism which has been made against it is that it is dilatory and time-consuming, and as a result is unsuited to the modern conditions.³³

It follows that if measured against the criterion for a contract in South African law, ukulobola is clearly a contract entered into between two parties with the intention of creating binding obligations. The validity of this contract has been statutorily entrenched, and it is thus not open to attack on the basis of being contra bonos mores.

Although ukulobola is a contract, it is a contract that has features that are alien to the South African common law,³⁴ despite having been influenced by the common law.³⁵ Although some of the differences have been mentioned above, it is necessary to examine them briefly here.

9.3 THE NATURE OF ILOBOLO CONTRACT

It was pointed out above that one of the striking features of ilobolo is that it is not concluded between the parties to the marriage, but between the two family heads, although the conclusion thereof does have consequences for the marriage partners. Thus it cannot be regarded as a stipulation for the benefit of a third party because when the two family heads conclude the contract, they do not intend that performance should inure to the intending parties.³⁶

Ilobolo contract is invariably concluded through two inter-

mediaries known as abakhongi. These are merely messengers, and have no discretion of their own. After the conclusion of the contract they disappear out of the picture. Their service is gratuitous except for small gifts during the wedding ceremony.³⁷ The reason for the use of abakhongi is because they are better able to tolerate rough treatment during negotiations for the delivery of ilobolo. That they have to be two in number is for purposes of proof, if a dispute arises as to the lobolo agreed upon.

Another difference is that prescription does not apply to ilobolo agreements.³⁸ This is unlike the position in common law. In Zulu law ilobolo agreements could endure for generations. This is because if a person was unable to raise cattle for ilobolo purposes he could conclude an agreement to the effect that ilobolo would be settled from ilobolo for his eldest daughter. This would obviously take time.

In Zulu law a mere agreement does not create legal obligations. Obligations will not be incurred unless performance or part-performance is rendered.³⁹ The delivery of ilobolo engenders the obligation to transfer the bride or to return the goods. On the other hand, the transfer of the bride engenders the obligation to deliver ilobolo owing.⁴⁰ It is not, however, necessary to deliver the whole amount of ilobolo before the conclusion of the marriage.

A further question is whether the contract does exist, and the delivery of ilobolo is a result of the agreement or whether no contract exists without the delivery of ilobolo. According to Zulu law no trace can be found where executory contracts were enforceable. Before the delivery of ilobolo the agreement is inchoate.⁴¹ Zulu law had not developed to the stage of enforcing consensual contracts. Consequently where an ilobolo agreement has been reached, but before delivery of ilobolo, the person entitled to ilobolo cannot sue for it if he himself has not performed his part that is, delivering

the woman in marriage. Similarly the conclusion of the lobolo agreement per se does not entitle the bridegroom to claim delivery of his wife unless he has delivered ilobolo. But it must be pointed out that the position is quite confusing here. This is because even in purely consensual contracts none of the parties can claim performance before he himself has performed. Should he purport to claim performance he can be met with the exceptio non adimpleti contractus.⁴² This defence, however, does not form part of Zulu law. Yet whatever the position was in traditional Zulu law, contract between it and South African law has greatly influenced it. As a result the stage has been reached where ilobolo contract has become a consensual contract. Thus if A and B agree that B should deliver ilobolo for A's daughter, if upon B's delivery of ilobolo he discovers that A has given his daughter to C, B can sue for damages for the expenses incurred in obtaining and delivering ilobolo cattle. This is a logical development of ilobolo contract.

9.4 THE ENFORCEMENT OF THE LOBOLO CONTRACT

The mechanism of enforcing ilobolo agreements in customary law differs among various tribes. Among some black tribes delivery of ilobolo has to take place before the celebration of the marriage.⁴³ A further distinction can also be drawn between those tribes where the amount of ilobolo is fixed either by agreement between the parties or by the accepted custom in that tribe, and those tribes where there is no fixed amount of ilobolo cattle to be delivered and the marriage depends on the delivery of a reasonable number of cattle. In the former instance the bridegroom or his family has complied with his obligation where the required number of cattle has been delivered, whereas in the latter case it will depend on the circumstances when a sufficient number of ilobolo cattle has been delivered.⁴⁴

Although there are various methods available to the father of

of the bride whereby to enforce delivery of ilobolo, among most black tribes in South Africa customary law does not provide a remedy for specifically enforcing the lobolo contract in court.⁴⁵ Among the Zulu this is attributable to the fact that ilobolo was in early customary law a contract cementing a bond of friendship between the parties. Under normal circumstances the prospective bridegroom would be obliged to give one or two head of cattle each time his "father-in-law" turned to him for help. It was inconceivable that he would refuse to do so if he was in a position to help. In addition, there was of course, the sanction of public opinion, the influence of tradition as well as the religious sanction.⁴⁶ There is a strong belief among traditionalists, and even among some non-traditionalists, that a woman for whom ilobolo was not delivered, will not bear children. This is not because ilobolo buys children, but because they believe that the ancestors will not allow her to bear children.

The strength of the social and religious sanctions ensured that ilobolo would be delivered without recourse to court. The fact that there was seldom recourse to the courts in customary law might create the impression that ilobolo could not be claimable in court. Such a conclusion is incorrect. Ilobolo was a well-known custom that if a man refused to deliver ilobolo owing, he could be sued in court.

Although various remedies, other than enforcement by way of an action in court were available in customary law, the father of the bride would seldom resort to such extraordinary remedies under normal circumstances. Provided the bridegroom showed willingness to deliver the balance of ilobolo or, where he had to give it in "instalments", provided the father of the bride received them from time to time even though he might have to wait for an indefinite period, he would be satisfied and would not bring pressure to bear upon his son-in-law. This would also be so where the father of the bride was aware that his son-in-law did not have cattle. It would only

be in instances where bad faith was involved on the part of the bridegroom that the bride's father would resort to the remedies provided by customary law.⁴⁷ Ilobolo is not a commercial transaction, and the father of the bride would not be keen to sue within a certain time limit as ilobolo was not affected by price fluctuations.

Among the various Xhosa tribes, ilobolo is mostly not fixed before the marriage, and the father of the woman makes use of ukutheleka. A demand for a reasonable amount of ilobolo may be made by the woman's father at any time and the bridegroom is obliged to comply with it. Failure to comply therewith entitles the guardian or the father of the woman to theleka her until the demand has been met. The husband has no valid complaint. The wife herself co-operates with her father because the delivery of as many cattle as possible enhances her prestige and status.⁴⁸

If the husband feels that he has already delivered a sufficient number of cattle, and that his father-in-law is consequently unreasonable in demanding further cattle or that he refuses to release his wife or children after offering a certain number of cattle, he may resort to a court action whereby he either demands the return of his wife or children or claims the dissolution of the marriage, and the return of ilobolo already delivered.⁴⁹ The courts are not prepared to allow the guardian to theleka the wife if a reasonable amount of ilobolo has been delivered. What is regarded as a reasonable amount is in the discretion of the court. In determining what constitutes a reasonable number of cattle in the specific circumstances, the court will take into account the average amount that is ordinarily received in that tribe for a woman of the social standing of the bride concerned.⁵⁰

Ukutheleka as a method of enforcing the delivery of ilobolo is not permitted where ilobolo is concluded in anticipation of a civil marriage. In that event a legal action lies which,

as explained, has no counterpart in Xhosa customary law.⁵¹

The Tswana belong to the group of tribes that do not practise ukutheleka. Moreover, they do not have a right of action for enforcing ilobolo agreement.⁵² Yet the fact that there is an agreement to deliver ilobolo seems to entitle the father of the woman to sue on the contract. This so-called contract is, however, difficult to construe since consensus as to the amount of ilobolo to be delivered is absent seeing that this is determined unilaterally by the bridegroom's group.⁵³ Even among those groups where the amount to be delivered is fixed by agreement, there is no authority that an action lies for the enforcement thereof.⁵⁴ In the past, however, there was great social pressure for the delivery of ilobolo. This was closely connected with the right over children. Before the delivery of ilobolo the man's right over children would be doubtful. This would compel the man to deliver ilobolo with the object of acquiring guardianship over his children as children were regarded as a priceless possession.⁵⁵

The Zulus also do not practise ukutheleka. It was apparently not necessary in early customary law to resort to legal action because the lobolo agreement was based on good faith. As Maine rightly points out, "many of us have an almost instinctive reluctance to admitting that good faith and trust in our fellows are more widely diffused than of old, or that there is anything in contemporary manners which parallels the loyalty of the antique world".⁵⁶ He concludes that the reason for this is not that the people of old practised a higher morality than people of his time, but that "morality has advanced from a very crude to a highly refined conception - from viewing the rights of property as exclusively sacred, to looking upon the rights growing out of the mere unilateral reposal of confidence as entitled to the protection of the law."⁵⁷ Whatever the position was in customary law,⁵⁸ in terms of the Code the lobolo agreement is today enforceable

by way of legal action.⁵⁹

9.5 ILOBOLO DURING THE ENGAGEMENT

It remains to determine the legal implications of the delivery of ilobolo during an engagement. The use of the term engagement implies that an engagement in the Roman-Dutch law sense is known to Zulu customary law. This therefore requires a definition of an engagement, and to determine whether an engagement exists in Zulu law.

9.5.1 Definition of an engagement

An engagement is an agreement between two persons of the opposite sex wherein they promise to marry each other either on a fixed day or within a reasonable future time.⁶⁰ This agreement is a contract that is enforceable in a court of law.⁶¹ The question is whether the same phenomenon exists in Zulu law.

9.5.2 The engagement in Zulu law.

There are a number of practices in Zulu law which approximate an engagement in Roman-Dutch law, but the question is whether it is correct to refer to any of these as an engagement.

Some writers regard ukuqoma (literally to choose, which means to fall in love) as an informal betrothal in Zulu law. In earlier times this could only take place after permission had been granted by the king. No girl may qoma twice, and this was a first step towards marriage.⁶² Strictly speaking, ukuqoma is not an engagement because it is an informal relationship between the two intending parties, and no legal obligations arise from it. ..

The informal ukuqoma is followed by ukucela or ukukhonga which is a formal type of "betrothal". This ukukhonga, however, is

not a contract between the two intending partners, but is between the two family groups.⁶³ This agreement is regarded as an engagement because it is where the father gives his consent to the future marriage of his daughter. By his agreement to negotiate for the delivery of ilobolo, he impliedly agrees to give his consent to the marriage. The weak point in this agreement is that it does not create an enforceable obligation, but can be repudiated with impunity. The only issue which is actionable in case of breach of an engagement is the return of ilobolo already delivered during the engagement.⁶⁴

The practice of the Zulus is similar to the engagement in early Germanic law where it was not enforceable.⁶⁵ It was only during the Frankish Empire, and largely due to the influence of the Church that a distinction was made between sponsalia de futuro and sponsalia de praesenti. The sponsalia de futuro was a formal agreement between the father of the girl on the one side, and the bridegroom on the other for the handing of the girl upon the bridegroom's promise to give the pretium nuptiale.⁶⁶ It was only later that this developed into a contract between two parties wherein they promised to marry each other in future in consequence of which they had to exchange arrahae.⁶⁷ This was an outgrowth of the recognition of the rights of the woman which was due to the influence of the Church.

Although an engagement in the Roman-Dutch law sense is unknown to customary law, the Code impliedly recognizes the existence of an engagement,⁶⁸ and the delivery of gifts in contemplation of, or during the existence of such engagement.⁶⁹ Yet in the light of the above, an engagement in Zulu law is an engagement sui generis.

9.6 DELIVERY OF ILOBOLO DURING AN ENGAGEMENT

It is customary that ilobolo be delivered during an engagement.

Among the Xhosa an engagement is confirmed by the delivery of isinyaniso or earnest beasts to the family of the bride-to-be.⁷⁰ The bride's father stipulates the number of those cattle.

When ilobolo is delivered during the engagement period, the courts in the Cape and Transkei have been wont to refer to these cattle as earnest or engagement cattle. This has the effect of confusing ilobolo cattle and earnest cattle. Ilobolo cattle are given not as evidence of the engagement, but in anticipation of the marriage which is supposed to take place later. Although the courts have applied the same rules to both, according to customary law ilobolo cattle are returnable to the man or his family if the marriage was abortive whereas the return of earnest cattle depends on who was at fault.⁷¹ Ilobolo cattle delivered during the engagement are regarded as sisa cattle, and remain the property of the person who delivered them until the celebration of the marriage.⁷²

Among some Tswana tribes, especially the Bafokeng, the father of the woman becomes the owner of bogadi on delivery,⁷³ although the question of increases and deaths before marriage remains a problem. For this reason some have suggested that the delivery of such cattle consequent upon a conditional contract is governed by the principles of South African law, and the risk does not pass to the transferee on delivery, but remains with the transferor.⁷⁴

The delivery of ilobolo during an engagement period has a number of consequences for the parties as well as their family groups. Although the contracting parties are the two family heads, the two intending partners assume a new status. They become known as umkhwenyana and umakoti (bride and bridegroom). They are nevertheless not yet entitled to sexual privileges. But if they are intimate, the woman's father is not entitled to claim damages from the bridegroom.⁷⁵ Above that, ilobolo delivered entitles the bridegroom to demand the fixing of the day for the marriage.

9.7 THE TERMINATION OF AN ENGAGEMENT AND RETURN OF ILOBOLO

An engagement may be terminated by death or breach.⁷⁶ A betrothed girl or her guardian may also terminate an engagement at any time before the marriage.⁷⁷ Of importance is the termination of the engagement and the return of ilobolo.

9.7.1 Termination by death and return of ilobolo

Usually a distinction is drawn between death as a result of natural causes and as a result of complications where the bridegroom is responsible for the pregnancy. In the case of the death of the affianced girl an attempt is made to obtain a substitute.⁷⁸ If there is none available, ilobolo should be returned together with its increase.⁷⁹

Where death was caused by complications arising from pregnancy, a distinction is also made between where there was a miscarriage, and where there was a child born alive. If there was a miscarriage, the lobolo will be refunded except the mother's beast. But where a child was born alive there will be return of ilobolo minus two head of cattle, one for the child born and another being ingquthu beast.⁸⁰

9.7.2 Breach of an engagement and return of ilobolo

In early customary law, breach of an engagement was not actionable. This was largely due to the infrequency of such breach. As it has been said, because Cape courts had equated ilobolo cattle with engagement cattle, they have held that if an engagement was breached wrongfully by the man, he forfeits them.⁸¹

In Natal and KwaZulu the breach of an engagement is regulated by s85(1) of the Code. The interpretation of this section is that even if the engagement is breached for valid reasons by a woman there can be no forfeiture of ilobolo since

ownership in it passes only on the day of the marriage, but before that they are sisa cattle. As a result they must be returned with their increase.⁸² This has even been followed in the Transvaal, most probably owing to the influence of the Code.⁸³

That ownership remains in the person who delivered the cattle before the celebration of the marriage cannot be regarded as sufficient justification for the rule that cattle cannot be forfeited, because on divorce even though ownership has passed to the transferee, but if the woman was the party at fault, ilobolo is returnable.

Although it has been held that where ilobolo is to be refunded, the man is entitled to claim the original cattle as they should not be substituted without his consent,⁸⁴ this rule should not be applied inflexibly because if the father has disposed of those cattle it would be tantamount to demanding the impossible to say that he should return the original cattle. It should only apply if the cattle are still available. But it has been rightly decided that although the father has locus standi to sue for the return of ilobolo,⁸⁵ he cannot sue the son for the lobolo delivered, but must sue the person to whom he has delivered it,⁸⁶ because ownership does not first pass to the son and then to the woman's father, but remains with him. A representative or guardian who receives ilobolo, and accounts for it is not personally liable for its return if the marriage falls through.⁸⁷ On divorce, however, only the husband is entitled to reclaim the cattle⁸⁸ because he is legally capable so to do. Cattle can only be returned if a legal customary marriage is the basis of the contract, and not where a man is already married by Christian rites and the girl rejects him.⁸⁹ In that event the par delictum rule applies.

Small gifts made gratuitously to the girl's mother and unconnected with ilobolo are not reclaimable.⁹⁰ The girl's

father is entitled to set off any damages suffered including damages for seduction and pregnancy.⁹¹ The father may also set off against return of ilobolo burial fees for any child so born.⁹² Although the custom of ukuhlobonga (external intercourse) does not ground an action for damages, if as a result thereof the woman falls pregnant, the man's admission of the intercourse is corroborative evidence of the girl's statement of his paternity,⁹³ and the father is entitled to set off damages for seduction against return of ilobolo. No refund of cattle slaughtered to celebrate an engagement is claimable by the father if the girl has jilted the man.⁹⁴

An agreement of infant betrothal is repugnant to the principles of public policy, and payments made thereunder are not recoverable. As a result the doctrine of unjustified enrichment does not come into the picture.⁹⁵

It is now appropriate to look at the question of damages for breach of an engagement and the return of ilobolo.

9.7.3 Claim for damages for breach of contract and the return of ilobolo

Breach of an engagement contract in early Roman-Dutch law entitled the innocent party to claim for specific performance.⁹⁶ This is no longer so in modern South African law.⁹⁷ This has overflowed to customary law. In a case where a commissioner ordered a defendant to hand over a betrothal girl to her fiancé on a fixed date or in the alternative refund of ilobolo, the appeal court set the decision aside, and decided that such an order was repugnant to "our sense of natural justice and human liberty".⁹⁸ According to customary law this would have been valid because of the extensive power of the guardian.⁹⁹

According to South African law an aggrieved woman has an action for damages against the defaulting party if an engagement is breached. She can claim for both contractual and delictual damages.¹⁰⁰ The question is whether according to customary

law a woman is entitled to sue for damages for breach of contract.

An action for breach of an engagement was unknown in customary law owing, no doubt, to the infrequency of the rejection of a woman after a formal betrothal.¹⁰¹ It might not be easy on the part of the man to breach an engagement after the delivery of ilobolo. In most instances he would proceed with the marriage. This was offset by the possibility of polygyny according to which a man might take a further wife of his choice later on.¹⁰²

The action for damages for breach of an engagement developed in South African law as an alternative to a claim for specific performance, and it eventually superseded it. The process resulted in the "liberalization of marriage and in the recognition of the individual claims to compensation for personal injuries".¹⁰³ Customary law on the other hand had not developed to the stage of recognizing individual rights, and consequently separating the individual from his family and kinship group. It was the group, and not the girl herself, that was injured if she was seduced.¹⁰⁴

Although an action for damages has not fully developed in customary law, disputes often arise in connection with an abortive marriage agreement relating to the cattle delivered in anticipation of the marriage. Since these cattle remain the property of the person who delivered them until the celebration of the marriage, he is entitled to reclaim them if the marriage does not materialise. This claim is likely to be resisted by the girl's father.¹⁰⁶

Damages for patrimonial loss are aimed at compensating the woman for the actual pecuniary expenses she has incurred in contemplation of the marriage. As a result they must be proved in court.¹⁰⁷ The fact that the courts have allowed counterclaims against the refund of ilobolo, seems to create

the impression that the courts have felt that it would be inequitable to refuse such counterclaims.¹⁰⁸ Yet to conclude from this that the courts have recognized the existence of an action for damages for breach of an engagement in customary law may well be illusory. The practice of the courts has been chequered.

Closely connected with the claim for contractual damages is the claim for delictual damages. It has been decided that the claim for delictual damages resulting from breach of promise of marriage is not co-extensive with the claim for contractual damages. The former are recoverable only if there is proof that the engagement was breached not only wrongfully, but also injuriously or contumeliously.¹⁰⁹ In customary law as well such a principle had not clearly developed when cultural contact with Roman-Dutch law commenced. The views of the courts have not been consistent.

In Natal and Transvaal the door towards the development of the recognition of this claim, has been slammed. The court will not countenance the father of the girl's retention of ilobolo if the engagement has been broken off whether by her or by the man. In Nyamane v Busakwe¹¹⁰ Braadvedt P was very emphatic in his rejection of this view. He declared that it is contrary to Zulu, and probably to "true native law" for the father to keep the cattle in a broken engagement. The father, according to him has suffered no loss if the daughter has been rejected. To allow him to appropriate the cattle would be unjust because their value may be more than the damages paid by the seducer, and would amount to enrichment of the father because according to him, "Native girls" had no difficulty in finding husbands and the father of the girl would receive ilobolo.

It is submitted that this decision misses the point. It ignores the principle of customary law that inja ibambela umniniyo (a dog catches buck for its owner), meaning whatever

a young man gets or does must of necessity go to his father. Despite the fact that the cattle delivered do not belong to the defaulting young man but to his father, the father is liable for the wrongs of his son. Furthermore, the action is aimed at assuaging the injured feelings of the woman. If it is obvious that the feelings of the woman have been injured there is no reason why this should not be actionable. This does not, of course, mean that the father of the woman should retain all the cattle. In fact in Mlangeni v Dhlamini,¹¹¹ the court rightly pointed out that the function of assessing damages suffered is the courts' and not that of the parties concerned. The fact that such a claim had not fully developed in customary law may only be understood in the light of the then prevailing circumstances. In traditional law breach of an engagement was rare and even if it did occur, it would be difficult to prove any loss. Breach of an engagement where it did occur, was viewed seriously. The saying in Zulu is that intombi ayaliwa, which means that a girl is never rejected. The position of black women, even those subject to customary law has greatly changed today. The court has not been unwilling in some cases to adapt customary law to changed circumstances.¹¹² The decision becomes even more unacceptable when it holds that the girl's father cannot claim damages for buying the trousseau. Truly the buying of a trousseau is an innovation of westernization and should be compensated for. This decision in fact deviated from earlier cases where such claims had been entertained.¹¹³

A rigid application of this rule may be unjust to the girl's people and to the girl herself.¹¹⁴ In the case of Mbuyisa v Ntombela¹¹⁵ the plaintiff delivered eleven head of cattle and £7. He then lived with the woman for a number of years and had four children by her without solemnizing the marriage. When he eventually drove her away from his home and married another woman, he then claimed a refund of ilobolo. The court held that he was entitled to a refund and awarded the girl's father five head of cattle as damages for illicit cohabitation.

Despite this decision the court did not expressly recognize an action for damages for breach of promise of marriage in customary law. It merely awarded those cattle as damages for illicit cohabitation. These damages would have been awarded in any case for the seduction and subsequent pregnancies even without the parties having purported to stay together as husband and wife. The fact that the woman had stayed with the man under an impression that they were married should have been taken into account also in awarding damages as well as the fact that the marriage prospects of this woman had been diminished. Seeing that the man had chased the woman away for no fault on her part, he should have been ordered to pay damages for using the woman in diminishing her marriage prospects in addition to the damages for seduction and pregnancies. Had they been married, he would have forfeited all his lobolo cattle because he was the party responsible for the dissolution of the marriage. It is submitted that if the case had come before an English court it might have regarded the woman as a "common law wife" and come to a different decision.¹¹⁶ It is clear, no doubt, that such a decision is based on the fact that customary law has been handled in an inflexible manner by the courts. In short the court should have been bold to recognize an action for damages in customary law for wrongful and culpable breach of an engagement based on the analogy of common law. When ordering return of ilobolo this should have been done subject to the necessary deductions for seduction, pregnancies and damages for breach of the engagement.

The recognition of an action for damages in customary law would not necessarily mean that the termination of an engagement would always be actionable. It would only be actionable provided the elements for liability existed. In determining those elements recourse could be had to South African law as persuasive authority.¹¹⁷ In this way South African law would be used to develop customary law. There would also be nothing wrong in developing this action at

customary law because every legal system purports to offer a remedy for every contingency. It is in other words universal.

The southern division of the appeal court, on the other hand holds that the manner of disposing of these cattle after the breach of an engagement must depend on the degree of fault attaching to one or other of the parties. The one who delivered ilobolo is entitled to a refund if all agree to terminate the engagement or if either the girl or the man dies before the marriage.¹¹⁸ He cannot recover if he made her pregnant and she died in childbirth.¹¹⁹ If she or her father breaks off the engagement without good cause;¹²⁰ if he demands an unreasonable amount of ilobolo before marriage¹²¹ or if she behaves immorally,¹²² the man is entitled to return of ilobolo. The man who delivered ilobolo cattle, forfeits them if he has condoned her behaviour,¹²³ but not if she insists on a church marriage to which the suitor had not agreed.¹²⁴ It has also been decided that the girl's father may keep the cattle if the prospective bridegroom absconds,¹²⁵ defaults without good cause¹²⁶ or insists on a customary marriage after having agreed to marry in church;¹²⁷ or is guilty of immoral conduct when the marriage was to have been by Christian rites.¹²⁸ Yet the man who delivered cattle is entitled to a refund if the girl has condoned his offence, or when she enters into a church marriage with another man.¹²⁹

The view adopted by the court that ilobolo should be forfeited to the girl's father if she has broken off the engagement because after he had agreed to a church marriage, her fiancé has been guilty of immoral conduct, represents an attempt to adapt customary law to the standards of the common law. Although the older idea that the girl should marry the man despite his misconduct may still persist among traditionalists, the rule that a defaulting bridegroom who has breached an engagement without good reason, is liable to forfeit the cattle seems to have been well received in customary law.¹³⁰

According to Scott P in Mlakalaka v Bese,¹³¹ the forfeiture is

consistent with indigenous customary law as well as good morals, and partakes of the nature of delictual compensation since the bridegroom is being "mulcted in damages for the insult to the girl".¹³² This line of reasoning is to be preferred to that of the northern division of the appeal court. One can hardly find fault with the view of Simons who says:

"The emphasis laid on the girl's feelings is a welcome advance on traditional tribal attitudes. It is also to be preferred to the view of the northern courts that compensation need not be paid for a breach of promise because 'native girls very easily find husbands'. The statement is neither true nor relevant to the main issue, which is to make men respect and value the feelings and interests of the women. A salutary effect of the Cape Court's practice in these matters is that fathers, being relieved of the obligation to refund cattle to a defaulting suitor, are less prone to bully a betrothed daughter into marriage against her wishes".¹³³

After the elevation of the status of the Zulu woman, it cannot be seriously suggested that an action for breach of an engagement is out of place. The old idea that it is the group that has been injured and not the individual has consequently become outdated.

9.8 SUMMARY AND CONCLUSION

Although ilobolo is a contract, it is a contract that is peculiar to customary law, and displays features alien to common law. Nowadays it is enforceable by way of legal action in terms of South African law more especially since the courts are statutorily precluded from declaring it contra bonos mores.

When ilobolo is delivered during an engagement, it does not vest ownership in the transferee until the celebration of the marriage. This presents problems when the engagement is breached and ilobolo has to be reclaimed. The claim is often resisted if the male partner was at fault. Although according to customary law no action for damages lies for the wrongful and culpable breach of an engagement, deserving cases should have been treated according to their own merits. Thus the courts should not have rejected all such claims, but should have

used the conflict of laws approach suggested above in determining which course would best meet the reasonable expectations of the parties. But as matters stand-, an action for breach of an engagement is not allowed if an engagement was concluded in contemplation of a customary marriage.

FOOTNOTES

1. WA Joubert (ed) The Law of South Africa vol 5 (1978) 49; De Wet and Yeats 7; see also AC Myburgh "Law and justice" in WD Hammond-Tooke (ed) The Bantu-speaking peoples of Southern Africa (1974) 311.
2. Cape Native Laws and Customs Commission Report 30.
3. 1891 6 EDC 62.
4. Bekker & Coertze 257; see also Olivier et al 531 et seq.
5. at 89.
6. Matthews 13; Swanepoel 58-59.
7. Maine 170.
8. W.Seagle The quest for law (1941) 254.
9. On standard form contracts see P.Aronstam Consumer protection, freedom of contract and the law (1979) 16 et seq.
10. Bekker & Coertze 258.
11. GW Paton A textbook on Jurisprudence (1964) 393.
12. Maine 312.
13. Seagle 255.
14. Seagle 34.
15. On the requirements for contractual liability in general see Joubert 51 et seq; De Wet & Yeats 7 et seq; AJ Kerr The principles of law of contract 3 ed (1980) 1 et seq; JTR Gibson South African mercantile and company law 4 ed (1980) 10 et seq; RH Christie The law of contract in South Africa (1981) 13 et seq; Hosten et al 384 et seq.
16. Joubert 49; Hosten et al 384; De Wet & Yeats 7.

17. Myburch(1974) 311. English law despite the fact that it is a modern legal system generally does not recognize a binding contract without a valuable consideration. On valuable consideration in English law see in general G C Cheshire et al The law of Contract (1972) 57 et seq.
18. J.Church "'Lobolo'- a critical evaluation" in A.J.G.M. Sanders (ed) Southern Africa in need of law reform (1981) 29.
19. On unenforceable obligations see Gibson (1980) 81 et seq.; Hosten et al 394.
20. S 11 of Adminsitration Act; Anonymous "The contract of ukulobola, its validity and effect" 1906 SALJ 107 et seq.
21. Hebe v Mba 12 EDC 6; Nombombo v Stofile 19 SC 353; Majozi v Mude 1935 NAC (N&T) 16; Gwala v Cele 1978 ACCC (N-E) 27.
22. Myburgh (1974) 311.
23. Schapera (1955) 180; Van Tromp 5; Krige 118-119.
24. TW Bennett "The status of children under indigenous law: the age of majority" in A J G M Sanders (ed) Southern Africa in need of law reform (1980) 18-19. S 27 of the Code has changed the position.
25. S 11(3) of Act 38 of 1927.
26. s27 of the Code. s16 of KwaZulu Act has changed this.
27. Dhlamini v Gcwensa 1954 NAC (N-E) 189.
28. Simons (1968) 114. This will also be so where the bridegroom is not a contracting party.
29. See chapters II and III above.
30. Proviso to s 11(1) of Act 38 of 1927.
31. The par delictum rule applies: J Lewin "Some legal aspects of marriage by Natives in South Africa" 1941 Bantu Studies 22; Mkwanaza v Twala 1929 NAC (N&T) 19.
32. The traditional procedure for the opening of negotiations for the delivery of ilobolo is generally ukukhonga or ukucela. The other forms like ukuganisela and ukuthwala have fallen into disuse because they conflicted with modern ideas. On these see: Krige (1974) 126; De Clercq 239 et seq.; H Britten "Twala" 1930 Bantu Studies 269. On ukukhonga or ukucela see Krige (1974) 126 et seq.; De Clercq 233 et seq.; Bradley 72 et seq.; Msimang 253 et seq.; Whitfield 151 et seq.

33. Krige (1936) 17; Bradley 74.
34. Some of the features are that prescription does not apply to it; it is concluded between two family groups, and it is concluded through intermediaries who exercise no discretion.
35. This is so where it is attached to a civil marriage - see Bekker & Coertze 257 et seq.
36. On the stipulation for the benefit of third parties see Gibson 89-91.
37. The gifts which abakhongi receive cannot be regarded as commission as agency was unknown in Zulu customary law.
38. See s 152(2) of the Code; s117(2) of KwaZulu Act.
39. Myburgh (1974) 311. This approximates the Roman contractus re where a cousa was essential as the rule was ex nudo pacto non oritur actio. Agreement plus the physical delivery of the thing was therefore necessary.
40. Myburgh (1974) ibid.
41. Seagle 256-7.
42. On the exceptio see Joubert 105-107; De Wet & Yeats 177 et seq.
43. Olivier et al 104. This is so among the Shangaan-Tsonga group.
44. Olivier et al ibid.
45. Olivier et al ibid.
46. Malinowski (1961) 52.
47. Olivier et al 105.
48. Olivier et al ibid.; Bekker & Coertze 162.
49. Olivier et al ibid.
50. Olivier et al 106; Bekker & Coertze 163.
51. Bekker & Coertze 258.
52. Bekker & Coertze 164, Olivier et al 109.
53. Schapera 140; Coertze 227; Swanepoel 33.
54. Swanepoel ibid.
55. Swanepoel 34.

56. At 306.
57. Maine 307.
58. Olivier et al 108.
59. s93 of the Code; s70 of KwaZulu Act.
60. Hahlo (1975) 45.
61. Although an engagement is a contract, it is a contract sui generis because it has some differences from an ordinary contract see Hahlo (1975)46.
62. Krige (1962) 123.
63. Bradley 75.
64. Olivier et al 13.
65. Hahlo & Kahn (1973) 345.
66. Hahlo & Kahn (1973) 383.
67. Hahlo & Kahn (1973) 447; See also chapter II above.
68. s137 of the Code; s102 of KwaZulu Act.
69. s95 of the Code..
70. Olivier et al 13.
71. Olivier et al 15; Van Tromp 59 et seq; Harries 17-18.
72. s85 of the Code; Olivier 17 et seq and the cases quoted. For the details see also chapter VI above.
73. Coertze 229; Schapera 142.
74. Swanepoel 28.
75. s137 of the Code; s102 of KwaZulu Act.
76. See Olivier et al 19-24.
77. Simons (1968) 104.
78. Breytenbach 173.
79. Breytenbach 174.
80. Breytenbach ibid.
81. Lucani v Mbuzweni 1910 NAC 27; Gwayi v Gwija 1909 NAC 235; Ngcobo v Msululu 1910 NAC 33; Magedlana v Mbotshane

- 1913 NAC 191; Kesa v Ndaba 1935 NAC (C&T) 65; Presenti v Mashalaba 1941 NAC (C&O) 78; Zwakala v Ncapai 1946 NAC (C&O) 65.
82. Sotsha v Mbhalo 1923 NHC 60; Magwaza v Magwaza 1937 NAC (N&T) 3; Ndlovu v Kumalo 1938 NAC (N&T) 101; Nyamane v Busakwe 1944 NAC (N&T) 78; Myende v Chiliza 1973 BAC (N-E) 304. Olivier et al 26.
83. Msibi v Sibanyoni 1940 NAC (N&T) 28; Nyamane v Busakwe 1944 NAC (N&T) 78; Mlangeni v Dhlamini 1948 NAC (C) 10; Dhlamini v Ndlela 1954 NAC (N-E) 46; Khumalo v Ntshalinstshali 1971 BAC (C) 59.
84. Nxumalo v Ndwandwe 1956 NAC (N-E) 79.
85. Dwayi v Bhekumbuso 1926 NHC 23; Bhulose v Ndimande 1926 NHC 23; Hlatshwayo v Buthelezi 1977 ACCC (N-E) 252.
86. Myeni v Myeni 1956 NAC (N-E) 89.
87. Molife v Molife 1938 NAC (N&T) 83.
88. Mtimunye v Mabena 1939 NAC (N&T) 129.
89. Cele v Mbukiso 1942 NAC (N&T) 78.
90. The implication is that such gifts are given with the intention that they shall be forfeited if the marriage falls through.
91. s137. of the Code; Somzamana v Cwejile 1912 NHC 40; Mbuyisa v Ntombela 1939 NAC (N&T) 93.
92. Somzamana v Cwejile 1912 NHC 40; Xakaza v Tshabalala 1943 NAC (N&T) 50; Ncube v Makanya & another 1948 NAC (N&T) 8.
93. Mntambo v Ndaba 1950 NAC (N-E) 149; Sindane v Mbhokazi 1930 NAC (N&T) 153.
94. Ndaba v Mbata 1939 NAC(N&T) 32; Cili v Nyatikazi 1943 NAC (N&T) 14; Mbuyisa v Ntombela 1939 NAC (N&T) 93.
95. Butelezi v Ndhlela 1938 NAC (N&T) 175; Zulu v Mdletshe 1950 NAC (N-E) 203; Mngomezulu v Lukele 1953 NAC (N-E) 143; Mhlungu v Sikhakhane 1979 ACCC (N-E) 198.
96. Hahlo (1975) 54.
97. Repealed by the Marriage Order in Council of 1838 s 19.
98. Zimande v Sibeko 1948 NAC (CD) 21.
99. Simons (1968) 99 et seq.

100. Mc Calman v Thorne 1934 NPD 86. In this case the impression was created that this action was of a hybrid nature. It was in the case of Guggenheim v Rosenbaum 1961 4 SA 21(W) that the court clearly separated the contractual from delictual damages and stressed the point that the rules applying to them are different. In recognizing a claim for damages rather than specific performance for breach of an engagement, South African law followed the example of English law - PM Bekker "Die aksie op grond van troubreuk" 1974 THRHR 403 404 et seq. English law has, however, abolished an action for breach of an engagement - PM Bekker "Die aksie op grond van troubreuk" 1975 THRHR 52.
101. The only acceptable way by which a young man might reject the woman was to delay marriage in which case the woman would simply baleka to somebody who might be willing to lobola and marry her.
102. This provided an outlet in the case of a loveless marriage in which case it would still be stable.
103. Simons (1968) 104.
104. ibid.
105. The family head was the only person having full legal capacity.
106. Simons (1968) 104.
107. This view was clearly enunciated in Guggenheim v Rosenbaum 1961 4 SA 21 (W).
108. Mtetwa v Lembede 1937 NAC (N&T) 30; Mbuyisa v Ntombela 1939 NAC (N&T) 93; Ndaba v Mbata 1939 (N&T) 32; Cili v Nyatikazi 1943 NAC (N&T) 14; Myende v Chiliza 1973 BAC (N-E) 304.
109. Guggenheim v Rosenbaum 1961 4 SA 21 (W).
110. 1944 NAC (N&T) 78. See also Ndimande v Mkize 1943 NAC (N&T) 87; This view was followed in Gumede v Khumalo 1977 ACCC (N-E) 183.
111. 1948 NAC (C) 10.
112. This was the case of ilobolo given for an infant betrothal to mention one example.
113. Mtetwa v Lembede 1937 NAC (N&T) 30; Mbuyisa v Ntombela 1939 NAC (N&T) 93; Ndaba v Mbata 1939 NAC (N&T) 93; Ndaba v Mbata 1939 NAC (N&T) 32; Cili v Nyatikazi 1943 NAC (N&T) 14.
114. Simons (1968) 105.

115. 1939 NAC (N&T) 93; see also Msibi v Sibanyoni 1940 NAC (N&T) 28.
116. AN Allott The limits of law (1980) 259 et seq on common-law wife.
117. s11(1) of the Administration Act recognizes the application of customary law in cases relating to customs. This section makes the application of customary law discretionary. Yet there are a number of rules which govern the exercise of such a discretion. See Bekker & Coertze 47 et seq.
118. Tiyeka v Sikayi 5 NAC 47 (1926).
119. Valashiya v Ntoa 1932 NAC (C&O) 32.
120. Memani v Makaba 1 NAC (SD) 178 (1950).
121. Zombovu v Nowalaza 1927 NAC 54.
122. Qangisa v Mngwazi 1922 NAC 109.
123. Mlakalaka v Bese 1936 NAC (C&O) 22.
124. Ngcongayi v Jwili 1944 NAC (C&O) 15.
125. Mngadi v Nogwaza 1943 NAC (C&O) 14.
126. Nojiwa v Vuba 1903 NAC 57; Lucani v Mbuzweni 1910 NAC 27.
127. September v Mpolase 1910 NAC 27.
128. Lupusi v Makalima 1911 NAC 163.
129. Elipha and another v Mbulawa 1928 NAC 16.
130. Simons (1968) 105.
131. 1936 NAC (C&O) 22.
132. 24.
133. 105-6.

CHAPTER X

ILOBOLO AND A CUSTOMARY MARRIAGE

10.1 INTRODUCTION

Although ilobolo has been expressly recognized, a customary marriage remains unrecognized as a marriage although it is regarded as a customary union.¹ This results in a customary marriage having an inferior status. It is proposed in this chapter to investigate the relationship between ilobolo and a customary marriage and related institutions.

10.2 ILOBOLO AS A REQUIREMENT OF A CUSTOMARY MARRIAGE

After an analytical discussion of the significance of ilobolo, it becomes obvious that it is no doubt an essential requirement for the conclusion of a valid customary marriage. Yet it is not so.²

There is a difference of opinion among writers as to the role of ilobolo in a customary marriage. Although some regard the delivery of ilobolo as a strengthening factor in marriage, they by no means regard it as essential to its validity.³ The problem is that to regard ilobolo as an essential of a customary marriage means that without the delivery of ilobolo sexual relations between a man and a woman are unlawful, but to some this is not so.⁴ Moreover, if ilobolo were regarded as an essential it would mean that if ilobolo has not been settled, a man would not be able to claim damages from a third party on the grounds of adultery committed with his partner. Yet the protection of the relationship against infringement by third parties, and the action for adultery are not dependent on whether or not ilobolo has been delivered.⁵ But this argument ignores that even if no ilobolo has been delivered, there is always an agreement to deliver it. At least this is the position in Zulu law. No marriage would

take place without at least an agreement as to ilobolo.

The argument has also been raised that if ilobolo validates a marriage it means that children born of the union do not belong to the father,⁶ if ilobolo has not been delivered, but belong to the mother's group.⁷ But according to Tswana law⁸ although the father does have certain paternal powers and rights over children,⁹ if he has not settled ilobolo, the children are not fully incorporated into the father's group.¹⁰ If a daughter of that union marries, it is not her father, but her maternal grandfather who is entitled to receive her ilobolo.¹¹ Yet despite these deviations Swanepoel¹² is of the view that the non-delivery of bogadi does not seriously affect the validity of the marriage.¹³ But he qualifies his view. According to him the safe way is to accept that an agreement to marry includes an implied term that ilobolo will be delivered more especially because for a Tswana marriage without the delivery of ilobolo is inconceivable. Consequently even if the parties do not mention the delivery thereof during marriage negotiations, it is regarded as obvious. But an agreement to deliver ilobolo which is implicit in the agreement to marry, although not legally enforceable, is an essential requirement of a customary marriage.¹⁴

The questions which arise in connection with ilobolo in Tswana law do not arise in Zulu law. Ilobolo agreement in Zulu law is invariably agreed to expressly so that there is no question of an implied agreement. Even if the man may not deliver the whole of it, there must be an express agreement for the delivery thereof. But even in Tswana law, taking the view that ilobolo is invariably implied in marriage negotiations, one can come to no other conclusion than that it is an essential of a customary marriage. Thus statements by writers to the effect that ilobolo is a "rock on which the customary union is founded,"¹⁵ underlie the essence of ilobolo in customary law of marriage. The opinion that ilobolo is irrelevant to the validity of a customary marriage

underestimates the practical importance thereof, and is contradicted by the facts.¹⁶ It is entirely inconceivable for a Zulu father that he could give consent to the marriage of his daughter without at least a promise to deliver ilobolo. In fact the consent of the girl's father is conveyed in the lobolo agreement and is made conditional on the delivery thereof.¹⁸ Moreover, no wife would feel secure in her marital status, nor would the father be confident of his rights in his children without the delivery of ilobolo.¹⁹ The question of what the effect of non-delivery of ilobolo is, is often met with the answer that it is not a done thing in customary law.²⁰

Although ilobolo has been granted statutory recognition,²¹ nowhere is it regarded as an essential of a valid customary marriage.²² Although it was included in the earlier Codes,²³ it has since been removed from the list of essentials. The anomaly created by the exclusion of ilobolo as an essential on the one hand, and the contention that it is in fact an essential requirement on the other, can be understood in the light of the history of the Code. It was pointed out above that the exclusion of ilobolo was aimed at according more finality and solemnity to the marriage and to forestall litigation.²⁴ The exclusion of ilobolo from the essentials was therefore ideological. Moreover, the fact that it has been excluded as an essential does not detract from the fact that in practice it is regarded as an essential.²⁵ Without ilobolo, convincing evidence would be required to prove that there was a customary marriage. In fact in practice an agreement to deliver ilobolo is such an indispensable requirement both in Natal and outside to such an extent that it is repugnant to a black's idea of a valid customary marriage to exclude it.²⁶ Yet despite that it is not regarded as an essential requirement this does not affect the right of the parties to conclude such an agreement and to enforce it.²⁷

The provisions of KwaZulu Act on the Code have greatly

changed the position of ilobolo in a customary marriage. Section 16 provides that a Zulu citizen attains majority on marriage and on turning twenty one years of age. This means that strictly speaking a Zulu woman can marry without her father's consent once she has attained the age of twenty one. This is further evidenced by the fact that the provisions of s22 ter of the 1927 Act have been repealed by s124(1) of KwaZulu Act. Despite the repealing of the provision that requires a Zulu woman to require the consent of her father even though she is of age, and despite the fact that ilobolo is not a requirement of a valid marriage in terms of KwaZulu Act, s42(2) of the Act provides that although the father's consent is no longer a requirement for entrance into marriage by a major Zulu woman, this does not disentitle the person entitled to claim ilobolo for that woman from claiming it. The effect of this provision is doubtful. It does not put ilobolo in any different position. What it does is merely to state the obvious. The reason for the inclusion of this provision is that the legislator did not want the impression to be created in the minds of the public that the raising of the status of a Zulu woman meant that fathers would be deprived of ilobolo for their daughters. This was necessary because of the radical change of customary law in respect of women. Any action by the legislature which could be interpreted as depriving parents of the right to demand ilobolo for their daughters would be strongly resented. Such a step could even lead to social unrest.

If there has been conflicting views by writers on the question whether or not ilobolo is an essential of a marriage, the courts have been no less contradictory.²⁸ What is surprising is that some of these conflicting decisions have been given in Natal.²⁹ The preferable view is that in practice ilobolo agreement is the most important requirement. Thus mere cohabitation even for a long time will not be recognized as a customary marriage by the court "since in basic native law

as practised by the natives and applied by the courts, lobolo is the chief ingredient of the marriage".^{29(a)} Besides all this, a court in Natal is strictly speaking bound to recognize a customary marriage as valid even though no lobolo has been delivered.³⁰ The persistence of the custom goes beyond the confines of legal obligation. This is attested by that most parties to a civil marriage, and all parties to a customary marriage demand and receive ilobolo, although it is not legally essential to the validity of such marriage.³¹ This shows that the purpose of excluding ilobolo from the essentials of a customary marriage has not been entirely successful.

Although it has been said that ilobolo is in fact an essential for the conclusion of a valid customary marriage, such a statement should not be exaggerated. The juridical meaning of ilobolo is that it is the ordinary essential condition and proper sign of a real customary marriage between parties living together as husband and wife.³² Yet it is not ilobolo alone, but ilobolo and other requirements which form part of a marriage.³³

If one regards ilobolo as an essential of a customary marriage, the question then is: how does one reconcile this view with the inferences to be drawn from what has been said above? The answer is that according to customary Zulu law no marriage could take place without an arrangement to deliver ilobolo. Any such union would be irregular. But this has been changed by legislation.

The next question is what is the effect of the exclusion of ilobolo as an essential of a customary marriage? Because ilobolo has been excluded from the essentials of a customary marriage in Zulu law, it means that it must form the subject of a separate agreement. Although this is theoretically so, in practice there can be no giving of the father's consent

to the marriage of his daughter unless ilobolo has been delivered or agreed to. But legally that is something which does not affect the validity of the marriage.^{33(a)} Because this is a subject of a separate agreement, it means that it has to be enforced like all ordinary contracts by way of action in court. As a result its enforceability does not arise from its natural setting, but from the fact that it is a contract, and that it is not subject to the repugnancy clause.

That ilobolo is not regarded as an essential of a customary marriage means that it is placed in the same position it occupies in a civil marriage. It follows that if there is no express agreement to deliver ilobolo, the father will not be entitled to demand it later on. In practice, as it has been shown, the removal of ilobolo from the essentials of a customary marriage poses no problems as the father invariably demands ilobolo before granting consent to the marriage of his daughter, although this will not be the case where the woman is a major and where the father's consent is not required. In that event it is the force of tradition which will prevent a woman from marrying without the father obtaining ilobolo for her. Although the law has changed, the practice of the people has not changed and is not likely to change for a long time to come. This means that the law as codified and as applied by the courts does not reflect what the position is in practice. Although this was done with the purpose of discouraging ilobolo, it has not diminished its popularity.

The question is whether ilobolo should be re-included among the essentials of a customary marriage in order to reflect the position in practice? Although the re-inclusion of ilobolo as an essential will reflect the position as it is in practice, it might introduce an element of rigidity. As the non-inclusion of ilobolo among the essentials of a customary marriage does not constitute a positive prohibition to demand ilobolo, it may not be said that it encourages disrespect for the law owing to non-observance. Consequently re-inclusion

of ilobolo among the essentials of a customary marriage is not necessary. It was perhaps for this reason that KwaZulu Act has left the position as it was before.

10.3 REGISTRATION OF A CUSTOMARY MARRIAGE AND ILOBOLO

Despite the non-recognition of ilobolo as an essential of a customary marriage, the Code does provide for the registration of a customary marriage which includes the registration of ilobolo delivered as well as owing.³⁴ This registration has been regarded as Natal's major contribution to marriage reform.³⁵ It is conclusive evidence of the existence of the customary marriage.³⁶ Yet this registration is not compulsory, nor is non-registration having the effect of nullifying the marriage as long as there has been compliance with the essentials.³⁷ The registration is done through the official witness who is also supposed to acquaint himself with the details of ilobolo delivered, and also liabilities arising out of the marriage.³⁸ The salutary effect of this registration of ilobolo is that it provides prima facie proof of the lobolo delivered and still owing which in many cases in the past meant reliance being placed on vague recollections of what had happened some years back.

An entry of ilobolo delivered and debts owing can be rebutted, but in such a case strong evidence would be needed to disprove the existence of a registered customary marriage.³⁹

10.4 ILOBOLO DURING THE SUBSISTENCE OF A CUSTOMARY MARRIAGE

It has already been pointed out above that ownership of ilobolo remains in the person who provided it until the day of the celebration of the marriage. On the celebration of the marriage, the father or guardian of the woman becomes the owner and can use it as he pleases. If ilobolo has been settled in cash, however, hardly anything remains after the wedding ceremony.⁴⁰

Among the Venda the bridegroom's group (vhakwasha) have an interest in the manner ilobolo (thakha) is disposed of.

As a result the woman's group (makhulu), cannot use the lobolo received for a daughter for what is owing in respect of another. If the makhulu uses the lobolo for whatever purpose, he must replace it so that he may mala a girl. This girl who has been mala'ed will either be wife to the father or to any unmarried son as a dzekiso wife.⁴¹ In Zulu law, on the other, there is no specific way provided for the use of the lobolo cattle by the father of the woman. It was pointed out above that he could use those cattle to lobola a wife for himself or for the first wife of his son. This, however, does not entitle the father of the bridegroom to enquire as to how ilobolo delivered was used. Nor does he have an interest in the use thereof. Once ilobolo has been delivered the woman's father has a free discretion how to use it.

10.4.1 Ilobolo and the children of the marriage

Although reference was made above⁴³ to the position of children and ilobolo, further comment on ilobolo and its relationship to the children of the marriage is apposite. The argument that ilobolo is a form of security for the children was disputed. The children have no right to the lobolo given for their mother. Although their maternal grandmother may come to their aid if the father is deceased or the marriage is dissolved, they cannot claim this as of right. The idea that ilobolo purchases the children to be born of the marriage was disputed because the number of ilobolo cattle given has no relevance to the number of children to be born. Comparing the position among the Zulus and the Lozi Gluckman has this to say:

"Zulu society is chiefly distinguished from Lozi by its structure of unilineal agnatic groups, which are exogamous, and which are associated with a marriage rule by which the giving of cattle to a woman's father transfers her fertility for all her lifetime to the agnatic group of her husband, who may indeed have been dead before she was married to his name, or who may be a woman or an impotent man. If the wife goes off in adultery, the children are her husband's; if he dies, she continues to bear for him; if she is barren, or dies before bearing, a younger sister should

replace her. The outstanding fact is the extreme endurance of the husband's rights and their passing on his death to his agnatic heirs. Legal marriage and the domestic unit it establishes are thus very stable, though there may be frequent adultery. The legal emphasis is the same among the Nuer, even though they have frequent changes in the constitution of households. Marriage is stable in that wherever the woman is her husband accompanies her, even after his death, to be pater of her children, for whoever their genitors are, they belong to the man or group which gave cattle for her. The husband or his heirs may let his wife go and not reclaim the marriage payment, since they get the children even though they lose her other services as wife. In these tribes marriage payment thus binds the woman's reproductive capacity to the perpetuation of the extended agnatic lineage. Each such group loses its daughters, but insists on its rights to the fertility of its daughters-in-law. Moreover, rights of inheritance vest in children exclusively from the agnatic lineage of their pater. They have no rights in their mother's family unless they are unredeemed illegitimate children, when they rank as if they were members of her agnatic lineage. Therefore economic and other interests pull the children almost entirely to the home of their pater and his agnatic lineage".42

The above argument in support of the view that ilobolo purchases the fertility of the woman is not conclusive. As was pointed out above, it uses institutions and events which are by way of exception. That a woman bears illegitimate children should not be taken as a standard against which to measure the function of ilobolo. That those children are regarded as belonging to the husband should not be interpreted to mean that all children however born belong to him. It should rather be interpreted as the reluctance on the Zulu society to mete out unequal treatment to the children owing to the fault of a parent. It is also trite that the retention of the illegitimate child is in the discretion of the husband. Even if he does not repudiate it, according to Zulu custom the woman has to pay a fine for her misconduct. If therefore the equal treatment of such children can be used to support the idea that ilobolo secures the reproductive capacity of the woman for her lifetime, and in whatever manner they are begotten, one would expect that there would be no

fine payable. In any case women do not always commit adultery. The strong moral censure against adultery in traditional Zulu society makes this a weak argument in support of the fertility theory. It should rather be interpreted to mean that in traditional Zulu society there were procedures for effecting reconciliation, and marriage was regarded as indissoluble. The commission of adultery did not necessarily mean the termination of marriage. But the position in Zulu society is different from that of the Nuer as the children born of a woman after the death of her husband from somebody other than ukungena consort will be regarded as illegitimate.

Some writers are of the view that the marriage is not consummated until the wife has fulfilled her duty of bearing children and the husband of delivering ilobolo.⁴⁴ But one must say that the conclusion of a legally valid customary marriage today makes the children legitimate even if the marriage is for whatever reason dissolved.⁴⁵

As a general rule it may be stated that the conclusion of a legally valid customary marriage leads to the procreation of legitimate issue. The children belong to the father, but in some tribes the position of the children before the delivery of ilobolo is fluid, and they can be regarded as belonging to the mother's group.⁴⁶ The delivery of ilobolo therefore gives rise to a presumption that the man who delivered such lobolo is the father of the children born of the marriage. In traditional Zulu law there was always an arrangement as to the delivery of ilobolo. As a result the position relating to the children would not be under the uncertainty of whether or not they belonged to their father.

10.4.2 Ilobolo and sororate

The right to keep a woman's children has been regarded as the reason for the institution of ilobolo.⁴⁷ The question then is: what happens if the woman is sterile or barren?

Most of the African tribes know the practice of sororate whereby the parents of the barren woman give or even the woman herself asks for a seedraiser.⁴⁸ This substitute⁴⁹ has no status of her own but ascribes to the status of the woman for whom she has to bear children.⁵⁰ Although this practice is known among various African tribes, there are local variations. The area of difference relates in particular to the role of ilobolo in such a union, and whether there is a legal obligation on the woman's father to provide a substitute.

Seemingly among the Tswana and the Pedi there is a legal obligation resting on the father of the barren woman to provide a seantlo otherwise the woman leads an unpleasant life, and the failure to provide her may entitle the husband to reclaim the lobolo.⁵¹ Although a similar practice is found among the Sotho, it would appear that there is no legal obligation resting on the father to provide her, and yet he is entitled to keep ilobolo. Among some Sotho tribes the practice has practically fallen into disuse.⁵²

In the traditional Zulu society, a similar practice existed. If a woman was sterile or died childless, the husband could reclaim his lobolo but ordinarily a sister would be provided as insila⁵³ to bear children on her behalf.⁵⁴ The fact that little or no ilobolo was delivered for the substitute is regarded as a justification for the view that the purpose of ilobolo is the purchase of children in marriage.⁵⁵

There is, however, no evidence that in Zulu law there was a legal obligation resting on the father of the woman to provide a seed-raiser. It was at most a moral obligation.^{55(a)} As the supreme goal of marriage according to customary law is the procreation of legitimate children, if a woman therefore fails in this duty she is failing in one important respect as a wife. Moreover, sterility was in traditional society regarded as a disgrace. In order to cover the shame of his

daughter the father might provide a sister of his daughter to provide children for her. Yet this was not something to be done against the wishes of the wife. According to our informants this seed-raiser would be provided if the wife herself asked for one. Above that at least a certain amount of ilobolo would still be provided. The practice itself has never prevalent among the Zulus. The very fact that other arrangements were resorted to in case of sterility is adequate proof of its infrequency.⁵⁶ The Code itself does not refer to this institution, nor to the husband's entitlement to the dissolution of the marriage because of sterility. No genuine case of sterility and claim for a seed-raiser has come before the courts. The only cases where refund of ilobolo has been claimed are those where the wife died prematurely without lawful issue.

In the case of Gidja v Yingwana⁵⁷ the court was inclined to regard the practice as contrary to public policy and natural justice. The court in any case decided that it was contrary to these principles to allow a father to "pledge" his daughter as a man's future wife. But in the case of Dube v Mnisi⁵⁸ the court decided that the provision of a substitute is not immoral or contra bonos mores.

As the Code is silent on the question of providing a seed-raiser owing to sterility, it appears that the husband will have to prove the existence of this custom and his entitlement to a substitute owing to his wife's barrenness. It is doubtful that he would be entitled to dissolve the customary marriage and claim return of ilobolo. No wife would be compelled to allow a substitute.⁵⁹ Nor would a woman be forced to be a substitute against her will. The institution of sororate itself seems to have rested on a false premise that the absence of issue in marriage is always attributable to the barrenness of the woman. The bearing of children is not dependent on one spouse, but on both of them.⁶⁰ It may be safely said that the practice of providing a seed-raiser in the case of the

wife's barrenness or alternatively refund of ilobolo has practically fallen into disuse. Yet the lobolo institution continues.

The Code provides that if a woman dies within twelve months of marriage without surviving issue, a portion of ilobolo not exceeding half may in the discretion of the commissioner be returned. If there is surviving issue, no lobolo is returnable.⁶¹ That the return of ilobolo is in the discretion of the commissioner is commendable in that if it were not discretionary the return of ilobolo under all circumstances of premature death without surviving issue might be inequitable. As to the return of the half portion of ilobolo referred to in section 94 of the Code, the court decided that the following principles must be applied in respect of the obligation resting on the father of the deceased woman and on the husband respectively: it must be ascertained what the amount of ilobolo delivered was. If the full ilobolo was delivered a half thereof must be returned. But if more than half of ilobolo agreed upon had been delivered, everything in excess of the half must be returned. Moreover, if less than half of ilobolo agreed upon had been delivered, the person responsible for the delivery must deliver the remaining lobolo so that at least the father has half of it.⁶²

In the case of Molo v Mfungelwa⁶³ plaintiff's wife experienced difficulty in child-birth. Defendant, her father, brought four of his wives to assist. One of his wives used a sharp instrument which caused the death of the wife. When plaintiff brought an action before the chief, he awarded the husband five head of cattle being return of the portion of ilobolo. On appeal, the magistrate upheld the chief's judgment on the ground that defendant was liable for his wife's act, which resulted in the death of plaintiff's wife. On appeal it was held that as the chief had awarded a return of portion of ilobolo the magistrate had erred in treating the claim as one for damages. As a result the magistrate's

decision was set aside without affecting the decision of the chief. A number of decisions have been based on this principle.⁶⁴

Where plaintiff claimed refund of ilobolo delivered by him for defendant's sister who died within a year of the anniversary of her marriage, defendant, as son of a chief was entitled to fifteen head of cattle, but only nine had been delivered leaving a balance of six head still owing. Judgment was given for the plaintiff for six head of cattle. On appeal the number was reduced to five.⁶⁵ As long as the issue of the marriage survived, for any period the deceased wife, her husband has no claim for a refund of ilobolo delivered even though he derived no benefit from the child.⁶⁶

Where the woman died within six months, but it was shown that she had lived with her husband for a long time before the marriage and had left issue surviving her, it was held that ilobolo was not refundable.⁶⁷ If the woman has died shortly after the wedding, it is not competent for the father of the husband to sue for the return of ilobolo. Only the husband is entitled to do so.⁶⁸ Moreover, only if the woman dies within twelve months of her having entered into a marriage without having any issue surviving her is a portion of the lobolo refundable, and then only not exceeding one-half of the number of cattle delivered.⁶⁹

In Masondo v Shoba⁷⁰ the parties were Zulus resident in the Transvaal. Plaintiff's son contracted a customary marriage with the defendant's daughter and plaintiff delivered fifteen head of cattle as ilobolo. A year later the wife died in child-birth leaving no issue. An action for the return of ilobolo was brought by plaintiff. It was decided that the general rule among African tribes is that if a woman dies shortly after marriage without issue, the survivor may claim that the woman be replaced or alternatively that ilobolo or a portion thereof be returned. Even if the death was due to child-birth, the court decided, ilobolo is refundable if

there is no surviving issue. A return of nine head of cattle was consequently held not to be unreasonable.

The view that even if the death is caused by child-birth ilobolo is refundable is, it is submitted, unacceptable. Firstly it does not seem to be in accordance with the spirit of Zulu law. Secondly it ignores the fact that the husband has contributed towards the death of the wife, and he should bear the responsibility as well. In early customary law if the woman died the father of the woman would out of sympathy for his son-in-law provide a substitute or refund a portion of ilobolo. This was not obligatory.

In Gidja v Yingwana⁷¹ the court decided that to order a refund of all ilobolo was unjust because the woman's services and the marital privileges enjoyed by her husband must be taken into account. It was further decided that the Zulu custom that a refund of a portion of ilobolo may be claimed only if she dies childless within a year after the marriage, and that no refund is claimable after a year, should be applied to the Shangaan and other tribes who fall within the jurisdiction of the court. The court's application of the provisions of the Code outside Natal and to other nationalities than the Zulus is unjustifiable.⁷²

The Zulu practice relating to barrenness of the woman is similar to that of the Xhosa where barrenness does not entitle the man to get a substitute nor does it entitle him to dissolve the marriage and recover the lobolo.⁷³ If the wife dies within twelve months without surviving issue only a portion of ilobolo not exceeding half is returnable.⁷⁴

It is to be doubted whether under modern circumstances the retention of this rule is justifiable. To claim return of ilobolo because of the death of the woman owing to no fault of the woman's father is to add insult to injury. It is out of step with modern ideas of fault as a requirement for

liability. Although this is a customary rule, it is ideal to bring the custom in line with modern ideas. Considering that today most of ilobolo is spent in paying marriage expenses, there is little justification for the claim of return of ilobolo on the death of the woman. It is to be regretted that this provision was not repealed by KwaZulu Legislative Assembly.

Closely related to the question of the sterility of the woman is the sterility of the husband. It has been pointed out that to regard ilobolo as a purchase of the reproductive capacity of the woman creates the impression that the procreation of children is only a woman's business and ignores the fact that even the man has to co-operate in this respect. It is based on the wrong assumption that if the marriage is childless the woman is the culprit. This is further evidenced by the lack of any remedy for the woman in the case of the man's sterility except the dissolution of the marriage.⁷⁵ Among the Pedi there are procedures of verifying that the woman is barren.^{75(a)} No such procedures exist among the Zulus.

10.4.3 Ukuvusa and ilobolo

Ukuvusa is another institution which has been used to justify the view that ilobolo can be separate from marriage and can exist without marriage which further justifies the view that it is a "child-price".⁷⁶

Ukuvusa is defined by the Code as a form of vicarious union which occurs when the heir at law or other responsible person uses property belonging to a deceased person or his own property to take a wife for the purpose of increasing or resuscitating the estate of such deceased person or to perpetuate his name and provide him with an heir.⁷⁷

This institution derives its existence from a strong feeling

among the Zulu that a person's name be perpetuated. As a result if a man dies a bachelor leaving property his natural heir will instead of appropriating the property altogether, take some of it and use it to lobola a wife whom he marries as wife of the deceased and who will bear children to inherit his estate. This he does out of affection and out of feelings of piety.⁷⁸

This marriage is based on a central fiction, namely that a dead man can father children by a woman to whom he has never been physically united.⁷⁹ This union is recognized as a customary marriage,⁸⁰ and creates a separate and entirely independent estate in the name of the deceased.⁸¹ Particulars of the name of the deceased and the purpose of the union must be disclosed to the official witness with the purpose of registration in the register of customary marriages.⁸² The wife and children born of the relationship are regarded as those of the deceased. The eldest son will be heir and has no right against the estate of the natural father.⁸³

This type of marriage illustrates that ilobolo can procure a marriage even for a person who is deceased. As was pointed out above the marriage is based on a fiction. The view that there is no marriage does not commend itself to a Zulu. The institution of ukuvusa differs from ukungena in that ukuvusa is a new and independent customary marriage whereas ukungena flows from a previous one.⁸⁴ Because of the fading away of the traditional religion and because of the many problems that may arise therefrom, the institution has fallen into disuse. Its disappearance has not affected ilobolo.

10.4.4 Ilobolo and ukungena

At customary law marriage is regarded as coextensive with the life of a wife. The implication thereof is that the death of the husband does not necessarily terminate the marriage. It is possible for a woman to retain the status of a married

woman for a number of purposes despite her husband's death.⁸⁵ The marriage is intended to be indissoluble, indefinite measurable only by the natural life span of the wife which is in any case the real meaning of a "union for life".⁸⁶ The institution of ukungena or levirate is adequate proof that the widow is bound to remain at the homestead of her deceased husband.

The Code defines ukungena as a "union with a widow undertaken on behalf of her deceased husband by his full or half-brother or other paternal male relative for the purpose (i) in the event of her having no male issue by the deceased husband of raising an heir to inherit the property or property rights attaching to the house of such widow or (ii) in the event of her having such male issue of increasing the nominal offspring of the deceased".⁸⁷

The requirements for this ukungena are that it must be concluded for one of the purposes mentioned in s 1(1) of the Code; that it must be with the free consent of the widow; that it has to be arranged with the approval of the family head and in the case of the chief where this is done with the purpose of bearing the heir, that it must be approved of by the majority of the tribe; and that no lobolo should pass for the union.⁸⁸ The offspring of the union are regarded as offspring of the deceased and not of the genitor.⁸⁹ In addition it can be terminated at any time by either partner.⁹⁰

As Braadvedt puts it, ukungena is regarded by blacks as an "honourable institution". The widow is not compelled into it and may do as she pleases although most widows choose to observe the practice.⁹¹ The practice of ukungena among the Zulu is mostly the same as in other tribes except for a few differences here and there.⁹²

The institution of ukungena has been used as justification for the fact that ilobolo is a child-price, viz that since

ilobolo cattle have come from the bridegroom's family, if the bridegroom should die while the wife is still nubile, the family are entitled to keep posthumous children she may bear and steps are taken to see that she does bear children.⁹³

This view prompts the question as to whether the existence of ukungena is based on ilobolo or whether it exists even apart from it and for other purposes. In other words is ilobolo institution a sine qua non for ukungena?

The institution of ukungena is an ancient one found even among the ancient Jews.⁹⁴ Even among the Jews the vexatious question which has given rise to conflicting theories is what actually the raison d'etre of this institution is. It would appear that the existence of this institution, despite the institution of mohar, is based on the fact that the extinction of a line was regarded as a curse from God. Moreover, the institution seems to be based on ancestor worship, for if there was no male issue the honoured traditional rites and ceremonies for the deceased would not be performed.⁹⁵

Another explanation has been sought in the institution of mohar.⁹⁶ The Old Testament provision is in favour of the view that the original and primary motive of levirate was to raise up a son for the deceased. But this institution was also aimed at the protection and security of the childless widow. In addition she was fulfilling her duty as against the mohar which had been provided for her.⁹⁷

Coming back to the position among the Zulus, Whitfield says the aim of the institution is "to maintain things as they were before, to keep the children in the kraal, for the very young ones would have to go with their mother for some time at least, and to maintain friendly relations between the kraal and the people of the widow".⁹⁸ It is interesting to note that Whitfield does not mention the delivery of ilobolo as a reason for the existence of ukungena. His explanation is more acceptable than that of those who simply regard ilobolo as

a justification for the existence of ukungena. One cannot effectively evaluate this institution by looking at only one side of it. Although ilobolo is relevant to it, it is only one factor to be taken into account in order to evaluate and appreciate it.

The union is based on the spirit of brotherly affection and involves an act of piety whereby a man might forego inheritance to provide an heir for his deceased brother. Moreover, he derives a measure of sexual satisfaction from the relationship. But the reasons for the existence of this institution may be sought in a complex of religious, sexual and even economic practices and beliefs.⁹⁹ The simplest explanation is that the marriage vests the wife's procreativity in her husband and when he dies this is continued by an appointed representative. This continues until the marriage is dissolved by her death or the refund of ilobolo. Yet ilobolo is not necessarily the sine qua non for the existence of the institution of ukungena. This is not to say that ilobolo is irrelevant.

It has been pointed out above that ilobolo secures the validity of the marriage and this marriage is kept alive even after the death of the husband by a fiction which makes it possible for children born after his death to be regarded as legitimate. The fact that ilobolo is returnable if she should reject an ukungena consort to marry somebody else may be regarded as a tendency in customary law to punish any person who deviates from custom. Ukungena must be understood in the light of the background in which it was practised.

In the traditional set-up a widow would fall prey to unscrupulous men. Ukungena on the other hand provides the widow with security, companionship, sexual satisfaction and the right to procreate legitimate issue as well as an assured status at her late husband's home.¹⁰⁰ These are important

considerations if one bears in mind that in traditional society if the widow left she would forfeit her children, house property and support. In addition she would not be in a position to earn a living on her own as in those days there were no employment opportunities for women. The continued existence of this institution can be explained in the light of the benefits it conferred on the widow rather than the simple fact that ilobolo had been delivered for her. As was pointed out above the institution does not require the delivery of ilobolo. If ilobolo is delivered a new marriage is created.¹⁰¹ What is more, the ukungena partner may require payment in the form of inkomo yamadolo or inkomo yeqolo (beast for the knees or beast for the back) for his services.¹⁰²

Ukungena is declining owing to its incompatibility with a civil marriage, Christianity, monogamy and the new breed of liberated women. It is an institution that belongs to the patriarchal, patrilineal, polygynous family system which is on the wane. Despite the continued existence of ilobolo, and its attachment to a civil marriage, ukungena cannot be accommodated and is bound to disappear. Yet ilobolo continues which shows that the two are separable.¹⁰³

It follows that although ilobolo is not irrelevant to the institution of ukungena, it cannot be taken in isolation as the justification that ilobolo procures the fertility of the woman because the woman is retained not only for procreation, but also for other purposes. The relevance of ilobolo is that it makes this ukungena a valid union. It is based on a fiction that the ukungena consort is vicariously bearing children for the deceased. Whereas these children would be illegitimate without the delivery of ilobolo; they are regarded as entirely legitimate. The basis of validity is ilobolo delivered by the deceased on whose behalf the children are procreated. Ukungena therefore provided a form of social security for the woman and its interpretation as a justification of the productivity theory is therefore unacceptable.

10.4.5 Ukulobola and polygyny

Polygyny was earlier severely criticised by missionaries on dubious grounds of scriptural inaccuracy.¹⁰⁴ It was also regarded as a form of slavery for women while encouraging idle sensuality on the part of men, and immorality, jealousy and bickering among women.¹⁰⁵

It is not necessary to deal with these objections. What is pertinent here is to evaluate the relationship between ilobolo and polygyny, and the effect each has on the other in the light of the cultural background of the Zulu people.

Despite the social evils of polygyny it must be pointed out that in traditional society this institution had a role to play. It enabled women to marry and have children. In the traditional set-up there were no job opportunities for women. The only form of security for women, except a few, was marriage and associated practices. The choice was therefore between marriage, even a polygynous one, or lifelong celibacy for which condition the tribal society provided no arrangement. Spinsterhood on the other hand meant the lifelong dependence of the woman on her father, brother or kinsmen which might be quite onerous. Yet marriage brought with itself the enhanced status of a married woman, and the bearing of legitimate children. In a society where there were more women than men,¹⁰⁶ monogamy would have meant a number of women being forced to remain spinsters for life. Polygyny therefore provided an alternative. The sharing of a husband, as Simons puts it, may have seemed not too great a price to pay for the advantages of being a wife and mother in a society where other careers were not open to women. Furthermore, the co-wives benefitted from companionship and security which was provided by a large establishment. In addition polygyny was in a way a form of family planning because sexual intercourse during the period of lactation was prohibited.¹⁰⁷ Monogamy would have militated against this.

Moreover, women were saved the burden of excessive child-bearing. Although jealousy, strife and marital problems did arise in a polygynous establishment, there is no concrete proof that these were more productive of martial discord than in the contemporary monogamous society.¹⁰⁸ One must bear in mind that this institution was a socially accepted institution. It was not frowned upon. The criticism was levelled against it by people with a foreign outlook. Consequently their criticism could not be valid because it was not based on an appreciation of the value system of the blacks.

Legally a customary marriage has been regarded as incompatible with the concept of marriage on the grounds that it is actually if not potentially polygynous. This apparently conflicts with the view of marriage as a union of one man and one woman. Obi, however, is of the view that a polygynous marriage is in accord with this definition. He puts it as follows:

"To think of marriage in terms of one man and one or more women is to confuse its basic nature with one of its characteristic incidents, a negative one in this case. For a polygamist is a man who has entered into two or more separate marriage contracts concurrently with as many women, not one who has entered one marriage contract with two or more women considered as a legal entity. In other words, there are as many marriages co-existing in a polygamous household as there are wives. To postulate the converse of this would be to imply that the various contracts are simultaneous in their inception and interdependent on each other for their existence, so that they either stand or fall together".¹⁰⁹

Even though one may not wholly agree with this postulation, the point is well taken. The relevant enquiry here is the relationship between polygyny and ilobolo. It has been said that ilobolo is an adjunct of polygyny in the sense that the father or brother utilizes the cattle obtained for the daughter's or sister's lobolo for obtaining a substitute for

her namely a wife who will stand in her place since her going away leaves a vacuum.¹¹⁰ As a result in a society where marriage required cattle and where the multiplicity of wives was a status symbol, the men with more cattle would have more wives than younger even more handsome men.¹¹¹ That is the reason why even in ancient society, polygyny was confined to the well-to-do and not to the poor. Because of this it has been argued that if ilobolo is abolished it would mean the demise of polygyny.¹¹² It is submitted that this last view is not quite precise. Polygyny did not exist only because of ilobolo but for other purposes as well. In fact one would think that the converse would be true if ilobolo were abolished. Informants interviewed expressed fear that if ilobolo were abolished it would mean that marriage would be easy rather than difficult. What is not disputed is that the more cattle a person has, the more women he may be able to marry.

Ilobolo has also been regarded as the cause rather the consequence of polygyny.¹¹³ This argument has been criticised on the grounds that it transposes the values of a commercial society to the subsistence economy of the tribe.¹¹⁴

Besides the merits and demerits of polygyny one thing is quite obvious; that it is fast disappearing. It belongs to a tribal situation and is unsuited to the contemporary society. Many women are educated, and involved in lucrative employment. Women who desire to avoid a polygynous establishment can do so by marrying by civil rites or by remaining single for life.¹¹⁵

10.5 DISSOLUTION OF A CUSTOMARY MARRIAGE

According to the laws of most African tribes the marriage is dependent on the lobolo contract. As this contract is concluded by the woman's guardian and the bridegroom's father, the dissolution cannot be effected unless the parties

concerned are brought into the proceedings and formalities.¹¹⁶ The present discussion is not concerned with the dissolution of the customary marriage in general, but with the effect of ilobolo on the dissolution of the marriage and the fate of such lobolo on dissolution of the marriage. Yet a brief note on the dissolution of customary marriage is appropriate.

Customary marriage has been regarded as being more binding on the blacks than a civil marriage.¹¹⁷ This has been largely due to the fact that a customary marriage is more a union of two family groups who exercise a lot of influence in keeping the marriage from breaking up. Because of these checks and balances the idea of divorce has been almost unknown in customary law. Despite the absence of legal impediments to divorce, a marriage was not lightly dissolved.¹¹⁸ Whatever the position was in early customary law, today a number of factors have changed the stability of a customary marriage. Although its stability was attributed to the institution of ukulobola, it is a romantic theory unsupported by evidence that ilobolo as an economic factor produced marital stability, but the whole network of kinship relations produced by the involvement of the two family groups was responsible for this. The relaxation of these has therefore led to the customary marriage being less stable.

The dissolution of a customary marriage can take place by divorce or in certain cases by death. The latter will be discussed first.

10.5.1 Dissolution by death

In Zulu customary law the death of the wife or husband does not necessarily dissolve the marriage. When a wife has died within twelve months without surviving issue a portion of the lobolo is returnable or the parents of the deceased wife may provide a substitute.¹¹⁹

Death of the husband according to the traditional Zulu law did not dissolve the marriage no matter how shortly after its consummation his death occurred. His widow continued to live at the homestead of the deceased.¹⁰²

The Code stipulates that a customary marriage is dissolved by the death of the first dying partner or by a competent court.¹²¹ In this respect it is either that the Code is not a true reflection of customary law or that it modified customary law by the principles of Roman-Dutch law where the death of either of the spouses dissolves the marriage. At the same time the Code provides that a child born of a widow is a member of the family of such widow's deceased husband¹²² while the widow herself is under the guardianship of the family head of the homestead to which she belongs.¹²³ By the latter, it is hoped, the Code refers to the heir of the deceased husband. The dissolution which the Code refers to therefore seems not to be effective as the widow remains at the homestead of the deceased. A male relative of her husband may, with her consent, form an ukungena union with her.¹²⁴ The children born of such union belong to the deceased.¹²⁵ Should she marry, ilobolo delivered for her belongs to the house to which she belonged in the home of the deceased husband.¹²⁶ All this goes to show that even today the death of the husband does not effectively terminate the marriage. The emancipation of Zulu women has, however, altered this position.

It is submitted that death does dissolve a marriage when the husband dies with the woman having passed the child-bearing stage. In such a case no ukungena union will be formed. Yet the widow will not leave the homestead of the deceased husband possibly out of deference to the children who may already be grown up.¹²⁷

10.5.2 Divorce

In the other provinces, except Natal, the matter of the

dissolution of the customary marriage is a private, though by no means secret, affair in which the courts do not normally intervene.¹²⁸ Consequently the repudiation of the wife by the husband terminates the marriage. On the other hand if the wife repudiates the marriage with the guardian's restoration of ilobolo or if the husband's conduct justifies his forfeiture of ilobolo they may resort to legal action in court for an order dissolving the union with or without forfeiture of ilobolo by the husband and then the marriage is terminated. A variety of procedures in fact may be used in terminating a marriage. A divorce may result from action taken separately by a father, a husband, a lobolo holder in conjunction with the husband or alternatively by a wife and her ilobolo holder.¹²⁹

In most cases the court outside Natal is only called upon to decide how ilobolo is to be disposed of.¹³⁰ The question that must be scrutinised is actually what the criterion is for the true severance of ties in a customary marriage. This problem, it must be pointed out, is of significance outside Natal.

According to the practice in old society the dissolution of a customary marriage was completed by the return of ilobolo minus certain deductions. As long as the wife's guardian continued to be in possession of the lobolo cattle no dissolution was effective. Even if the dissolution might have been decreed by a court of law, it was not efficacious unless accompanied by the return of the lobolo. The purported dissolution would only be tantamount to a suspension of a marriage. Even if the guardian could give the wife away in another marriage she could be entitled to return to her former husband and the former marriage would be automatically revived. The second husband would only be content with the claim for the refund of his cattle. But if ilobolo in the previous marriage had been restored when it was dissolved, it would have been effectively terminated. Should the wife return to her former husband it would be a remarriage, and a

fresh ilobolo would be required for the conclusion of a valid marriage.¹³¹ The reason for this is that according to customary law a marriage is a "contract" between not only the parties to such a marriage, but also between the two family groups. It follows therefore that until the holder of the lobolo has been informed of the repudiation of the wife and as long as ilobolo remains with him, the marriage legally remains in existence.¹³² The presence of ilobolo cattle at the homestead of the husband is visible and tangible proof that the marriage has been terminated.¹³³ Just as the marriage was brought about or preceded by the delivery of ilobolo, it is logical that its undoing must also be accompanied by the passing of cattle, only this time in reverse order as when making one viz the wife went back to her father, and the cattle to her husband.¹³⁴ The return of ilobolo therefore was "to mark" the dissolution of the marriage. Any purported dissolution without the return of ilobolo would therefore not be effective.¹³⁵ Should the wife of this inchoately dissolved marriage attempt to conclude another customary marriage, that second marriage would be null and void.¹³⁶

In dealing with this matter the courts were not always consistent. The early Transkeian courts insisted on the restoration of at least one ilobolo beast "to mark the dissolution of the marriage" even if it was the husband who had caused the disintegration of the marriage by grossly ill-treating his wife.¹³⁷ Yet when making an order for the return of cattle "to mark the dissolution" it was also held that it is a well-defined principle of customary law for the husband to forfeit his ilobolo rights if he rejected his wife or made it impossible for her to live with him.¹³⁸ In some cases the court refused to give an order for the restoration of any cattle to the husband who had chased his wife away without a just cause.¹³⁹ In fact this was the tendency of the court later on.¹⁴⁰ It would seem that this latter tendency had the effect merely to suspend the consequences of the marriage, and

was not a complete divorce.¹⁴¹ In fact these judgements had the effect of cutting the link between marriage and its ilobolo base where the husband was held responsible for the dissolution. Because men do not readily accept that they are responsible for the break-up of the marriage and consequently that they should forfeit ilobolo, the principle that divorce takes place with forfeiture of ilobolo rights opened the way for disputes which could only be solved by the intervention of the courts.¹⁴²

The view held by the northern division of the appeal court, possibly with the aim of reforming customary law of divorce by judicial action, was that the marriage may be considered to have been dissolved if the attempt to reconcile husband and wife fails.¹⁴³ Yet it would seem that this view may suffice for those cases where the parties after having agreed on divorce reached a settlement as to the disposal of ilobolo. These unfortunately are not the cases that come to court.¹⁴⁴

There is still a lot of uncertainty as to the court's function in suits for divorce. Whereas in one case the court has disclaimed any competence or authority to dissolve a customary marriage because it can be dissolved by the parties,¹⁴⁵ it has also been pointed out that parties come to the court when they cannot agree whether or not there has been desertion and for settling ilobolo dispute in which case the court, while making an order for the restoration of cattle, may accompany it with a formal declaration of dissolution although it is not the declaration which constitutes the divorce.¹⁴⁶ Yet in another case it was contended that the court does not make an order of dissolution, but deals only with the lobolo delivered. The order for the return of ilobolo, however, in effect is a declaration of dissolution.¹⁴⁷ It would seem therefore that the courts in fact have unwillingly been drawn into the dissolution of a customary marriage. Whatever pretexts may have been given, the effect is that whether they are only dealing with ilobolo disputes, they are in fact

dealing with the dissolution of a customary marriage as the two go together.¹⁴⁸

Another question which is closely related to the return of ilobolo to mark the dissolution, is the extent of such refund. In earlier cases the court held that the husband was bound to accept the tender of full ilobolo which had the effect of dissolving the marriage.¹⁴⁹ Yet in later cases it was held that the repudiation on the part of the woman can be effective only on the restoration of ilobolo or part thereof.¹⁵⁰ This latter view was confirmed in the case of Mayile v Makawula¹⁵¹ where the court held that the position might be that the father of the woman is unable to restore the full ilobolo which would mean that the husband would have a sort of lien over the wife until the full settlement of ilobolo. According to the court, such a situation was immoral and contrary to public policy. The tender of part of ilobolo is regarded as a clear indication that the wife is rejecting her husband.¹⁵² The better view is that if the initiative to dissolve the marriage emanates from the wife full tender of ilobolo must be made in particular if she repudiates the husband for no just cause. If on the other hand the initiative is on the husband the partial tender of ilobolo, and the acceptance thereof should be regarded as full settlement.

Although the position above seems to have been belaboured it must be pointed out that it does not apply in Natal and KwaZulu. The importance of analysing the position above is to show whether or not the position in Natal at present is in fact in accord with Zulu customary law. Whether or not the situation as outlined above was the same in Natal and KwaZulu is difficult to say. The position is complicated by the fact that most informants say that in Zulu customary law divorce was unknown.¹⁵³ Yet it would seem that when divorce among the Zulu became widespread the return of ilobolo afforded concrete evidence of the termination of the marriage.

Whatever the position in customary Zulu law, the position today is regulated by the provisions of the Code. In Natal and KwaZulu a customary marriage cannot be dissolved extrajudicially by the parties themselves and without any good cause simply by the wife's formally repudiating her husband or by the voluntary return of ilobolo by the guardian at the request of the wife. The commissioner's court is the competent tribunal to decree such a divorce.¹⁵⁴

Because of these innovations the Code plays down the role played originally by ilobolo in the formation, existence and dissolution of a customary marriage. As a result it has had the effect of removing the dissolution of a customary marriage from its natural setting and makes it purely a judicial affair.¹⁵⁵ The reason for this shift can be understood in the light of the background to the promulgation of the Code. Ilobolo in terms of the Code, unlike in original Zulu law, is not a requirement for the conclusion of a valid customary marriage. It would be anomalous if ilobolo would not be regarded as an essential of a customary marriage and yet its restoration be regarded as an essential in the final dissolution of the marriage. The only reason why at all the Code still postulates that there has to be return of ilobolo is to be sought in the fact that in any case ilobolo is still recognized in the Code though not as an essential.¹⁵⁶ Because return of ilobolo no longer marks the termination of the marriage, it is only logical that the dissolution should vest in the courts and not in the parties themselves. Perhaps the drafters of the Code might have learned from the experience of the other provinces that to make this dissolution a private matter does not help because finality and consensus are hardly the norm when the marriage is dissolved, and the parties almost always resort to court.

The Code also provides for the grounds of dissolution of a customary marriage.¹⁵⁷ Some of these grounds are not based on customary law, but are of Roman-Dutch law origin.¹⁵⁸

Another provision of the Code which partakes of the nature of the customary law rule as well as the rule of common law is that a wife who seeks divorce should on leaving her husband's homestead seek asylum from her father or protector who would be her guardian had she remained unmarried, and the latter must attempt a reconciliation. Should she be without one or where the protector or father refuses, is absent or refuses to assist her, she may apply to the commissioner's court for the appointment of a curator ad litem for the purposes of the case. Similarly if a man wants to divorce his wife he must notify the father or protector of his intention and the latter must attempt a reconciliation, failure upon which the husband may proceed to the commissioner's court.¹⁵⁹

10.5.3 Parties to the action

In an action for the dissolution of a customary marriage the main opposing parties are the husband and the wife.¹⁶⁰ The husband has the competence to institute an action for the dissolution of the customary marriage and the restoration of ilobolo delivered if any. An action brought in Natal and KwaZulu differs from that brought in other provinces because in Natal the husband has to request the dissolution of a customary marriage specifically, and not in the form of the return of the wife or alternatively return of ilobolo.¹⁶¹ The disposal of ilobolo is mostly an incidental factor on which the court has to make an order. It never appears as the main feature of the action around which the dispute centres.¹⁶²

The question as to who should be cited by the plaintiff as defendant depends on whether or not in his action he includes the return of ilobolo. Should this be included, then the provisions of s 80 of the Code apply. This section provides as follows:

"Notwithstanding anything contained in section 83, no order for the return or forfeiture of lobolo shall be granted in any action for the dissolution of a customary union unless the father or protector of the wife is cited as a party to the action".¹⁶³

The joinder of the father in the same action is necessary in order to make it binding on him, otherwise the question of ilobolo would have to be disposed of in a later action between the husband and the father. The splitting of the action is, however, not favoured by the court. To join the parties in one action is both convenient and less costly.¹⁶⁴

Section 80 read with section 83 has given rise to conflicting decisions in the past. Section 83 stipulates that the court must give clear and explicit orders relating to, inter alia, the number of cattle to be returned by the wife's father or guardian to the husband.¹⁶⁵

Where the wife's father or guardian has not been joined in the divorce action, the court will not make an order concerning ilobolo. Should it purport to do so it will be ineffective.¹⁶⁶ No judgment can be given against the father or protector who has not been cited.¹⁶⁷ The father or guardian has to be cited as a party to the action and not simply as assisting his daughter in the action for divorce.¹⁶⁸ The order referred to in s83(c) can only be made if the action has been brought under s80, and in other cases no such order can be made.¹⁶⁹ If the lobolo holder is a minor, he ought to be duly assisted by his guardian who is usually the nearest male major relative of his deceased father. The guardian is, however, not personally liable under the lobolo contract as he appears in court in a representative capacity only.¹⁷⁰

Where the wife's father or guardian has not been joined in the divorce action, the disposal of ilobolo may be settled in a subsequent action at the suit of either himself or the husband. The wife is not joined in this action.¹⁷¹ In this

action the husband is the proper person to sue or be sued and not his father or guardian.¹⁷²

In earlier decisions the court took the view that s83(c) was imperative, and that in all cases of divorce it was necessary to cite the father or protector in order to enable the court to comply with the sub-section.¹⁷³ Merely to quote the father as assisting the wife was not enough.¹⁷⁴ From these cases the conclusion to be drawn is that an order must be made in every case and in order to enable the court to do so the father must be cited as a party.¹⁷⁵ To follow those decisions would lead to a number of difficulties.¹⁷⁶

The problem is that the provisions of section 83(c) appear imperative. It is the words "if any" that apparently qualify its peremptoriness.¹⁷⁷

A different approach had been followed in the case of Dhlamini v Kuluse.¹⁷⁸ In this case the court attempted a reconciliation of the apparently conflicting provisions of sections 78 to 83 of the Code. The court accepted that an order under s83(c) was obligatory and in accordance with the requirements of s81. It placed an extensive interpretation on the word "cite" in s80, and decided that if the father of the woman was named as assisting the woman, and was present and took part in the obtaining of the divorce, he would be found by the order and not otherwise. It was also pointed out in this case that according to Zulu law the delivery of ilobolo is an essential to the validity of a marriage. The return of ilobolo automatically dissolves it although this was altered by the Code. It is this fact which the drafters of the Code had in mind when they promulgated s81 and s83(c).¹⁷⁹

The reason why the drafters of the Code apparently wanted the father to be cited is that they intended that the father of the woman as a representative of her family group must be

cited in all cases when the dissolution of the marriage was effected in particular when ilobolo was being reclaimed because he is the one who received it. Moreover, the questions of marriage and ilobolo are so intimately connected that it would be inconceivable that there could be a marriage without ilobolo being given.¹⁸⁰

Later cases are inclined towards the view that the court is not in all cases required to give an order as to the return of ilobolo and consequently it may not be necessary that in all cases the father or protector be cited as a party to the action.¹⁸¹ Should the court give an order for the return of ilobolo where the father or protector was not cited as a party to the action, the latter is entitled to apply for the setting aside of the decision on the grounds of irregularity without having to appeal.¹⁸²

In Sikakane v Shandu¹⁸³ the court decided that since an order relating to ilobolo can only be made in the divorce action if the question of its disposal has been brought into issue before it, s83(c) of the Code may be regarded as redundant. If the question of the disposal of ilobolo has been brought into issue by the parties, the court would in any case have an inherent duty to deal with it.

On the other hand s83(c) may be interpreted differently to mean that the wife's father or guardian must, in every case, except where the husband is the plaintiff and does not wish to lay claim to the restoration of ilobolo or a part thereof, be joined as a party to the action.¹⁸⁴ In fact the court has intimated that the wife's father or guardian should be cited as a party to the divorce action. Where the husband is the plaintiff, since he cannot be forced to make a claim for ilobolo, his failure to cite the wife's guardian as a party may be construed as an abandonment by him of any claim he might otherwise have been entitled to make for the restoration of the lobolo or a portion thereof.¹⁸⁵

Where the wife is the plaintiff it is necessary that her father or guardian should be cited as a party in order to enable the defendant, should he desire it, to claim the restoration of ilobolo or a portion of it.¹⁸⁶

The hurdle in the way of the view that the father or protector of the woman must always be cited as a party, is that it is possible in some cases for the father or protector to refuse to assist the wife in which event she will then have to be assisted by a curator ad litem.¹⁸⁷ It is then not feasible to make an order against the father or protector.

Because it is possible for a woman to sue for divorce even without the assistance of the father, as long as she is properly assisted,¹⁸⁸ and because the husband cannot be compelled to reclaim ilobolo, the conclusion that one should come to, despite the apparent peremptory nature of s 83(c), is that it is not necessary to cite the father as a party in all cases.¹⁸⁹ If she is suing individually although duly assisted, then an order for the return of ilobolo cannot be made.¹⁹⁰ The only problem arises where the father or protector refuses to assist the woman, and the husband reclaims ilobolo or a portion thereof delivered to her father. In such a case it would seem that although he was not a co-plaintiff, he must be treated as co-defendant in a claim in reconvention.¹⁹¹

The onus to comply with s 83(c) of the Code rests in the court and not on the parties. As a result the presiding judicial officer at the trial of the action where the wife's father or protector has not been joined as a party, to ascertain from the parties *inter alia* whether the husband intends to claim the refund of ilobolo or a portion of it.¹⁹² Although the divorce order is a judgement in rem and so binding on the parties to the later action concerning ilobolo, it is not regarded as conclusive proof of the facts or grounds on which the order was based in the face of their

denial by either of the parties. It is nevertheless, prima facie proof of those facts or grounds, and has the same value in the action as a decree of divorce made in respect of a civil marriage possesses in a subsequent action regarding the disposal of ilobolo given in respect of the marriage.¹⁹³

The return of ilobolo as provided for in the Code has become entangled in the intricacies of procedure. The traditional procedure was simple and not technical. The law was flexible and dependent on the considerations of fairplay.¹⁹⁴ Moreover, the dissolution of the marriage in traditional society was not easy although it could be effected without resort to judicial machinery.¹⁹⁵ In fact divorce was either traditionally unknown altogether or only resorted to in exceptional cases. Because marriage was an alliance between two family groups, its dissolution and return of ilobolo as well as the custody of children were the chief concern of the two families.¹⁹⁶ Above this, traditional society provided machinery for reconciliation and arbitration without recourse to the judicial tribunal if there was any dispute. Despite the existence of grounds for divorce in customary law, these were not regarded as rigid and inflexible as was the case in common law. Consequently a marriage could not be lightly dissolved simply by a mechanical proof of the grounds. The existence of these grounds was not the only consideration to take into account, but many other factors had to be considered.¹⁹⁷

Although the return of ilobolo is a factor to be considered in the dissolution of a customary marriage, the infrequency of divorce cannot totally be attributed to the amount of ilobolo given or the difficulty to return it. It was rather because of sound structural reasons that this was the case. The amount of ilobolo could rather be symbolical rather than causative of such marital stability.¹⁹⁸

The gradual withering of the family or kinship group in marital relationship and the consequent individualism have largely been responsible for the undermining of marriage stability. In this regard one may mention a few points. The choice of partners is the responsibility of the parties; because the young man today mostly provides his ilobolo it is less likely that he would be persuaded by the family to abandon a woman of whom they do not approve; ilobolo is in many cases a cash transaction and the significance of its traditional nature as a bond between the families of the spouses has been lost; lastly spouses especially the wives, in matters of dissolution derive little satisfaction from family arbitration and in many cases have frustrated the traditional function of the family by resorting to judicial divorces by the courts.¹⁹⁹

It is important to consider the return of ilobolo and the legal implications thereof on the marriage and its dissolution.

10.5.4 Return of ilobolo

It has been pointed out above that the return of ilobolo is according to customary law part and parcel of the dissolution of a customary marriage. It was also stated that the reason for such return was to "mark the dissolution" of the marriage. Yet in Natal and KwaZulu the dissolution of the marriage is a judicial matter. Nevertheless the attempt has been not to deviate completely from the position in customary law.

Section 81 of the Code provides:

"The dissolution of a customary union by divorce, except when decreed at the suit of a wife by reason of the wrongful acts, misdeeds or omissions of the husband, must be accompanied by the return of at least one beast or its equivalent by the father or protector of the woman, where he has been cited as provided for in

section 80, to the husband".²⁰⁰

To a lawyer steeped in the western legal tradition, the return of ilobolo at the dissolution of the marriage may seem paradoxical. This was clearly expressed in the case of Nbono v Manoxoweni²⁰¹ by Maasdorp J who said:

"It may at first sight appear that the statement of the law as given by Rev. Chalmers is inconsistent, because he speaks of the dowry as the absolute property of the father, and then adds that he might be compelled under certain circumstances to return it; but there is no greater inconsistency in this than in Burge's statement of the Roman law, that 'the husband acquires a dominium in the dotal property, which is determinable on the dissolution of the marriage!'"

One may further be puzzled by the fact that the father has to be compelled to return cattle not because of any fault on his part, but because of the fault or misconduct on the part of his daughter. This in itself seems strange because at the time of the commission of such misconduct the wife is under the guardianship of her husband.²⁰² Otherwise if she were still regarded as still falling under the guardianship of her father then the return of ilobolo might be justifiable on the grounds that the family head is responsible for the delicts committed by his wards.²⁰³ But now she is no longer under his control. The probable justification for the return of this ilobolo by the father is that just as he received ilobolo for his daughter, then he must pay if she has misconducted herself. This leads one to the conclusion that when ilobolo is delivered it includes an implied warranty that should the woman fail in her important duties in marriage ilobolo will be returnable.

If ilobolo is to be returned dependent on whether or not the wife has misconducted herself; the question that immediately comes to mind is whether this is not a vindication of the theory that ilobolo is a guarantee of good behaviour and good treatment on the part of the wife and the husband

respectively. As was pointed out above, and as will also be shown below, it cannot now be contended that the return of ilobolo cattle is aimed at restoring the status quo ante. That ilobolo will be forfeited if the man has been responsible for the break-down of the marriage refutes that. The return or forfeiture of ilobolo, it is submitted, should be interpreted rather as a form of punishment for the party that is responsible for marital misconduct. Just as the forfeiture of benefits on divorce in terms of South African law is a way of punishing the "guilty" party and of preventing him or her from benefitting from the marriage the destruction of which he has caused, it need hardly be emphasised that this is the same goal aimed at in customary law.²⁰⁴ But it cannot be contended that the forfeiture of benefits is aimed at maintaining stability in marriage or at least it has not been proved that it does. The same argument applies to ilobolo.

That in Zulu law it is not the woman who is punished, but her father should not be interpreted as being a deviation in any sense. Because she has no cattle or property, it is obvious that the father who received property for her marriage should also bear the blame if she has been guilty of marital misconduct. That she has to go back to her parents to get a beast as a fine for adultery supports this. There would be no sense in suing the wife personally because she has no property. It is therefore logical that the person to sue for the return of ilobolo is the father which impliedly imputes the misconduct of his daughter to him.

A consideration of the case law will show the principles upon which ilobolo has been regarded either as returnable or forfeited.

When the action has been instituted by the husband, the court must order that at least one beast must be returned.²⁰⁵ Yet more than one beast may, at the discretion of the court,

be refunded.

If the wife institutes an action, and the court decrees the divorce because of the "wrongful acts, misdeed or omissions" of the husband, the court must order that the lobolo delivered be forfeited.²⁰⁶ This means that the cattle will only be forfeited if both instances are present, viz the action is instituted by the wife and the cause is the "wrongful acts, misdeeds or omissions" of the husband.²⁰⁷ The "wrongful acts, misdeeds or omissions" referred to in s 80 are apparently those laid down in s 76. In this respect, it has been decided that the husband's neglect of the wife does not fall within these concepts, and that certain of the cattle are returnable to him.²⁰⁸ On the other hand denial of conjugal rights to the wife by the husband was held to fall within the ambit of the words mentioned in the section.²⁰⁹ It is submitted that the distinction between the two instances seems to be artificial. Neglect of the wife by a husband is as much misconduct or omission as the denial of conjugal rights.

Where the divorce has been granted on the ground that the conditions are such as to render the continued living together of the spouses insupportable or dangerous, the whole ilobolo delivered or due in terms of the lobolo agreement, after allowing the wife's guardian the usual deductions for the children of the marriage, is divided between the parties in inverse proportion to the blame attaching to each spouse.²¹⁰ If the fault or misconduct of the wife led to the divorce the court will consider the following factors when exercising its discretion in deciding as to the amount of ilobolo, if any, to be restored to the husband: (i) the period for which the marriage has subsisted; (ii) the number of cattle delivered; (iii) the number of children born of the marriage; (iv) the extent of the blame attaching to the parties; (v) whether the wife is likely to marry again and if so the amount of ilobolo her father or

guardian is likely to receive for her.²¹¹

These guidelines, it is submitted, are more realistic than the attitude of simply returning ilobolo minus one beast for each child born because it arbitrarily equates the "value" of a child with one beast. Furthermore it ignores the woman's contribution to the family, the services of the woman, as well as the sexual privileges which a man has enjoyed from the woman.

In accordance with this where the wife has substantially fulfilled the purpose of the marriage a smaller portion only of the returnable ilobolo will be restored to the husband even if divorce was due to her fault. A wife has substantially fulfilled the purpose of the marriage if the marriage has subsisted for a lengthy period and she has borne children.²¹² This view is to be commended.

In another case the wife had committed adultery, and had deserted her husband for four months after the celebration of the marriage. All attempts at reconciliation were futile. It was decided that she was entirely to blame for divorce, and that, there being no children of the marriage, the whole ilobolo had to be refunded to the husband. Although the court a quo had deducted the ukwendisa beast, another beast for wedding outfit and three for maintenance, on appeal the court decided that these were wrongly deducted.²¹³ The latter view is unacceptable in as far as it relates to deductions.

In yet another case the wife had deserted her husband on account of the latter's misconduct. There was a balance of ilobolo due to her guardian. The court, after deducting two head of cattle for the children of the marriage from a total of ten head, ordered that subject to the payment by him of the balance of seven head due by him, three head of cattle be restored to the husband.²¹⁴

A divorce was granted because continued living together had become intolerable to the parties, and although none of the spouses was entirely free of blame, the husband contributed more to the break-up of the marriage. The court ordered that six head of cattle be returned to the husband.²¹⁵ But the beast known as imvulamlomo being an illegal payment is not recoverable.²¹⁶

As the duty to deliver ilobolo to the husband is the father's and not the wife's,²¹⁷ an order cannot be given against the wife to restore ilobolo.²¹⁸ The court will also only give an order for the return of ilobolo if such return has been specifically claimed. But it will not suo motu order the return of ilobolo when it gives an order for the dissolution of the marriage.²¹⁹

In deciding whether ilobolo should be returned or not the court does not have to deal with ilobolo that must still be delivered. It cannot give an order for the delivery of the outstanding ilobolo in an action for the dissolution of the marriage because it is not in issue before the court.²²⁰

According to Tswana law the general rule is that bogadi is not recoverable in the case of the dissolution of the marriage²²¹ especially where the marriage has resulted in the birth of children as the husband is held to have suffered no prejudice because he retains the possession of the children.²²² The rule of Tswana law seems to be more preferable than the Zulu one. It is submitted that the court in dealing with questions of return of ilobolo should consider a number of factors, the most important of which is the birth of children. It is a notorious fact that blacks in general are undergoing cultural change. There are a number of practices which have become standard. These include the expenses which are incurred by the father of the woman in contemplation of the marriage. It was pointed out above that there is no profit which the father derives

from ilobolo. In most cases he suffers loss financially. If in addition to the loss which he suffered in preparation for the marriage he has to "return" ilobolo, this in fact is not a "return" of ilobolo because in any case there is none to return, but it is a penalty which he has to pay for the "sins" of his daughter. Because of the increased individualism, it is further submitted that the father should not be punished for the wrongs of his daughter. The return of ilobolo was justifiable in early traditional society because of a number of reasons. Firstly in tribal society the father did not have to incur a lot of expenditure in contemplation of the marriage. He might have had to part with one or two beasts. The rest would be his and would increase. Today even among the traditionalists a lot of expenses accompany a marriage. In addition if ilobolo is settled in cash it is easily consumed. Thus the court should also take into account the reasonable expenses incurred by the father of the woman. What are reasonable expenses will be in the discretion of the court. The court may have to take into account the question of whether the manner in which ilobolo was spent was necessarily connected with the marriage. The fact that the woman has borne children should affectively bar the action for the return of ilobolo. This is because if one of the children is a daughter she will marry, and the father will therefore receive ilobolo for her. Even in traditional society it could be possible for a wife to be lobola'd by the lobolo received for her daughter. There is no reason why the same analogy should not be extended to the position where the marriage has been dissolved after the birth of the daughter. The problem, however, is that the changes are so divergent. As a result the commissioner cannot be credited with special knowledge of new and ancient practices. ²²³

Reference has also been made above to the fact that the deterrent effect of ilobolo is of dubious character. Although it is often alleged that the husband is prevented from

seeking divorce by the fear of forfeiting ilobolo as well as his wife, the possibility of evasions and manoeuvring is great. By studied neglect and ill-treatment a man may put the onus of breaking up the marriage on his wife. Moreover, today the risk is less of a deterrent because kinship ties have been relaxed, and because employment opportunities may enable a man to amass cattle more easily than in the past, for a second ilobolo.²²⁴

What is important, however, is the stability of the marriage. The lobolo is not an end in itself. The grounds for divorce in terms of the Code have followed the South African pattern.²²⁵ Now that the South African law of divorce has changed to the irretrievable break-down principle, it is an open question whether eventually this will also be extended on to a customary marriage. It is suggested that this should be the case. In fact this was the underlying principle in the dissolution of a customary marriage. There were no clear-cut grounds, but it was more of the ceremonial burial of a marriage that had crumbled beyond repair.²²⁶

10.6 SUMMARY AND CONCLUSION

Although ilobolo has been excluded from the essentials of a customary marriage, it nonetheless remains popular. Its removal from the essentials has meant that a customary marriage is valid without it. Consequently it is a subject of a separate agreement to be enforced as such.

Although many institutions connected with a customary marriage have been used as indications of the purpose and function of ilobolo, their disappearance or gradual fading away, has not diminished the popularity of ilobolo. The inference to be drawn from this is either that they were neither responsible for its existence nor depended on it, or that ilobolo has acquired new functions and will outline them. This means an obvious non-dependence of ilobolo on them at

least in present society. Among these may be mentioned sororate, ukuvusa, ukungena, polygyny and the birth of children. It need hardly be emphasised that today the sterility of the woman will not entitle a man to a substitute or to a return of ilobolo. The most probable conclusion to be drawn therefrom is that ilobolo was not necessarily a sine qua non for these institutions or alternatively that they were not a sine quo non for ilobolo although they were related. Their demise has therefore not affected the continued existence of ilobolo even in a civil marriage, a marriage that differs from a customary one.

FOOTNOTES

1. In the case of SANTAM v Fondo 1960 2 SA 467(A) for instance a widow was refused a claim for damages for the wrongful and culpable killing of her husband because she was not regarded as a wife in the common law sense. Fortunately this grave injustice was rectified by the legislature's intervention and enacting s 31 of Act 76 of 1963.
2. s59 of the Code deals with the essential requirements of a customary marriage; s42(1) of KwaZulu Act.
3. Church (1975) 23; Church (1981) 29-31. She refers to Schapera who although he regarded ilobolo as an essential of a customary marriage earlier on - at 143 but later changed his mind - see Church 30. Writers like Jeffreys 60 regard ilobolo not as an essential because of a misunderstanding of the background to the provisions of the Code; see also Swanepoel 51 et seq.
4. Matthews 13.
5. Swanepoel 54-5; Church (1981) 29; Schapera 267.
6. According to Schapera 143 this is not the case. Where the marriage has taken place with the approval of both groups the father's claim to the children is indisputable. It must be noted however that Schapera gives a qualification to the cohabitation of the partners, viz. that it is with the approval of both groups. Taking the position of the Tswana to which this view relates it is not too much to aver that the agreement to deliver bogadi is implicit in the marriage negotiations.
7. Bekker & Coertze 225; Schapera 172.

8. The views of the writers referred to deal with the Tswana group.
9. Swanepoel 55-6. The children have to be in the custody of the father and he exercises the powers of chastisement over them and the children owe obedience to him.
10. Swanepoel 56 points out the children for whose mother bogadi has not been delivered are not in the same position as those of the mother for whom bogadi has been settled. For one thing in the past a boy could not be allowed to participate in the initiation ceremonies.
11. Swanepoel 56-7 points out that this is one exception to the general rule that bogadi disputes are not actionable in court.
12. At 57-9.
13. He also points out that writers like Schapera who assert that "no marriage is complete unless bogadi has been given" - at 139, do not attempt to analyse the legal consequences of such an incomplete marriage. Swanepoel concurs with the view expressed by Matthews 13, who opines that even before the delivery of bogadi the marriage is regarded as valid. As a result the man exercises all his rights and duties as husband and father. If the marriage breaks down it is taken retrospectively that there was never a marriage. He further postulates that this view point accords with the idea that conclusion of a marriage among black tribes is a long process and the delivery of ilobolo is only one of the stages in this chain of events.
14. At 58-9. Church (1981) 29-30, however argues that bogadi is not essential. She further points out that if the man died without delivering bogadi the duty to deliver it would fall on his eldest son, his successor. If the son were not legally the son of the deceased, she argues, he would not be a member of his father's group and could not be competent to receive bogadi for a sister nor transfer this to his mother's family. She further contends that if the children were not subject of the guardianship of the father's group, he would not be delictually liable for the seduction committed by his son. To support her argument she refers to the case of Dikoma v Kolwani 1952 NAC (C) 56 where the contention that the father is not liable for the son's seduction because he had not delivered bogadi for his mother was rejected and the court decided, on the strength of the statement made by the Chief, that liability to pay damages was not dependent on the delivery or otherwise of ilobolo.

15. Bekker & Coertze 150; Myburgh (1974) 306; Simons (1968) 87; B J Van Niekerk "Struikelblokke in Bantoe=regtelike veldwerk" 1965 Codicillus vol 6 no 1 34-5; Koyana 16; De Clercq 180; Olivier et al 50.
16. Reuter 245.
17. Reuter 251; Simons (1968) 70.
18. Simons ibid.
19. Simons (1968) 94.
20. This is the answer which one gets from informants. The reason is that even if a man had no cattle at least an arrangement had to be arrived at as to how ilobolo would be provided. The position among the Zulus is further complicated by the fact that the marriage negotiations were and still commenced with the promise to deliver ilobolo.
21. s11(1) of the Administration Act prohibits that any court should declare ilobolo repugnant to public policy or natural justice.
22. S 59 of the Code of Zulu law lists three essentials viz: (a) consent of the guardian of the intending wife which may not be withheld unreasonably; (b) consent of the father or kraalhead of the bridegroom-to-be should such be legally necessary; (c) a declaration by the bride-to-be before an official witness that the marriage is with her own free will and consent; s42(1) of KwaZulu Act.
23. The 1878 and 1891 Code listed ilobolo among the essentials.
24. Chapter IV above. This view was also expressed by Shepstone before the 1883 Commission as a result the Commission recommended the exclusion of ilobolo as an essential.
25. Reuter 251.
26. Olivier et al 47.
27. Dube v Kunene 1903 NHC 70; Cetshwayo v Mcamelo 1903 NHC 70; Mfanombana v Fana 1922 NHC 26; Ngubane v Dhlamini 1922 NHC 3; Mbokazi v Kumalo 1931 NAC (N&T) 49; Guma v Nzuza 1937 NAC (N&T) 121; Mbonambi v Sibiya 1944 NAC (N&T) 49; Mdletshe v Kunene 1945 NAC (N&T) 52; Sibiya v Mthembu 1946 NAC (N&T) 90; Nkwanyana v Xulu 1955 NAC (N-E) 13; Xulu v Kumalo 1955 NAC (N-E) 10.
28. In Mocumi v Mocumi 1944 NAC (C&O) 107; Modisanyane v

Mokgogolo 1942 NAC (N&T) 65; Senggenge v Denge 1957 NAC (S) 16; Mkize v Memela 1953 NAC (N-E) 18 it was decided that ilobolo is essential to a valid customary marriage. In Khasi v Tabana 1944 NAC (N&T) 67; Zulu v Mokwanyana 1936 NAC (N&T) 1; Dhlamini v Dhlamini 1967 BAC (N-E) 7 it was decided that was not an essential.

29. Compare the case of Mkize v Memela 1953 NAC (N-E) 18 with that of Dhlamini v Dhlamini 1967 BAC (N-E) 7.
- 29.(a) Mdletshe v Kunene 1945 NAC (N&T) 52; Sitole v Xaba 1945 NAC (N&T) 81; Mpanza v Qonono 1978 BAC (C) 136.
30. This is because the Code provides so.
31. Simons (1968) 94.
32. Reuter 257.
33. Idem 252. This underlies the fact that ilobolo is distinguishable from marriage and is not marriage itself. Reuter concludes "When marriage is taken in the full and primary African meaning as an alliance between two family groups agreed to and realized by means of a conjugal relationship between a man of one group and a woman belonging to the other group, lobolo plays the counter-part of the bride who is the principal object of that family transaction. In this context ... lobolo 'materializes' or concretizes the will and intention of the contracting parties aiming at a bond of friendship which is to be established between them by means of the marriage agreed to at present and to be renewed by a hoped-for counter-marriage sooner or later".
- 33.(a) Moloi v Moloi 1979 ACCC (N-E) 273
34. ss65(1) and 67 of the Code; ss 49(1) and 51 of KwaZulu Act.
35. Simons (1968) 142.
36. J Lewin "Some legal aspects of marriage by Natives in South Africa" 1941 Bantu Studies 13.
37. Ndlovu v Shongwe 1940 PHR 75.
38. s67 of the Code; Simons 142; s51 of KwaZulu Act.
39. Qwabe v Qwabe 1945 NAC (N&T) 101; Sangweni v Sangweni 1945 NAC (N&T) 103.
40. It was pointed out above that money is dissipated by marriage expenses.
41. Van Warmelo 115; on the Shona see Holleman (1969) 150.
42. Gluckman (1950) 200-201.

43. Chapter V.
44. Olivier et al 111.
45. ibid.
46. Olivier et al 112; Schapera 143, 170. Swanepoel 55 et seq.
47. Jeffreys 170.
48. Olivier et al 94 et seq.; Harries 19-20; Schapera 155 et seq.; Ashton 18 et seq.; Duncan 31; Bekker & Coertze 155 et seq.; Junod 198-9; Ramsay 9; Krige 61, Stafford and Franklin 162; Marwick 136; Poulter 157-60, Van Warmelo 373 et seq.; Holleman (1969) 150, 188 et seq.
49. Olivier regards this appellation as wrong because according to him the seed-raiser does not replace the wife.
50. Olivier et al 94.
51. Schapera 145 et seq.; Harries 24, Olivier et al 94-5, Jeffreys 171.
52. Olivier et al 95.
53. This was usually in the case of women of royal blood.
54. Olivier et al 97.
55. Jeffreys 172.
55. (a) Contra Mgidhlana v Munyu 1912 NHC 43.
56. If a wife was barren a man might take one of his children from another house and put him in that house having no issue.
57. 1944 NAC (N&T) 4.
58. 1960 NAC (N-E) 66.
59. Olivier et al 98.
60. Torday 277.
61. s94 of the Code; s70(3) of KwaZulu Act.
62. Cele v Xolo 1956 NAC (N-E) 15; see also Olivier 99.
63. 1905 NHC 44. This case was decided in terms of the 1878 Act and before 1932 where the Code applied both in Natal and KwaZulu.
64. Owela v Mpini 1907 NHC 33; in Mgidhlana v Munyu 1912 (1) NHC 43 the claim was refused because it was barred by s181 of the 1981 Code which applied in Natal.

65. Meleli v Nene 1917 NHC 64.
66. Mbiyana v Mafolokohlo 1920 NHC 40.
67. Jojo v Lupogwe 1923 NHC 38.
68. Gazu v Zulu 1951 NAC (N-E) 307.
69. Mbuyazi v Mbuyazi 1954 NAC (N-E) 196.
70. 1936 NAC (N&T) 39.
71. 1944 NAC (N&T) 4.
72. Olivier et al 98.
73. Olivier et al 100.
74. S 94 of the Code. On the position among the Swazi see Sibeko v Malaza 1938 NAC (N&T) 117.
75. Olivier 103; In Chiliza v Chiliza 1956 NAC (N-E) 127 a very rare practice was related by one of the assessors. This practice has it that if the man is sterile or impotent the members of the family assemble and provide a close relative to have sexual relations with the woman secretly without the knowledge of the husband with the aim of bearing children for him. The court did not regard this practice as contra bonos mores and not contrary to s 144 of the Code. The wide acceptance of this practice cannot be confirmed.
76. Jeffreys 153 et seq.
77. s1(1) of the Code.
78. Tekeka v Ciyana 1902 NCH 13; see also E N Braadvedt "The Zulu customs of ukuvusa and ukungena" 1940 THRHR vol 4 111; Olivier 521.
79. Allott (1968) 144.
80. s74 of the Code; s61(1) of KwaZulu Act.
81. s75 of the Code; s61(2) of KwaZulu Act.
82. s53(g) of the Code; s47(g) of KwaZulu Act.
83. Dayingubo v Niyona 1907 NHC 1, Mlanjeni v Nodwengu 1909 NHC 84; Mpengula v Mqgwayi 1919 NAC 65; Macaleni v Jiji 1920 NHC 84; Maphumulo v Maphumulo 1932 NAC (N&T) 27; Cindi v Cindi 1939 NAC (N&T) 38; Mbuyazi v Mbuyazi 1954 NAC (N-E) 196; Mapumulo v Mapumulo 1940 NAC (N&T) 132; Nyawo v Nyawo 1944 NAC (N&T) 46. On the position among other tribes see Mönnig 206 et seq.; Harries 42 et seq.; Van Warmelo 325.

84. Olivier et al 522.
85. Obi 158.
86. Obi ibid; Olivier et al 505 et seq.
87. S 1(1) of the Code; for an elaboration on the purpose of ukungena see Xulu v Xulu 1943 NAC (N&T) 88; Dhlamini v Dhlamini 1946 NAC (N&T) 54.
88. s71 of the Code; s60(1) of KwaZulu Act.
89. s72 of the Code; s60(2) of KwaZulu Act.
90. s73 of the Code; s60(3) of KwaZulu Act.
91. Braadvedt 113.
92. For more information on other tribes see Ashton 84, 194; Schapera 127; 164-7, 170-1; Harries 42-51; Van Warmelo 915-37; Marwick 49, 138-30; Mönnig 142, 205; Bekker & Coertze 281 et seq; Whitfield 211, 372; Swanepoel 79 et seq.
93. Jeffreys 172; See also Olivier 505.
94. Deut 25: 5-10.
95. Neufield 26. But he points out that there is no evidence in the Bible that ancestor worship was the motive of the lawgiver when the levirate provisions were formulated.
96. This is similar to the view that ukungena is based on ilobolo procuring the reproductive capacity of the woman for the husband's lineage. Neufield 26-7.
97. Neufield 29-31.
98. 164-5; see also Mnguni v Kumalo 1938 NAC (N&T) 177.
99. Simons (1968) 250.
100. Simons (1968) 251.
101. Mnguni v Kumalo 1938 NAC (N&T) 177; Khanyile v Kanyile 1947 NAC (N&T) 95; Zwana v Zwana 1937 NAC (N&T) 7.
102. Ngcobo and another v Ngcobo 1941 NAC (N&T) 122; Nyawo v Nyawo 1944 NAC (N&T) 46; Shezi v Shezi 1945 NAC (N&T) 1.
103. Simons (1968) 251.
104. Simons (1968) 80-1.

105. idem 81.
106. ibid.
107. In some cases a man would have to abstain from his wife for a period of two years.
108. Simons (1968) 82.
109. 155.
110. Simons (1968) 90.
111. idem 91.
112. ibid.
113. ibid.
114. idem 92.
115. idem 84.
116. Bekker & Coertze 171.
117. Simons (1968) 122.
118. ibid
119. s94(1) of the Code; Krige 156.
120. Bekker & Coertze 175.
121. s57(1) of the Code; s40(1) of KwaZulu Act.
122. S32(1) (a) of the Code. This was amended by s29(4) of KwaZulu Act.
123. s44(4) of the Code. This was amended by s16 of KwaZulu Act.
124. s71 of the Code; s60(1) of KwaZulu Act.
125. s72 of the Code; s60(2) of KwaZulu Act.
126. s89 of the Code.
127. Among the Xhosa the widow is free to leave the homestead of the deceased without the return of ilobolo being necessary.
128. Simons (1968) 123; Bekker & Coertze 171.
129. On the dissolution of the marriage among various black tribes see Olivier 159 et seq; Seymour 164 et seq; Van Warmelo 453 et seq; Ashton 85 et seq; Swanepoel 69 et seq.

130. Bekker & Coertze 171.
131. ibid.
132. Sila and another v Masuku 1937 NAC (N&T) 121.
133. Simons (1968) 124.
134. Mapekula v Zeka 3 NAC 6 (1912).
135. Schapera 161-2; Van Warmelo 453, 519.
136. Mapekula v Zeka 3 NAC 6 (1912).
137. Maseti v Meme 1 NAC 119 (1929); Rwamza v Nkankane, 2 NAC 50; see also Novungwana v Zabo 1957 NAC (S) 114.
138. Conana v Dungulu 1 NAC 135 (1907).
139. Magandela v Nyangweni 1 NAC 14 (1896); Tetani v Mnukwa 1 NAC 38 (1900); Gungashi v Cunu 2 NAC 93; Logose v Yekwe 4 NAC 105.
140. Doni v Nkwese 1943 NAC (C&O) 51; Fuzile v Ntloko 1944 NAC (C&O) 2. This view was later on rejected by the court in the case of Jack v Zenani 1962 NAC (S) 40 where the court held that this practice is not in accordance with customary law which requires either the restoration or proper tender to the husband of ilobolo delivered by him for the wife less the recognised deductions. The court held the cases of Gungashi, Logose and Fuzile to be overruled.
141. Bekker en Coertze 171.
142. Simons (1968) 124.
143. Tyobeka v Madlewa 1943 NAC (N&T) 60.
144. Simons (1968) 124.
145. Saulus v Sibeko 1947 NAC (N&T) 25.
146. Nkabinde v Mlangeni and another 1942 NAC (N&T) 89.
147. Sibiya v Mbata 1942 NAC (N&T) 71.
148. See Sume and another v Radebe 1946 NAC (N&T) 75.
149. Menziwe v Lubalule 3 NAC 170. This was a case where the wife refused to return to her husband and ilobolo given for her was tendered.
150. Mapekula v Zeka 3 NAC 6; Bobotyane v Jack 1944 NAC (C&O) 9.

151. 1953 NAC (S) 262.
152. This case deals with the case where the initiative to dissolve the marriage comes from the wife. Olivier disagrees with this view and says it is an unnecessary and unjustifiable deviation from customary law - at 168-9. The view that tender of part of ilobolo dissolves the marriage was followed in the case of Mfazwe v Mfikili 1957 NAC (S) 33. Seymour 165-6 also is in agreement with this view because he says that there is in customary law a strong presumption that an acceptance of part is intended to be an acceptance in settlement. Furthermore he says:
- "Partial restoration of the dowry, whether made under an order of court or otherwise, and whether accepted by the husband on account or in settlement, also constitutes a final and complete dissolution of the union, for it means that the wife's guardian is no longer in possession of the dowry intact, but merely of a parcel of cattle which the husband, in accepting restoration, has agreed, or is obliged by an order of court, to allow the former to deduct and keep; the dowry as such, having been disintegrated by such partial restoration and acceptance, is no longer in existence and so the union is finally dissolved and cannot be revived".
153. This was also the view of the assessors in the case of Mtiyane v Mate 1957 NAC (N-E) 45; see also Ashton 85-7; Schapera 159.
154. S 144(1) of the Code; Mlaba v Myeni 1942 NAC (N&T) 6; Makwaba v Mhlongo 1947 NAC (N&T) 35; Bekker en Coertze 195; Olivier 195 et seq; see also Hlengwa v Maphumulo 1972 BAC (N-E) 58.
155. Bekker & Coertze 201.
156. Chapter 10 of the Code deals with ilobolo. At the same time the proviso to s 11(1) of the Act precludes any court from declaring ilobolo contrary to public policy and natural justice. Yet in s 59(1) it is excluded from the essentials of a customary marriage.
157. S76 of the Code; Olivier et al 195 et seq; Bekker & Coertze 171 et s
158. These grounds have been changed in South Africa law by the Divorce Act 70 of 1979; see also J C Bekker "Grounds for divorce in African customary marriage in Natal" 1976 CILSA 346. "
159. s78 of the Code; s54 of KwaZulu Act.
160. s76 of the Code; s52 of KwaZulu Act.

161. Olivier et al 199.
162. Bekker & Coertze 201-202.
163. This section replaces a previous one which was repealed by Proc 176 of 1952 which provided as follows: "In any action for the restitution of conjugal rights or in the alternative an order of divorce, in which a claim to the return of lobolo is advanced by the husband, he must cite in addition to the wife her father or protector". This section has been described as being "unfortunately worded". For a discussion of this section see Stafford and Franklin 135-8 and the cases cited.
164. Coka v Kumalo 1946 NAC (N&T) 92; Ndaba v Mazibuko 1946 NAC (N&T) 65; Xulu v Mtetwa 1947 NAC (N&T) 32; Mbanjwa v Mbanjwa 1952 NAC (N-E) 247.
165. s83(c) of the Code; s58(c) of KwaZulu Act.
166. s80 of the Code; s55 of KwaZulu Act.
167. Ngubane v Ngubane 1937 NAC (N&T) 27; Ngcobo v Mabaso 1935 NAC (N&T) 40; Nkabinde v Nkabinde 1946 NAC (N&T) 2; Ndaba v Mazibuko 1946 NAC (N&T) 65; Coka v Khumalo 1946 NAC (N&T) 92; Xulu v Mtetwa 1947 NAC (N&T) 32; Mtshali v Mtshali 1949 NAC (N-E) 119; Masoka v Mcunu 1951 NAC (N-E) 327; Mkize v Mkize 1951 NAC (N-E) 360; Zulu v Nkosi 1950 NAC (N-E) 227; Mbuyazi v Mthethwa 1952 NAC (N-E) 54; Mbanjwa v Mbanjwa 1952 NAC (N-E) 247; Qwabe v Qwabe 1953 NAC (N-E) 211; Mnyandu v Dladla 1978 ACCC (N-E) 64.
- The same controversy took place in the Transvaal. The court gave conflicting decisions. It was held in Tyobeka v Madlewa 1943 NAC (N&T) 60; Ngwenya v Koza 1944 NAC (N&T) 58; Sibeya & another v Makakule 1944 NAC (N&T) 2, that the woman should be cited as defendant, duly assisted by her father or guardian, and the woman's father cited as second defendant for the refund of ilobolo, should the court grant the divorce; contra Zwana v Zwana and another 1945 NAC (N&T) 59; Serema v Mogapi and another 1946 NAC (N&T) 25; Monama v Masuku 1947 NAC (N&T) 116; Shiwenga v Ramashia 1947 NAC (N&T) 134; Mdhluli v Mbuyane 1953 NAC (N-E) 286; Phiri v Nkosi 1941 NAC (N&T) 94.
168. Coka v Kumalo 1946 NAC (N&T) 92; Qwabe v Qwabe 1953 NAC (N-E) 211.
169. Ngcobo v Mabaso 1935 NAC (N&T) 40; Xulu v Mtetwa 1947 NAC (N&T) 32
170. Sibiya v Mnguni 1960 NAC (N-E) 26.

171. Ndaba v Mazibuko 1946 NAC (N&T) 65; Masoka v Mcunu 1951 NAC (N-E) 327; Xulu v Mtetwa 1947 NAC (N&T) 32. This procedure is undesirable. A different view was taken in Coka v Kumalo 1946 NAC (N&T) 92 probably based on the faulty interpretation that the provisions of s 83(c) were imperative and not merely directive.
172. Gazu v Zulu 1951 NAC (N-E) 307.
173. Nkabinde v Nkabinde 1946 NAC (N&T) 2; Ndaba v Mazibuko 1946 NAC (N&T) 65; Coka v Kumalo 1946 NAC (N&T) 92.
174. Xulu v Mtetwa 1947 NAC (N&T) 32 it was held that the court could only make the order referred to in s 83(c) if the action had been brought under s 80 and that in other cases no such order could be made.
175. Xulu's case, however, restricted the court's power to make the order.
176. It is difficult to cite the father as a party if his daughter is a plaintiff and the father himself is not claiming anything. If the woman is legally represented in court by a curator ad litem whose appointment is recognized in terms of s 78(2) and s 79 of the Code, how can the father be cited? It is in itself incomprehensible why the father has to be cited if he is making no claim for the return of ilobolo. See Stafford and Franklin 136.
177. Stafford and Franklin 136-7 are of the view that there is no qualification of this peremptory section. The "if any" is to them a qualification not of the order to be given but of the number of cattle.
178. 1937 NAC (N&T) 147. The court did not follow this in the case of Mnyandu v Dladla 1978 ACCC (N-E) 64.
179. Stafford and Franklin 137 point out that it would be alien to the Zulu's conception of marriage and divorce if the question of the return of ilobolo were not decided pari passu with the dissolution.
180. Stafford and Franklin 137 are therefore that s 83(c) is obligatory as that is in line with customary law.
181. Ndaba v Mazibuko 1946 NAC (N&T) 65; Xulu v Mtetwa 1947 NAC (N&T) 32; Masoka v Mcunu 1951 NAC (N-E) 327.
182. Mbuyazi v Mthethwa 1952 NAC (N-E) 54; Mbajwa v Mbajwa 1952 NAC (N-E) 247.
183. 1959 NAC (N-E) 71.

184. Xulu v Mtetwa 1947 NAC (N&T) 32; Seymour 201 is of the view that this is the most reasonable interpretation to be given in view of the peremptory nature of s 83 read both as a whole or subsection by subsection.
185. Xulu v Mtetwa 1947 NAC (N&T) 32.
186. s78(1) of the Code; s54(1) of KwaZulu Act.
187. s76 to s79 of the Code; s52 of KwaZulu Act.
188. See Kumalo v Shamase 1942 NAC (N&T) 55; Masoka v Mcunu 1951 Nac (N-E) 327; Mbuyazi v Mthethwa 1952 NAC (N-E) 54; Qwabe v Qwabe 1953 NAC (N-E) 211.
189. This is of course in conflict with customary law.
190. Kumalo v Shamase 1942 NAC (N&T) 55; see also Olivier et al 201.
191. Olivier et al 201 points out that although this procedure is unusual it is not difficult to implement in practice.
192. Bekker & Coertze 208.
193. Masoka v Mcunu 1951 NAC (N-E) 327.
194. See Simons (1968) 124.
195. Cotran 19; Bekker & Coertze 175 say: "Customary law permits a husband to dissolve his union extra-judicially by unilateral act at his pleasure and for no reason other than the desire to terminate it..." Bekker 346, points out that a superficial reading of what the writer says may create the impression that the case of dissolution was the norm of African marriages.
196. Cotran 19.
197. *idem*.
198. Preston-Whyte 194. Some writers regard ilobolo as the cause of much stability.
199. Cotran 21.
200. See s56 of the KwaZulu Act.
201. 6 EDC 62 (1891) at 65.
202. s27 of the Code.
203. s39 of the Code.

204. On forfeiture of benefits see Hahlo (1975) 430 et seq.
205. Msomi v Msomi 1932 NAC (N&T) 25; Ndhlovu v Ndhlovu and another 1954 NAC (N-E) 183.
206. Zalukazi v Mtwazi 1904 NHC 45; Petrus v Alice 1916 NHC 85. Nobangoma v Mnanjana 1912 NHC 25; Mkize v Mkize 1941 NAC (N&T) 125; Mlambo v Makoba 1946 NAC (N&T) 2; Mbanjwa v Mbanjwa 1952 NAC (N-E) 247; Mdakane v Mdakane 1956 NAC (N-E) 155; Dumisa v Shange 1978 ACCC (N-E) 72.
207. Olivier et al 202; Dumisa v Shange 1978 ACCC (N-E) 72.
208. Manundu v Nomalumbo 1920 NHC 67.
209. Tshangase v Mtembu 1928 NHC 14; Mlambo v Makoba 1946 NAC (N&T) 2.
210. s76 (1)(f) of the Code; Mbanjwa v Mbanjwa 1954 NAC (N-E) 183; Mkize v Mkize 1941 NAC (N&T) 125.
211. Masoka v Mcuru 1951 NAC (N-E) 327; Mahaye v Lutuli 1952 NAC (N-E) 279; Nyatikazi v Bhengu 1931 NAC (N&T) 32; Msomi v Msomi 1932 NAC (N&T) 25; Mkize v Mkize 1941 NAC (N&T) 125; Gasela v Lutuli 1941 NAC (N&T) 28; Ndhlovu v Ndhlovu and another 1954 NAC (N-E) 183; Nzuzva v Kumalo 1958 NAC (N-E) 78; Ngcobo v Zulu 1964 BAC (N-E) 116; Stafford and Franklin 140-1.
212. Mahaye v Lutuli 1952 NAC (N-E) 279; Gasela v Lutuli 1941 NAC (N&T) 28.
213. Ngema v Ngema and another 1942 NAC (N&T) 27. This decision seems to be in conflict with the development of customary law. Not all of these deductions should have been rejected. The court declared the beast given for outfit as a personal gift and lost sight of the fact that it had been given in contemplation of the marriage. This decision has the effect of stifling the growth of customary law.
214. Mdakane v Mdakane 1956 NAC (N-E) 155.
215. Mkize v Mkize 1941 NAC (N&T) 125.
216. Cece v Mpikwa 1911 NHC 103; Somzamana v Cwejile 1912 NHC 40; Sigqungwana v Mdhlume 1915 NHC 151.
217. Mkize v Mkize 1951 NAC (N-E) 360.
218. Bulunga v Bulunga 1960 NAC (N-E) 1; Ntuli v Mkonza 1964 BAC (N-E) 97.
219. Sikakane v Shandu 1959 NAC (N-E) 71.

220. Mdakane v Mdakane and another 1956 NAC (N-E) 155;
Kumalo v Shamase 1942 NAC (N&T) 55.
221. Matthews 16; Schapera 145.
222. Matthews 17, Schapera 145.
223. Simons (1958) 322.
224. Simons idem 336.
225. The guilt principle of the old divorce law.
226. Cotran and Rubin (1970) 209; see also Bekker (1974)
355.

CHAPTER XIILOBOLO AND A CIVIL MARRIAGE11.1 INTRODUCTION

There are obvious differences between a customary marriage and a civil one.¹ These differences include the following: that a customary marriage allows polygyny whereas a civil marriage does not; that a customary marriage involves the two family groups to a great extent whereas a civil marriage is primarily a relationship between two partners; whereas a customary marriage requires the delivery of ilobolo, a civil one does not; emphasis in a customary marriage is placed on the procreation of children; and the dissolution of a customary marriage differs from that of a civil marriage.

Despite the ideological dichotomy between a customary marriage and a civil one, a "marriage" has taken place between the two forms of marriage among blacks. This "marriage" has taken place through ilobolo. This in actual fact is not a real "marriage", but an uneasy truce as it will be shown here below. These differences are not permanent as a customary marriage itself is changing and acquiring more and more features of a civil marriage. The definition of a customary marriage in terms of s40(1) of the KwaZulu Act as "a civil contract entered into by and between the intending partners and endures until the death of the first dying unless earlier annulled or dissolved by a competent court", creates the impression that legally a customary marriage is no longer a relationship between the two family groups, but rather between two individuals. This is further strengthened by the exclusion of ilobolo from the essentials of a customary marriage. Although even in terms of s59(1) of the Code ilobolo was not regarded as an essential of a customary marriage, its importance was entrenched by the requirement of the father's consent. Since the father's consent is no

longer a requirement, ilobolo no longer forms "the rock and foundation" on which a customary marriage rests legally.

The continued adherence of blacks to ilobolo even in a civil marriage can be attributed to a number of reasons: it is mostly their inability to conceive a relationship as a marriage, despite compliance with other requirements, until there has been delivery of ilobolo; some do not even know that ilobolo is not an essential of a civil marriage.² Even if they are informed that it is not a requirement, habit conquers reason more especially because this institution serves an important psychological function, namely that a person has been married in the ample sense of the word. The form of marriage negotiations also makes it impossible for the parties to evade ilobolo even if they might like to. In Transvaal, in particular, the consent of the father is necessary for the conclusion of a valid marriage³ even for a woman who is of age. The conventional way of obtaining the father's consent is the traditional one of ukukhonga. There is also the social pressure!

The incorporation of ilobolo in a civil marriage results in conflicts. As Simons puts it:

"The conflict reflects contrasting social worlds which cannot be reconciled only in the legal sphere. Most Africans belong wholly to neither, but are alienated from each in varying degrees. Since most people combine elements of both cultures civil marriage is no proof of what is loosely called 'detrribalization'. Conversely, a customary union does not demonstrate a thoroughgoing adherence to tribal laws. Some people oscillate between the two types of marriage, as when polygamists marry one of their wives by civil or religious rites, or when men contract a spurious union during a marriage or a valid one after the dissolution of a marriage. Two other, and extremely common, examples of a 'mixed' cultural situation are the association of civil marriage with the tribal practice of lobolo and the tribal system of primogeniture. Real life bursting through legal forms blurs the sharp distinction between the two kinds of marriage and creates a zone of rules and behaviour which is common to both".⁴

The position as portrayed above continues to exist in Zulu society. It might have been thought in the past that the attachment of ilobolo to a civil marriage by blacks was a transitional measure, but it has endured beyond expectations. It is indeed now an open question whether a civil marriage as concluded by blacks may not be regarded as a civil marriage of a peculiar type.

It is the purpose of this chapter to evaluate the legal implications of ilobolo attached to a civil marriage, and the fate thereof on the dissolution of the marriage. The question that must be answered is: how far must the customary law principles of ilobolo be accommodated within a civil marriage, and how far should they be modified by those of a civil marriage? But before dealing with the legal position of ilobolo attached to a civil marriage it is necessary to look at the position of ilobolo given during a common law engagement. It is no doubt appropriate to put an engagement in common law in proper perspective. It is not necessary to define an engagement again because it has been defined above already.

11.2 THE ENGAGEMENT

A Roman-Dutch law engagement is different from a customary law one. The former is actionable in the case of culpable and wrongful breach whereas the latter is not. A customary law engagement is concluded between family groups unlike a common law one which is concluded by the two intending parties. When blacks intend to marry by civil rites a dual engagement comes into being. Marriage negotiations are initiated by the traditional ukukhonga, but this is preceded by the engagement between the parties. Such an engagement is legally binding and is governed by the principles of common law.⁵ Breach of that engagement grounds an action by the injured party for damages both for patrimonial loss and for injured feelings. Factors to be taken into account in

assessing the quantum of damages are the woman's educational qualifications, upbringing, religious convictions and social status.⁶ It is interesting to note that the courts were earlier on not favourably disposed towards granting a black woman an action owing to the absence of such a remedy in customary law even though the engagement breached was a common law one.

11.2.1 The engagement and ilobolo agreement

A civil marriage is preceded by an engagement. Among blacks during this engagement abakhongi are sent to initiate negotiations for delivery of ilobolo. This is a second phase where a customary law engagement is concluded between the two family groups. The agreement relating to the delivery of ilobolo is governed by the principles of customary law. Delivery before the celebration of the marriage does not pass ownership to the receiver.⁷ But this agreement must be accommodated within the applicable common law principles.⁸

Whereas according to customary law the woman's father is not entitled to terminate the engagement on the grounds of the bridegroom's unchastity without returning ilobolo cattle, if the agreement relates to an engagement for the conclusion of a civil marriage, the engagement can be terminated on the grounds of unchastity. In that event the father of the woman will be entitled to retain any cattle or gifts given. If the girl's father retains ilobolo, the court will take that into account when assessing damages to be awarded to the woman.⁹ As the father's right to terminate the engagement of his son if the girl does not show respect to him is restricted, should he do that the woman will sue for breach of an engagement.¹⁰ Should the marriage fall through by agreement or because of the fault of the woman, ilobolo will be restored.¹¹

From this it is obvious that a common law engagement gives a woman remedies which are denied her in customary law. That she has to sue for breach of an engagement contract is a recognition of her right to the contract being properly performed. Although the lobolo cattle belong to the girl's father, there is no harm in taking them into account when awarding damages to the woman.

11.3 THE LEGAL POSITION OF ILOBOLO ATTACHED TO A CIVIL MARRIAGE

It has been said above that ilobolo expresses the view of what according to a black is a valid marriage. In fact among blacks the binding effect of a civil marriage has been attributed to ilobolo agreement attached to it,¹² despite the attitude of the common law.¹³

Where blacks conclude ilobolo agreement, they will most probably regard the lobolo agreement as the chief ingredient of their marriage which gives rise to the rights and obligations that arise in the context of a customary marriage.¹⁴ Although all matters that relate to the marriage must be regulated by the common law, ilobolo agreements are alien to the common law. As a result it is more appropriate to apply customary law to those agreements.¹⁵

There is no legislation that deals with the relationship between a lobolo agreement and a marriage. The courts have had to find solutions to this problem, although the approach of the courts has not been entirely consistent.

The incorporation of ilobolo in a civil marriage presented a number of problems in the past.¹⁶ Although the question is now settled, it was earlier uncertain whether ilobolo agreement coupled with a civil marriage was enforceable. The early Transkeian appeal court held that the agreement was not enforceable.¹⁷ It is now trite law that an ilobolo

agreement is completely compatible with a civil marriage.¹⁸

The legal significance of ilobolo attached to a civil marriage was earlier also quite controversial. The question was whether one had to do with a dual marriage, namely a marriage by customary law and a civil marriage, or one marriage.

According to earlier judgments, where ilobolo agreement was entered into in anticipation of a civil marriage, it was held that the parties had in fact concluded two concurrent marriages, the one under African law, and the other under common law. African law was therefore regarded as entirely applicable to the customary contract,¹⁹ and common law applied to the civil marriage. In other decisions a different view was taken. Ilobolo was regarded as ancillary to the civil marriage, but African law was nonetheless regarded as applicable to the lobolo agreement.²⁰ Because African law was regarded as a entirely applicable to ilobolo, questions such as, for example, whether there is a right of action for the recovery of ilobolo or whether ilobolo must be returned on the death of the spouse, on divorce and on remarriage of the widow, must be decided according to the principles of customary law.²¹ This presented problems as the two institutions conflicted.

It is, however, now settled that ilobolo agreement is entirely ancillary to the civil marriage, and that the implications and consequences of the agreement are subject to and modified by the essential principles which form the basis of a civil marriage. The parties are deemed to have intended that it should be adjusted accordingly. There is an implied agreement that the spouses will adhere to the standards and ideals required of them by the civil marriage. Seeing that the principles and legal consequences of a civil marriage are of overriding importance, the customary consequences of the lobolo agreement will only be given effect

to if they are not in conflict with a civil marriage.²²

This, it is submitted, is a fiction. It can hardly be said that, at least in the past, when a black concluded a civil marriage he had intended that principles and standards of a civil marriage had to supersede those of customary law. That intention could hardly be imputed to him when in any case he did not even know the full implications of such a marriage. This is attested to by the fact that blacks after concluding a civil marriage have been known to contract a customary marriage. The real reason behind this preference is the inferior status of a customary marriage. Ilobolo being an institution of a customary marriage, it is obvious that it would not be regarded as overriding the principles of a civil marriage. Nor would the view that two concurrent marriages were concluded solve the problem. It would also not be feasible to hold that the parties had exercised a choice by marrying according to civil rites, and effect must be given to their intention which was that a civil marriage must override any customary institution attached to it. That choice would have been there had a customary marriage been regarded as a marriage in terms of South African law. Since it is not recognized as a marriage, it means that there is no choice.

Perhaps the better approach is that ilobolo is obviously an accessory of a marriage. Even in a customary marriage it is not a primary institution, but is merely a requirement of the marriage. As a civil marriage does not require the delivery of ilobolo, it obviously means that its position is weaker. As a result it should be modified by the principles of a civil marriage if its principles conflict with those of a civil marriage. The reason for this is that it, being an accessory institution, must take its shape from the main institution on which it is dependent.

This line of reasoning is more realistic, and avoids the use of a fiction. What is objectionable is not necessarily the

use of a fiction (fictions are indeed a common feature of any legal system) but to represent the fiction as a fact. Nonetheless the court came to a correct conclusion that ilobolo should be modified by the principles of a civil marriage, but for wrong reasons.

It has, however, been contended that the court cannot and does not apply customary law to such a contract, but that under the law of contracts ilobolo contract is accepted as long as it is not in conflict with a civil marriage. Consequently the court should apply the common law of contracts in terms of which the lobolo contract is treated as a contract sui generis arising from customary law.²³

The court, however, has not followed this contention. Thus in Hlengwa v Maphumulo²⁴ it was held that although the settlement of ilobolo has undergone material changes during the past years, and is often settled in cash rather than in livestock, this has not affected the principles underlying the idea of ilobolo. The reason for this is that ilobolo is given under customary law and is recoverable under that law irrespective of the form of celebration of the marriage.²⁵ Consequently where ilobolo is given in contemplation of a civil marriage, and the marriage does not materialise, ilobolo is refundable to the person who delivered it irrespective of the party at fault, if this accords with customary law.²⁶ But in some instances the court has not followed this rule to its logical conclusion, and has adapted the customary law to the ideals of a common law engagement.²⁷

On the other hand the court has decided that the locus standi to claim ilobolo must be determined according to the principles of customary law.²⁸ Although the consequences of a civil marriage including questions of custody and guardianship of the children would be determined by common law,²⁹ a widow of a civil marriage has been held to have no locus standi to claim ilobolo for daughters of a civil marriage.

Similarly a mother of an illegitimate daughter, although a major in terms of the Age of Majority Act,³⁰ is not entitled to receive ilobolo for the marriage of their child.³¹

It was perhaps for some of these reasons that in KwaZulu the legal status of the Zulu woman was raised. According to the KwaZulu Act a KwaZulu citizen attains majority on marriage or on turning twenty one years of age.³² As a result a woman is regarded as a guardian of her illegitimate child,³³ and a widow is the legal guardian of all her minor children.³⁴ A divorcee may, in a deserving case, be vested with the guardianship of her minor children.³⁵ All these women are entitled to stipulate and to receive ilobolo for their daughters if there is no heir.³⁶

On the other hand, it has been held that during her desertion a wife's guardian is not competent to claim the balance of ilobolo owing until the woman has returned to her husband, because there is no valid reason for departing from this customary principle even for ilobolo given for a civil marriage.³⁷ Because ilobolo attached to a civil marriage is entirely ancillary thereto, and has to be modified by the principles and ideals of a civil marriage, it follows that if the parties are above the age of majority according to common law, they are competent to conclude a civil marriage without the consent of their parents or guardians. As the duty to deliver ilobolo in that event is not an essential, there is no obligation on the bridegroom to enter into negotiations with the woman's father about the marriage and the delivery of ilobolo. Moreover, the father of the woman cannot thereafter demand the delivery of ilobolo or that the bridegroom or his father should bind himself to deliver it.³⁸

Although strictly speaking this is the legal position, in practice it will rarely happen. In Transvaal the consent

of the father or guardian of a woman is necessary for the solemnization of a valid marriage.³⁹ This means that a man will have to go according to proper channels in order to obtain the consent of the father of his bride. This, according to custom, is elicited by way of ukukhonga.

Another question is whether the father of the bridegroom can compel him to deliver ilobolo in terms of an agreement to deliver such concluded between him and the bride's father. A major son should only be bound if he himself expressly or tacitly was a party to the agreement. If the father entered into such an agreement contrary to the protests of his son, the father alone should be bound seeing that there can be no agreement between the bridegroom and his father-in-law. The son will only be bound if both father and son jointly agreed.⁴⁰

If the parties intend to conclude a civil marriage, the presumption is that ilobolo is not part of the agreement. In order to incorporate such an ilobolo agreement into a civil marriage a separate and express agreement must be concluded.⁴¹ Although theoretically that is so, in practice it is not. A lobolo agreement may, however, be implied if at the time of the marriage it is clear from the conduct of the parties that they intended ilobolo to be delivered. If the marriage negotiations follow the traditional pattern for the creation of a customary marriage with the difference that the marriage will be celebrated in church, the court could infer the existence of ilobolo agreement.⁴²

If a civil marriage was preceded by a customary marriage in respect of which ilobolo was agreed upon, it will not be necessary to enter upon a second express agreement. Nonetheless the prospective bridegroom remains bound to deliver ilobolo otherwise any other view would mean that a bridegroom is withdrawing from his obligations by concluding a civil marriage with the daughter without the knowledge and

consent of the father.⁴³

Generally there must be an express agreement as to the amount of ilobolo to be delivered, and it must be made in contemplation of the marriage.⁴⁴ But if parties belong to a tribe that has a fixed ilobolo and the bridegroom has agreed to deliver ilobolo, the inference to be drawn is that he agreed to deliver such fixed ilobolo and it can be recovered by an action in court. But there must be proof that there was an agreement to deliver it or that the delivery of ilobolo was contemplated by the bridegroom, and the father of the woman.⁴⁵ In Natal and KwaZulu by analogy the same conclusion can be reached. Where agreement has been reached that ilobolo must be delivered, but the amount was not fixed, the provisions of the Code will apply, and the agreement will be regarded as enforceable. Although the number of ten head of cattle fixed by the Code⁴⁶ is the maximum number in the case of a commoner and not the minimum, it is submitted that a plaintiff may be able to tender evidence to the effect that it has become customary to demand the maximum number of cattle.

Where there is an express agreement to deliver ilobolo in anticipation of a civil marriage, such an agreement will be enforced by way of a legal action. It means that even among those tribes which practice ukutheleka, it will not apply because it is incompatible with the nature of a civil marriage.⁴⁷ Before the new Divorce Act,⁴⁸ recourse to ukutheleka to enforce ilobolo demands caused numerous disputes. The general view was that it amounted to malicious desertion which was a ground for divorce at common law.⁴⁹ As a result it was regarded as opposed to the mutual obligations of husband and wife married according to civil rites.⁵⁰

In Mbani v Mbani,⁵¹ the court decided that ukutheleka did not amount to malicious desertion. In the words of the

court:

"A malicious deserter is one who, constrained by no just or necessary cause, but owing to a disposition approaching fickleness and ill will, or through impatience of the marriage tie, casts off the care of wife and children, forsakes them, and wanders about with no intention of returning".⁵²

Desertion required two elements, namely the physical and the mental. Whereas one might be present, that is factum, the animus would be lacking⁵³ as the wife did not intend to terminate the marriage, but to obtain more ilobolo.

After the passing of the Divorce Act, irretrievable breakdown of the marriage became a ground for divorce,⁵⁴ instead of the grounds based on fault. A marriage is regarded as having irretrievably broken down if it has disintegrated to such a degree that there is no prospect of reconciliation.⁵⁵ Accordingly, if a husband sought a divorce because his wife had been theleka'd by her guardian, he would have to prove that the marriage has irretrievably broken down. This would be difficult because ukutheleka does not imply that the marriage has broken down with no reasonable prospect of resumption of a normal marriage relationship. The intention of the wife and her guardian is not to terminate the marriage, but that the normal marriage relationship be resumed after the husband has delivered more ilobolo.⁵⁶

Although ukutheleka cannot truly be said to constitute irretrievable breakdown, it makes the continuance of the marriage dependent on ilobolo agreement. It is therefore incompatible with the common law marriage and contrary to public policy.⁵⁷

In some tribes the wife's inability to bear children entitles the husband to a seed-raiser or alternatively to dissolution of the marriage and return of ilobolo. Because a civil

marriage is essentially monogamous, the provision of a seed-raiser would be tantamount to adultery. The provision of a seed-raiser is therefore contrary to the fundamental principles of a civil marriage.⁵⁸

It is a principle of customary law that if the husband fails to settle ilobolo for his wife he will not acquire guardianship over his children. At common law, the parents may only be deprived of their rights of custody and guardianship under exceptional circumstances.⁵⁹ Failure to deliver ilobolo at common law does not result in the father being deprived of his rights over his children. Such deprivation is therefore incompatible with the principles of a civil marriage.⁶⁰

It follows that although ilobolo is a customary institution the courts are prepared to recognize and apply its principles even though it is attached to a civil marriage. But if its principles clash with those of a civil marriage effect is given to those of a civil marriage. In this manner the principles of a civil marriage have been used to "purge" ilobolo of "undesirable elements".

11.4 DIVORCE AND RETURN OF ILOBOLO

Another problem area is the question of divorce and the effect of this on the lobolo delivered. In order to deal properly with this, it is necessary to discuss the position as it was before the new Divorce Act,⁶¹ and the position now. But before dealing with the return of ilobolo it may be apposite to deal with divorce in general.

11.4.1 The South African law of divorce

Before the new Divorce Act, the South African law of divorce was based on the guilt principle which presupposed that there was one party that was to blame for the break-down

and the other that was innocent.⁶² The two of the grounds for divorce were common law grounds while the other two were statutory ones.⁶³ Three of the grounds were based on the fact that one of the spouses had committed a matrimonial offence namely adultery, malicious desertion and imprisonment. Only incurable insanity was not based on fault.⁶⁴ Such a divorce law was regarded as unrealistic because it seldom happens that only one person is solely responsible for the matrimonial tragedy, but mostly both of them share a measure of the blame.⁶⁵ A number of objections were raised against such a divorce law.⁶⁶ As a result the South African law commission made some recommendations which resulted in the new Divorce Act.

According to the new Divorce Act the two grounds for divorce are the irretrievable break-down of the marriage and mental illness or continuous unconsciousness.⁶⁷ The new Divorce Act has therefore changed the common law grounds for divorce. This is of particular importance in determining the return of ilobolo in the case of the dissolution of a civil marriage. Let us first deal with the position before the Divorce Act.

11.4.2 The position before the new Divorce Act

There is a difference between a civil marriage and a customary one as to the grounds of divorce and the manner of dissolution of the marriage. According to common law the grounds for divorce were adultery by any of the spouses and malicious desertion. According to customary law adultery by the husband is not sufficient ground for divorce. Neither is a single act of adultery on the part of the wife a sufficient ground. Desertion by the wife can under certain circumstances lead to the dissolution of a customary marriage.⁶⁸ According to customary law the grounds for divorce were not rigid. As a result a marriage was not dissolved simply because of the existence of one or other

ground, but because the marriage had been wrecked beyond repair. Thus the customary law of divorce was akin to the irretrievable break-down principle of the present divorce law.⁶⁹

In the case of the dissolution of a civil marriage by divorce, it has been determined that while the action for the return of ilobolo is distinct from that of divorce, the question whether ilobolo should be forfeited depends on whose conduct led to the dissolution of the marriage.⁷⁰

Although adultery per se would not be sufficient ground for dissolution of the marriage in terms of customary law, it would until recently have been in terms of the common law of divorce. This caused problems. In dealing with ilobolo the court was confronted with the problem that what constitutes a good ground for dissolution of a civil marriage would not necessarily entitle a husband of a customary marriage to the recovery of ilobolo. Similarly the wife's guardian might not be entitled to retain ilobolo simply because of the fault on the part of the husband. The question is therefore whether a man who has divorced his wife to whom he was married by civil rites, should be entitled to reclaim his ilobolo. At the same time if a wife of a civil marriage has divorced her husband because of his adultery, should he forfeit ilobolo? This problem has been further complicated by the fact that the policy of the courts has been to treat the institution of ilobolo as purely a customary law one.⁷¹

In the case of Gomani v Baqwa⁷² the court by a majority decided that, although all questions of ilobolo must be decided in accordance with customary law, where a husband had obtained a divorce on the grounds of a single act of adultery on the part of his wife he was entitled to succeed in a later action brought by him against the lobolo-holder for the restoration of ilobolo. Even if her conduct would

not under customary law entitle the husband to the return of ilobolo delivered, it would be repugnant to justice and equity to allow the woman and her father who was a party to the lobolo contract, to benefit from the woman's misconduct. Moreover, the return was held to be based on the fact that ilobolo was delivered on condition that the woman should be faithful to her husband.⁷³ This shows that the court was prepared to be consistent with the principle that ilobolo delivered in terms of a civil marriage must be deemed to be modified by the ideals and standards of a civil marriage.

In a minority decision it was held that customary law should apply. As the husband was not entitled to sue for divorce at customary law on the grounds of a single act of adultery, it meant that he would not succeed, the customary rule being that as long as she has disclosed the wrongdoer, and does not hinder her husband in an action against him, he should not divorce her. The latter view is not to be accepted. In fact it has not been followed by the courts.

By marrying by civil rites, it has been held, the parties have set themselves new ideals.⁷⁴ As a result, since adultery is misconduct in the context of a civil marriage, there is no reason why ilobolo should not be forfeited if a divorce was granted on this ground.

Although the return of ilobolo in a civil marriage was earlier justified on the grounds of equity,⁷⁵ it was later attributed to an implied agreement between the parties to the lobolo contract.⁷⁶ It would be more realistic to say that this is imputed by the law to the parties to the lobolo agreement as it cannot be said that in all cases when parties conclude ilobolo agreement they apply their minds to that eventuality.

Another question which was disputed in the past is whether a husband who has divorced his wife in one court should

prove his case again in another court for justifying his claim for refund of ilobolo. The appeal courts have given conflicting decisions on this matter. In one case it was decided that the record of the judgment in the divorce court could not be attacked or impugned by further evidence, but the mere fact that divorce had been granted, is not sufficient proof to enable the plaintiff to succeed in an action for the refund of ilobolo or for the commissioner to decide that ilobolo if any, should be returned. To do so, it was further held, he must ascertain the extent to which the husband has contributed to the breach of the contract.⁷⁷ Yet in a number of decisions the view was held that a decree of divorce on the grounds of adultery is a judgment in rem both as to the decree of divorce as well as to the adultery, and by virtue of the doctrine of estoppel cannot be impugned. As a result if the husband has obtained a decree of divorce on the grounds of his wife's adultery he is entitled to a refund of ilobolo, and if the wife obtained a decree of divorce on account of the husband's adultery the lobolo-holder is entitled to retain ilobolo.⁷⁸ Moreover, the lobolo-holder may still be entitled to claim the balance of lobolo owing by the husband if the marriage has been dissolved as a result of his misconduct.⁷⁹ As a result it is no defence against an action by the husband for the refund of ilobolo on the grounds of divorce obtained as a result of adultery by the wife that he had neglected his wife or had driven her away. On the other hand if she had obtained a decree of divorce against him on the grounds of adultery he cannot reclaim ilobolo on the ground that she had prior thereto deserted him.⁸⁰ These principles would even apply where a civil marriage between two persons follows upon a customary marriage.⁸¹

A contrary view was held in the case of Makhatini v Kubheka.⁸² In this case the court held that a decree of divorce is a judgment in rem, and is res iudicata against all and everyone, but the grounds on which the decree is based cannot

be binding on anyone but the parties to the action. The record of the divorce case is proof only of the fact that a divorce has been granted, but the facts on which the judgment is based are not facts which are res iudicata or a matter of estoppel as against the wife's father who was not a party to that action. As a result the party who wishes to bring an action under customary law for the refund of ilobolo cannot be estopped from doing so. The reasons for this decision were that a civil marriage is a contract between the man and the woman who concluded the marriage, while a customary marriage is concluded between the bridegroom-to-be and the guardian of the bride-to-be. As a result the father of the woman is not a party to the divorce in case of a civil marriage whereas he is a party to the lobolo contract.

The justification for this decision is that it is quite possible that a wife may have a good defence to the divorce, but may choose not to oppose it. But in a subsequent action for the refund of ilobolo following upon divorce as a result of the wife's desertion in an undefended action the lobolo-holder may wish to adduce evidence to the effect that prior to the desertion the husband had ill-treated her,⁸³ and as the lobolo-holder was not a party to the divorce proceedings it might be unjustifiable to hold him responsible for the way her daughter had conducted her defence.⁸⁴

Where a decree of divorce was granted on the basis of desertion the court had decided that the decree of divorce was a judgement in rem, but not in respect of the desertion on which it was based. The latter was regarded as a judgement in personam,⁸⁵ and in an ensuing action in respect of ilobolo it was entirely dependent on the husband or the lobolo-holder respectively to lead evidence as to who should bear the fault for the dissolution, and the disposal of ilobolo was determined by these factors. In this case the customary law principles would apply.⁸⁶

Outside Natal it was decided that the action in a customary marriage in respect of desertion by the wife is that for the return of the wife, and in the failure thereof that of the return of ilobolo. The husband cannot sue for the return of the wife after the granting of a decree of divorce, and in a subsequent action he is limited to the claim for ilobolo.⁸⁷ Moreover, during the subsistence of the marriage, the wife's father cannot bring an action to claim the balance of ilobolo if she has deserted her husband unless he offers to return her and she is willing to return.⁸⁸ If she has died before litis contestatio, the husband cannot sue for the return of ilobolo on the grounds of her preceding desertion.⁸⁹ On the other hand if the parties had agreed that the husband would not sue for the return of ilobolo if the wife agreed not to defend the action, it was regarded as permissible even without the acceptance or approval of the lobolo-holder.⁹⁰ Furthermore, a woman was precluded from relying upon the custom of ukutheleka when sued for restitution of conjugal rights, and her staying away was regarded as desertion.⁹¹ As was pointed out above although ukutheleka is incompatible with the principles of a civil marriage it was incorrect to equate it with desertion.

When a man concludes a civil marriage with a woman other than his partner in a preceding customary marriage, this customary marriage is automatically dissolved, and he forfeits any lobolo which he had delivered therefor. Similarly, if he concludes a civil marriage with one of his partners in a customary marriage, the customary marriages with the other partners are automatically dissolved, and he forfeits ilobolo which he had delivered for them.⁹² The forfeiture of ilobolo by the husband in such a case may not be lamentable as the man takes a calculated risk. But it is doubtful whether in many cases such steps are taken with full knowledge of the consequences. What is regrettable is the disruption of family life caused by such a ruling.⁹³

If a man delivers ilobolo in anticipation of a customary marriage with a woman while he is married by civil rites with another wife, no lawful marriage comes into being and he forfeits any lobolo which he had delivered in expectation thereof.⁹⁴ If he attempts to reclaim his ilobolo, he will be met with the par delictum rule provided the parties were equally guilty. If a wife of a customary marriage concludes a civil marriage with a man other than her customary law husband her previous customary marriage with him is superseded by the civil marriage.⁹⁵ The rejected man is entitled, however, to reclaim his lobolo apparently without deductions although her parents are free to provide a substitute.⁹⁶

As it has been shown above the question of fault was important before the promulgation of the new Divorce Act, in determining whether ilobolo would be forfeited or returnable. It remains then to examine the provisions of this Act and their effect on the fate of ilobolo upon the dissolution of the marriage.

11.4.3 The position in terms of the Divorce Act 70 of 1979

It has been pointed out above that the grounds for divorce at present in South African law are irretrievable breakdown of the marriage insanity and continuous unconsciousness.⁹⁷ Under certain circumstances adultery, desertion and imprisonment are regarded as guidelines for the finding of the irretrievable breakdown.⁹⁸ Adultery and desertion per se are no longer grounds for divorce, but they can be proof of the fact that a marriage has irretrievably broken down although any other evidence to prove the disintegration of the marriage is admissible.⁹⁹ Since the introduction of the faultless break-down of the marriage, fault is no longer in issue. At the same time the determination of whether ilobolo is or is not returnable, rests upon the fault which attaches to each party

respectively which led to the dissolution of the marriage.¹⁰⁰ The question then arises as to what should happen to ilobolo in the case of divorce in a civil marriage.

There is yet no reported case on the application of the new grounds of divorce in the light of ilobolo. Seeing that adultery and malicious desertion as such are no longer grounds for divorce and fault as such should no longer be considered for the finding of an irretrievable breakdown, it would seem that the granting of a decree of divorce on one of the new grounds will not be regarded as a judgement in rem.¹⁰¹ In a subsequent action relating to ilobolo any party is free to adduce evidence as to the party who by his wrongful conduct led to the dissolution of the marriage, and the disposal of ilobolo will be determined by these considerations.

Although adultery is no longer a ground for divorce, a party to a divorce action may allege that the other has committed adultery and the plaintiff finds it irreconcilable with the continued marriage relationship.¹⁰² This serves as evidence that the marriage has irretrievably broken down. If a marriage is dissolved because the husband cannot reconcile his wife's adultery with the continued marriage relationship, her guardian might attempt to resist a claim for the restoration of ilobolo. The success of the guardian would depend on the legal system to be applied to the lobolo agreement. If customary law were applied to the lobolo agreement, ilobolo would not be returned because at customary law a single act of adultery is not sufficient ground for the dissolution of the marriage. If ilobolo were not returned, it would mean that at least a customary marriage continues to subsist despite the dissolution of the civil marriage. The courts have, however, not followed this line of reasoning, but have held that no subsidiary union might survive the marriage when it is dissolved.¹⁰³ Moreover, where two parties who are married by customary law,

subsequently marry by civil rites, the civil marriage supersedes the customary one.¹⁰⁴ According to this view the application of customary law to determine whether ilobolo should be returned will conflict with the fundamental principles of a civil marriage.¹⁰⁵ The common law should therefore be applied to resolve the issue.¹⁰⁶

The common law should be applied not only to dissolve the marriage, but also to determine which spouse was at fault, and whether ilobolo should be returned. Once it has been decided that ilobolo should be returned, customary law will be applied only to determine the amount of ilobolo to be returned. Once the marriage is terminated, ilobolo agreement is equally terminated.¹⁰⁷

Although fault is no longer a prerequisite for divorce, section 9 of the Divorce Act does provide that in determining the patrimonial consequences of divorce, the court will have regard to the conduct of the parties in as far as it contributed to the break-down of the marriage. There is no reason why the same test cannot be used in determining whether or not ilobolo has to be returned. It seems as if customary law considerations in such a case will apply.¹⁰⁸ There is, however, no reason why the order for restoration or forfeiture of ilobolo will not depend upon whether or not there was misconduct within the context of a civil marriage, and not what would be misconduct in terms of customary law.^{108(a)}

11.4.4 Deductions in the return of ilobolo on divorce

Where ilobolo is returnable to the husband on dissolution of his marriage, his wife's guardian is entitled to such deductions for the children, for the trousseau and for the services of the wife as may be allowed by the customs of the tribe to which the parties belong.¹⁰⁹

It was pointed out above in relation to the refund of ilobolo in a customary marriage that the refund of ilobolo should be approached with caution. This applies a fortiori in a civil marriage. The courts do not seem to take into account expenses incurred in marriage and the fact that there is no profit in ilobolo. In fact in many cases the lobolo-holder pays more by way of marriage expenses. To claim that he must return ilobolo is tantamount to saying that he must return ilobolo which is not there in particular where money was used as a medium of ilobolo. It is reiterated here that ilobolo should not be returned where a man has received something in return besides the woman. The Tswana rule that where a wife has borne children the lobolo should not be returnable because he has suffered no prejudice, is preferable. This should be the case irrespective of who is to blame for the dissolution of the marriage. This will accord more with the idea of the faultless break-down of the marriage. To adhere to the original idea that ilobolo should be returned may amount to the lobolo-holder being punished for the wrongs of the wife. In a civil marriage the father is not even a party to the marriage. There is no amount of influence he can be expected to exercise on his daughter. In the past the woman would return to her guardian, but today she seldom does that. Moreover, the practice has developed whereby the daughter receives part of ilobolo. This should be taken into account in determining the amount of ilobolo to be returned. This should be so because ilobolo does not have the same function in a civil marriage as it has in a customary marriage. Although the courts have held the view that ilobolo is essentially a customary institution, and that customary law should be applied unless it conflicts with the principles of a civil marriage, the courts have not taken into account other factors which have modified ilobolo. To take those factors into consideration would not necessarily mean that ilobolo is no longer a customary institution. It would be a realistic reflection of ilobolo as practised by the Zulus. Customary law is not

static, but changes with the practices of the people. It is therefore imperative that the law should reflect the practices of the people otherwise it becomes antiquated.

11.4.5 The courts and ilobolo

Separate divorce courts were established to deal with cases of nullity, divorce and separation between blacks married according to civil rites.¹¹⁰ The provincial divisions of the supreme court have concurrent jurisdiction, and hear appeals from the divorce courts. Divorce suits relating to the other race groups, however, can only be heard in the supreme court. Because both courts apply common law, it would appear that the dualism does not necessarily arise from the blacks' peculiar cultural needs.¹¹¹

Although the underlying reason for the establishment of these courts was to provide blacks with a cheaper and less formalistic forum,¹¹² there is no evidence that the procedure is easier or the costs lower.¹¹³

What is more puzzling is that although these courts were established to deal with divorce suits for blacks, they have no competence to deal with ilobolo claims because it has been held that ilobolo is a contract that is peculiar to customary law, not an essential of a civil marriage, and not a question arising out of a divorce suit.¹¹⁴ The parties thereto are also not the same. Whereas the divorce is a matter between the husband and wife, ilobolo claims involve the husband and his wife's lobolo-holder. Because of this it means that although a divorce court may decree a divorce of a civil marriage, a further action relating to the restoration of ilobolo will have to be taken in a commissioner's court.¹¹⁵

This is a cumbersome process which is costly both in terms of finance and emotional distress. Although in practice

ilobolo will be settled either extra-judicially or by the chief's or commissioner's court, and only by way of exception by the higher court, the procedure is nonetheless undesirable.¹¹⁶ The limitation placed on the jurisdiction of the divorce court is artificial when one thinks that members of the divorce court when sitting in the appeal court for commissioners' courts regularly adjudicate on claims to ilobolo property or status arising from a civil marriage. Settling ilobolo claims during the same course of action would save time and money.¹¹⁷ The limitation becomes even more incongruous when one considers that these courts were established specifically for blacks. It is a notorious fact that blacks stipulate ilobolo even if they conclude a civil marriage. The limitation thus defeats the purpose of the establishment of these courts. The escalation of divorce among blacks prompts the question whether the jurisdiction of the divorce courts should not be extended to cover ilobolo claims connected with a civil marriage.¹¹⁸

A party to a civil marriage may sue for ilobolo in either the commissioner's court or the supreme court. Although the supreme court does not deal with ilobolo attached to a customary marriage, ilobolo attached to a civil marriage is enforceable even by the supreme court.¹¹⁹ It is a real anomaly that divorce courts, which were formed specifically to deal with black marriage disputes should have less power than the supreme court in respect of a matter that is so peculiar to black marriages as ilobolo. The extension of the divorce court's jurisdiction to deal with ilobolo would accord with the principle of sound judicial administration that the court which dissolves a marriage should also deal with all questions relating to such a marriage.¹²⁰ The extension of such jurisdiction, even by legislation, cannot be regarded as unreasonable especially because the causa continentia rule cannot apply owing to the peculiar nature of ilobolo.¹²¹ Because ilobolo transactions have always had

a close relationship with the marriage of blacks, and because ilobolo ought to be regarded as an extension or adaptation of customary law to modern circumstances, and, moreover, because these courts were established to expedite legal process for blacks, this should be taken to its logical conclusion.¹²²

Another anomaly is that although a commissioner's court will not grant an order for the return of ilobolo where a marriage has not been properly dissolved by a competent court,¹²³ it has been decided that the supreme court does not require a prior divorce to enable a husband to reclaim ilobolo on proof of desertion.¹²⁴

The only justification for this ruling is that ilobolo is not an essential of a civil marriage, and forms part of a separate agreement. Thus it can be recovered even without the dissolution of the marriage. But this should not be so because ilobolo is delivered in contemplation of a marriage, and it stands or falls with it. The view that ilobolo can be recovered without a divorce is therefore unacceptable.¹²⁵

11.4.6 The death of the wife and ilobolo

Although customary law generally allows the husband to get a substitute or to reclaim ilobolo if a woman is barren or dies childless, one would not expect such a rule to apply to a civil marriage even when ilobolo was delivered therefor.¹²⁶ This is in conformity with the rule that ilobolo must be modified by the principles and standards of a civil marriage where these conflict with those of customary law,¹²⁷ and that a civil marriage injects new ideals into ilobolo contract which bind both the spouses and ilobolo-holder.¹²⁸

In Zace v Tukani,¹²⁹ however, the court decided that customary law had to apply because ilobolo had been delivered in accordance with that law. According to the court the form of

celebration of the marriage was immaterial. The question was whether ilobolo was returnable.

In a later case¹³⁰ the same view was followed. In this case the husband claimed return of ilobolo as a result of the death of the wife two months after the conclusion of the marriage. The court reasoned that while customary law was allowed to apply parallel with common law, the only sound principle to follow was that customary law should be applied in matters that are essentially matters of African custom. Because of the diversity of the two legal systems any attempt at reconciliation was regarded as futile, and attempts to oust the one in favour of the other were also regarded as not legal and hence productive of confusion.

This view was taken under inspiration of the earlier idea that if ilobolo was attached to a civil marriage a dual marriage resulted, but as shown above this view was later altered.¹³¹ This is strengthened by the fact that according to later cases the court decided that no lobolo was returnable.¹³² Yet the position is still uncertain, and it is doubtful whether a person will succeed in a claim for ilobolo as a result of the early death of the wife.¹³³ It is submitted that in such a case ilobolo should not be returnable. It was contended above that this rule is obsolete.¹³⁴ This applies a fortiori to a civil marriage. Moreover, it is incompatible with the idea of a civil marriage as a union for life between man and wife.

11.5 ILOBOLO AND THE REMARRIAGE OF A WIDOW

Whereas the death of a husband in customary law does not terminate a marriage, but entitles the widow to an ukungena consort,¹³⁵ this does not apply to a civil marriage which is monogamous in nature, and which is measurable only by the lives of the spouses. If he dies, she is free to remarry.¹³⁶

If a widow at customary law decides to leave her husband's homestead because she wants either to return home or to remarry, she ceases to be her deceased husband's wife, and ilobolo may be returnable because of her repudiation. If it is the husband's family that rejected her, no lobola is reclaimable.¹³⁷ According to customary law the husband's heir inherits the deceased's rights and obligations under the lobolo agreement, including the right to receive ilobolo for the legitimate and illegitimate daughters of the widow,¹³⁸ although this in KwaZulu has been modified by legislation.

The courts have held the view that ilobolo agreement continues in force and that customary law is applicable to that agreement.¹³⁹ It would appear that the courts regard the widow and the deceased husband's heir bound by the lobolo agreement. In practice, at least, a widow is considered a "wife" in her husband's family in terms of customary law, although according to common law she is deemed no longer to be married, and although there is legally no customary marriage.¹⁴⁰ Whatever the view of the common law, traditions in any culture are not lightly disregarded.¹⁴¹

The question is what is the fate of ilobolo delivered for a widow who remarries. Should it be returned, and if so what is the basis of such return? Is it because ilobolo has been given for the second marriage, or is it returnable even if the second marriage takes place without ilobolo?

The view taken by some courts has been that if the wife has left the deceased's homestead, and she refuses to return, ilobolo is not reclaimable.¹⁴² Although the widow is entitled to remarry, and her guardian is entitled to give her in a second marriage after receiving ilobolo or otherwise,¹⁴³ if she remarries the heir is entitled to reclaim ilobolo on the basis that no man should hold more than one ilobolo for the same woman.¹⁴⁴ From the case law it appears that the courts did not draw the distinction between the cases where

the first marriage was a civil marriage and where it was a customary law one.¹⁴⁵

Whereas in a number of decisions it was decided that the second ilobolo is decisive on the ground that no man should hold more than one ilobolo for the same woman,¹⁴⁶ in other cases it was held that the remarriage itself is sufficient for reclaiming ilobolo and whether or how much ilobolo was delivered therefore was irrelevant.¹⁴⁷

In the case of Desemele v Sinyako,¹⁴⁸ it was held that the rule that "no man should hold more than one ilobolo for the same woman" is a "European misconception" of customary law because it created the impression that two marriages could subsist at the same time which was not so. The first marriage continued until its termination either by the return of ilobolo or by repudiation by the husband. According to this decision the widow must remain at the husband's homestead and bear children. The maxim that no man could hold more than one ilobolo for the same woman was held to mean no more than that ilobolo is returnable when the widow contracts a valid second marriage which terminates the first one and cancels the first ilobolo contract. That a second valid marriage has been contracted without ilobolo is immaterial to the claim for the refund of ilobolo because the contract in terms of which the woman's reproductive capacity was transferred has nonetheless been frustrated. Accordingly the criterion for the refund is not the receiving of more than one ilobolo, but breach of the first contract which could even come about as a result of a second civil marriage. But the question is whether it is correct to apply this principle where the first marriage was a civil one.

There are few cases where the first marriage was a civil one and where the question of the refund of ilobolo after remarriage of the widow, arose.¹⁴⁹ But the courts have approached the question of subsequent civil marriages in the

same way as in the case of customary marriages. Thus even where no ilobolo was delivered for the second marriage refund was ordered.

Although it has been held that the justification of this rule is that ilobolo is a custom peculiar to customary law, and should be regarded as returnable or forfeited under that law irrespective of the form of celebration because remarriage cancels the contract securing the reproductive capacity of the woman thereby transferring it to the second husband,¹⁵⁰ this view is obviously in conflict with the principle that ilobolo must be accommodated within the principles and standards of a civil marriage. In a civil marriage ilobolo cannot be said to secure the woman's reproductive capacity. Consequently a distinction should be drawn between the claim for refund after remarriage of a widow of a civil marriage and one of a customary marriage. In a civil marriage the death of a husband terminates the marriage, and the wife cannot enter into an ukungena union as it is incompatible with a civil marriage. To allow the heir to reclaim ilobolo is tantamount to giving him a right he does not have.¹⁵¹ The better view therefore is that ilobolo should not be reclaimed on the remarriage of a widow of a civil marriage.

According to Tswana law the parents of the woman are entitled to receive ilobolo for her irrespective of how many times the woman marries, and what caused the dissolution of the marriage. The principle that no man can hold more than one ilobolo for the same woman, does not apply among the Tswana.¹⁵² It is, however, submitted that this should also be modified by the principles of a civil marriage. The same applies to Zulu law. The number of ilobolo cattle to be returned, if any has been held to be governed by customary law.¹⁵³

Whereas when a man seeks divorce he will not only terminate

the marriage according to common law, but also according to customary law, by instituting an action for divorce and another for return of ilobolo, when a marriage is terminated by death, the heir is not likely to reclaim ilobolo with the purpose of severing the bond between the two families. Although theoretically non-return of ilobolo implies that the marriage according to customary law subsists, the view held by the courts that only one marriage subsists nullifies this view. As a result in practice the courts encounter fewer conflicts in the event of death than of divorce.¹⁵⁴

11.5.1 Ilobolo and the custody and guardianship of children

Although according to customary law the custody and guardianship of children vests in the man who delivered ilobolo for their mother, where children are born of a civil marriage their guardianship is governed by the common law.¹⁵⁵ This is because when a marriage is concluded according to common law, that system will govern not only the status of the spouses, but also the status, custody and guardianship of the children born of the marriage.¹⁵⁶ It is an invariable consequence of the marriage that parents have a right to the custody and guardianship of their children. This continues even after the dissolution of the marriage by death or divorce.¹⁵⁷ That ilobolo contract was entered into does not alter the legal position.¹⁵⁸

According to common law the widow is the sole guardian of her children by the deceased husband unless the court orders otherwise. The claimant enjoys no preference by virtue of the fact that he is a customary guardian.¹⁵⁹ The justification for this principle is that public policy demands that the mother should have a say regarding the custody of her children. If this were decided according to customary law she would be deprived of this right.¹⁶⁰ The test to be used is not what would be the fairest to the parties, but what would be to the best interests of the

child.¹⁶¹ The common law rule to the effect that a widow is the guardian of her children has been adopted by the KwaZulu Act.¹⁶²

The emphasis placed on the interests of the child is a welcome advance on the traditional rule that the guardian is a man who provided ilobolo or his heir. The rule that the man who provided ilobolo is the guardian is not based on the dictates of what is in the best interests of a child and is outdated.

On divorce arrangements have to be made regarding the custody and guardianship of minor children. The court may make a suitable order.¹⁶³ The court is precluded from granting a decree of divorce until it is satisfied that proper provision is made for the children of the marriage.¹⁶⁴

If it is in the child's best interests, the court may award sole guardianship or sole custody to either parent.¹⁶⁵ The best interests of a child are generally served by granting sole custody to the mother and sole guardianship to the father.¹⁶⁶ The rights to children at customary law are vested in the father and his family. It is common practice to allow young children to remain with the mother until they are old enough to return to their father. Where the father is not a fit and proper person, the courts have awarded custody to the mother.¹⁶⁷

Although customary law does not make a clear distinction between custody and guardianship, the acquisition of rights in children is of primary importance in customary law. The usual order made in terms of common law on dissolution of marriage between blacks does to a large extent harmonize with customary law.¹⁶⁸

According to the present law the rule that the father's rights to his children depend on the settlement of ilobolo

is clearly incompatible with the fundamental principles of marriage. The customary law to the effect that the custody and guardianship of children on the death of their father should vest in the heir to the deceased has been modified to the effect that the widow is the guardian of all her children. The dependence of guardianship on the delivery of ilobolo has therefore been done away with.

11.6 ILOBOLO AND RIGHTS OF SUCCESSION

Customary law of succession is pervaded by the principle of male primogeniture,¹⁶⁹ and the idea of universal succession¹⁷⁰ where the successor "steps into the shoes of his predecessor and inherits all his rights and his liabilities".¹⁷¹ Consequently, if there is any lobolo debt owed to the deceased it passes to the heir. Although it is sometimes said that the children "are the property" of the homestead or that "proprietary rights" in a girl belong to a certain house,¹⁷² such statements are misconceived if they imply that women themselves are property in an estate.¹⁷³ What is actually meant is that the heir, because he is the guardian, is entitled to receive ilobolo delivered for his sister's marriage.¹⁷⁴ If there is any ilobolo debt owed by the deceased, the heir has to bear the responsibility even to the extent of using his own property.¹⁷⁵ But the Code limits the liability of the heir to the extent of the assets to which he has succeeded.¹⁷⁶ This limitation, however, only operates in a moderate form in the case of ilobolo claims.¹⁷⁷ Even though there is no property which the heir has inherited from the deceased, but if there is potential benefit which will accrue to him from the lobolo of his sister, he will be liable for the lobolo debt owed by the deceased.¹⁷⁸ This claim is further reinforced by the fact that prescription does not apply in customary law.¹⁷⁹ This is the position in a customary marriage. But what is the position in a civil marriage?

A civil marriage concluded by blacks without an antemptial contract does not produce the normal consequences of a marriage in community of property unless the parties have made a declaraticn before a magistrate or commissioner or marriage officer within the month of the solemnisation of their marriage, wherein they express their intention to marry in community of property.¹⁸⁰ Although this provision was intended to protect blacks from being entangled in the consequences of a marriage in community of property, it has entrenched the customary rule of succession even in a civil marriage.¹⁸¹ In respect of KwaZulu, the customary rule of succession has been amended by the KwaZulu Act. Section 83(3) provides that the estate of a KwaZulu citizen married by civil rites out of community of property shall devolve according to the law of intestate succession as it applies in South Africa.¹⁸²

Many blacks who contract a civil marriage are ignorant of the provisions of s22(6) of the 1927 Act.¹⁸³ As a result many of them marry out of community of property even unintentionally.¹⁸⁴ The South African law of succession applies to blacks married in community of property,¹⁸⁵ whereas to those married out of community of property, the customary law of succession applies except where its application will be inequitable or inappropriate,¹⁸⁶ or where there is a valid will.

In accordance with this rule although a widow of a civil marriage is the sole guardian of surviving issue, the successor to the deceased husband will be entitled to ilobolo to be delivered for the daughters of the marriage.¹⁸⁷ He will also be entitled to ilobolo to be refunded should the widow decide to remarry.¹⁸⁸ This rule obviously does not apply in KwaZulu as the widow is the guardian of her children and is entitled to stipulate for the delivery of ilobolo for her daughters.¹⁸⁹

That the heir has to reclaim ilobolo on the remarriage of a widow of a civil marriage has already been referred to above as being undesirable. Equally, the application of the customary rule of succession in a civil marriage is undesirable.

11.7 THE NULLITY OF A MARRIAGE AND ILOBOLO

Another feature of a civil marriage that is alien to a customary marriage is the concept of nullity although it has also been incorporated into a customary marriage.¹⁹⁰ South African law makes a distinction between nullity of marriage and dissolution of marriage. Whereas dissolution terminates a valid marriage, annulment implies that no marriage had existed.¹⁹¹ This distinction between divorce and annulment is of canon law origin. It was an expedient out of the dilemma of divorce. According to the Church divorce was anathema and marriage was regarded as a bond for life. Annulment was a way out since in the latter case the fiction was that there had in any case been no marriage.¹⁹²

Although requirements for a valid marriage are known to customary law, the concept of nullity as known in a civil marriage is foreign. This does not mean that African law ignores 'no-marriages'. Although African law does recognize the non-existence of marriages especially where there has been no compliance with the formal requirements of a marriage, individuals cannot pretend to be married if no marriage has taken place.¹⁹³ The father would not in any case receive ilobolo and give consent for such.

What happens if ilobolo has been delivered in terms of a marriage that is null and void? If such a marriage is annulled ilobolo has to be returned without deductions even including ingquthu beast.¹⁹⁴ The latter view does not seem to be acceptable. Ingguthu beast should not be returnable because it is not part of ilobolo. Ingguthu beast is even

claimable for seduction unaccompanied by marriage. It is also claimable together with a further beast if accompanied by pregnancy.¹⁹⁵

From the above it is quite clear that courts have attempted to solve all possible conflicts between ilobolo and a civil marriage by ignoring that ilobolo signifies a marriage at customary law and by declaring the agreement separate and ancillary to the marriage. As a result it can be upheld as long as it is not in conflict with the marital obligations of the spouses.¹⁹⁶ The two fundamental obligations of a civil marriage are cohabitation and conjugal fidelity. The courts will not enforce any rights and obligations that flow from ilobolo contract if they conflict with these fundamental obligations.¹⁹⁷

Although ilobolo agreement must be adjusted to fit in with the marriage, in many other respects customary law must apply to the lobolo agreement. The adjustments, however, do create the impression of "make-shift solutions" to the basic problem of the many and varied conflicts which arise between common law and customary law because of the inclusion of ilobolo agreement in a civil marriage. There is unfortunately no magic formula for eliminating all the conflicts. Even prohibition or refusal to enforce ilobolo contract attached to a civil marriage will be dysfunctional.¹⁹⁸

11.8 - SUMMARY AND CONCLUSION

Although ilobolo is an institution of a customary marriage, blacks have grafted it onto a civil marriage although it is not a requirement of this marriage. The courts have decided that ilobolo attached to a civil marriage is entirely ancillary, and is a subject of a separate agreement. As a result ilobolo in a civil marriage does not have the same legal significance as in a customary marriage. It is purely a stipulation for the benefit of the father and not the parties

to the marriage.

Although ilobolo has not been regarded by the courts as a contract sui generis arising from customary law and governed by the principles of a common law, but as a customary institution, it has been held that ilobolo attached to a civil marriage will be modified by the principles of a civil marriage if they clash with those of customary law. The courts have not been entirely consistent in this. Thus, although the custody of children belongs to the mother and not to the customary guardian, for the man to reclaim ilobolo on the death of a woman is unjustifiable.

Although the consistent attachment of ilobolo to a civil marriage and the consequent importation of a number of customary principles creates the impression that a black civil marriage has been so naturalised that it has become a civil marriage sui generis, the courts have not accepted this.

FOOTNOTES

1. Cotran (1968) 16 et seq.
2. It appeared from interviews that not only illiterate people, but also the educated, unless trained in law, do not know that ilobolo is not an essential of a civil marriage.
3. s22 ter of Act 38 of 1927. The application of this section in KwaZulu has been repealed - s124(1) of KwaZulu Act.
4. op cit (1961) 17.
5. Olivier et al 210.
6. Nzalo v Maseko 1931 NAC (N&T) 41; Ngwane v Nzimande 1936 NAC (N&T) 70; Biyela v Mfeka 1953 NAC (N-E) 119: In some early decisions the court applied the principles of customary law even where the intended marriage was a civil one; see Tetana v Sikukela 1 NAC 22 (1897); Maloyi v Mlalandle 2 NAC 82 (1910); Pantshwa v Msi

- 2NAC 147 (1911). Yet in other early decisions a contrary view was taken - Hebe v Mba 12 EDC 6; Lupusi v Makalima 2 NAC 163 (1911).
7. s85 of the Code.
 8. Olivier et al 211.
 9. Olivier et al ibid.
 10. Olivier et al ibid.
 11. Khumalo v Ntshalintshali 1971 BAC (C) 59; Jama v Sikosana 1972 BAC (S) 21.
 12. Olivier et al 212; R Verloren van Themaat "Die verfyning van die reg vir swartes in Suid-Afrika" 1980 THRHR 241.
 13. Peart (1981) 46.
 14. Peart (1981) 48.
 15. Peart (1981) 49.
 16. AJ Kerr "Roman-Dutch law marriages and the lobolo contract" 1960 Acta Juridica 334; AJ Kerr "Christian marriage and the lobola contract" 1959 South African Outlook 26 et seq; AJ Kerr "Implied lobolo contracts ancillary to Roman-Dutch law marriages" 1963 Acta Juridica 49 et seq; Anonymous "The contract of ukulobola, its validity and effect" 1906 SALJ 107 et seq.
 17. Manqana v Ntintili 1 NAC 218 (1908); Edward and another v Msingeleli 3 NAC 69(1912); Msingeleli v Edward and Another 3 NAC 237 (1913); Magadla v Nombewu 3 NAC 71 (1916).
 18. Dikeni v Klass 41 (1924); Majozi v Mude 1935 NAC (N&T) 16; s11(1) of Act 38 of 1927.
 19. Gomani v Baqwa 3 NAC 71 (1917); Peme v Gwele 1941 NAC (C&O) 3.
 20. Samson v Mbangwa 1 NAC 217 (1908); Manqana v Ntintili 1 NAC 218 (1908); Hanisa v Ngodwana 5 NAC 49 (1927); Somzana v Bantshi 4 NAC 84 (1921).
 21. Gasa v Gasa 1921 NAC 162; Qotyane v Mkhari 1938 NAC (N&T) 192; Phalane v Lekoane 1939 NAC (N&T) 132; Raphela v Ditchaba 1940 NAC (N&T) 29; Mosina v Ndebele 1943 NAC (N&T) 2; Mfubu v Cempi 1947 NAC (C&O) 101.
 22. Mpoko v Vava 3 NAC 198 (1912); Cobokane v Mzilikazi

- 1931 NAC (C&O) 44; Fuzile v Ntloko 1944 NAC (C&O) 2; Raphuti and another v Mametsi 1946 NAC (N&T) 19; Ntabeni v Mlobeli 1949 NAC (S) 158; Mbonjiwa v Scellam 1957 (S) 41; Sgatya v Madleba 1958 NAC (S) 53; Matchika v Mnguni 1946 NAC (N&T) 78; Sikupi v Jonkman 1966 BAC (C) 20; Khumalo v Ntshalintshali 1971 BAC (C) 59.
23. Bekker & Coertze 258.
 24. 1972 BAC (N-E) 58; see also Bekker & Coertze 258-9.
 25. Bekker & Coertze 259.
 26. Khumalo v Ntshalintshali 1971 BAC (C) 13.
 27. See footnote 13 above.
 28. Khumalo v Zulu 1976 ACCC (N-E) 201.
 29. Madlala v Madlala 1975 BAC (N-E) 96.
 30. Act 57 of 1972; cf s27 of the Code.
 31. Church (1981) 32.
 32. s16
 33. s29(2).
 34. s29(4).
 35. s29(5).
 36. s63 of the KwaZulu Act.
 37. Dlamini v Kuboni 1953 NAC (S) 230.
 38. Olivier et al 215.
 39. s22 ter of the Act 38 of 1927; see also DK Nkadimeng "Consent to African marriages" 1974 Speculum Iuris 84 et seq; JC Bekker "Is emancipation of Bantu women in Natal still necessary?" 1975 THRHR 164.
 40. Olivier et al 215.
 41. Mbonjiwa v Scellam 1957 NAC (S) 41.
 42. Peart (1981) 53.
 43. Cebe v Silimela 6 NAC 14 (1928).
 44. Ntabeni v Mlobeli and another 1949 NAC (S) 158; Majozi v Mude 1935 NAC (N&T) 16; Mbonjiwa v Scellam 1957 NAC (S) 41.

45. Ntabeni v Mlobeli and another 1949 NAC (S) 158; see also Kerr (1963) 49 et seq.
46. s87 of the Code; s65(1) of the KwaZulu Act.
47. Adonis v Zazini 1 NAC 46 (1901); Sikuku v Ntshaba 1 NAC 62 (1903); Njengaye v Mbola 3 NAC 76 (1917); Skweyiya v Sixakwe 1941 NAC (C&O) 126; Ntsimango v Ntsimango 1949 NAC (S) 143.
48. Act 70 of 1979.
49. Tonya v Matcmane 1949 NAC (S) 138; Ntsimango v Ntsimango 1949 NAC (S) 143.
50. Ntsimango v Ntsimango 1949 NAC (S) 143.
51. 1939 NAC (C&O) 91; see also Gama v Gama. 1937 NAC (N&T) 77.
52. 92.
53. Peart (1981) 55.
54. s3 of Divorce Act
55. s4(1) of Divorce Act.
56. Peart (1981) 55.
57. Cheche v Nondabula 1962 NAC (S) 23; Peart (1981) 56.
58. Peart (1981) 57.
59. E Spiro The law of parent and child 3 ed (1971) 239, 247, 325.
60. Mbonjiwa v Scellam 1967 NAC (S) 41.
61. Act 70 of 1979.
62. AH Barnard The new divorce law (1979) 1 trans J Church.
63. s1(1) (a) and (b) of the Divorce Laws Amendment Act 32 of 1935.
64. Barnard 1; PJJ Olivier et al The South African law of persons and family law (1980) 273 et seq trans C Nathan.
65. Barnard 2.
66. Barnard 4 et seq.
67. s3 of Act 70 of 1979; see also the guidelines provided for in s4 of the Act. For a discussion of these see:

HR Hahlo & JD Sinclair The reform of the South African law of divorce (1980) 16 et seq; Barnard 23 et seq; Olivier et al 283 et seq.

68. Olivier et al (1981) 230-1.
69. See Chapter X above. There are also differences when it comes to fault or the guilt principle.
70. Fuzile v Ntloko 1944 NAC (C&O) 2.
71. In Natal this was not a problem because the grounds of divorce laid down in the Code did tally with those of common law. Mtiyane v Mtiyane 1952 NAC (N-E) 229.
72. 3 NAC 71 (1917).
73. It was held in a number of decisions that the husband will be entitled to a refund of ilobolo if he has obtained a decree of divorce on the ground of the wife's adultery. On the other hand if the wife had obtained a decree of divorce against the husband on the grounds of his adultery, the lobolo-holder would be entitled to retain ilobolo- Cobokwane v Mzilikazi 1931 NAC (C&O) 44; Peme v Gwele 1941 NAC (C&O) 3; Fuzile v Ntloko 1944 NAC (C&O) 2; Mzizi v Pamla 1953 NAC (S) 71; Nkuta v Mathibu 1955 NAC (C) 47; Sgatya v Madleba 1958 NAC (S) 53.
74. Nkambula v Linda 1951 1 SA 377 (A).
75. Gomani v Baqwa 3 NAC 71 (1917).
76. Fuzile v Ntloko 1944 NAC (C&O) 2; Raphuti v Memetsi 1946 NAC (N&T) 19.
77. Qotyane v Mkhari 1938 NAC (N&T) 192; dissented from Thlopane v Motsepe 1932 NAC (N&T) 35.
78. Mpoko v Vava 3 NAC 198 (1912); Sicence v Lupindo 3 NAC 164 (1914); Gomani v Baqwa 3 NAC 71 (1917); Cobokwana v Mzilikazi 1931 NAC (C&O) 44; Andries v Mayekiso 1932 NAC (C&O) 7; Peme v Gwele 1941 NAC (C&O) 3; Fuzile v Ntloko 1944 NAC (C&O) 2; Mzizi v Pamla 1953 NAC (S) 71; Nkuta v Mathibu 1955 NAC (C) 47; Sgatya v Madleba 1958 NAC (S) 53.
79. Chabane v Sietse 1946 NAC (C&O) 53; Gwala v Cele 1978 ACCC (N-E) 27.
80. Mpoko v Vava 3 NAC 198 (1912); Andries v Mayekiso 1932 NAC (C&O) 7.
81. Sgatya v Madleba 1958 NAC (S) 53. The better view would seem to be that if the lobolo-holder had not agreed to the later civil marriage, the lobolo

- agreement retains its customary character since it relates to the original customary marriage. The fate of ilobolo should therefore be determined by the customary law principles - see Bekker & Coertze 257 footncte 44; Olivier et al 220.
82. 1974 BAC (N-E) 462. The court expressed approval of the decisions in the cases of Nkuta v Mathibu 1955 NAC (C) 47; Chabane v Sietse 1946 NAC (C&O) 53; Qotyane v Mkhari 1938 NAC (N&T) 192.
 83. Mosina v Ndebele 1943 NAC (N&T) 2.
 84. Nkuta v Mathibu 1955 NAC (C) 47.
 85. Qotyane v Mkhari 1938 NAC (N&T) 192; Mkize v Mkize 1941 NAC (N&T) 125; Mosina v Ndebele 1943 NAC (N&T) 2; Raphuti and another v Mametsi 1946 NAC (N&T) 19; Mfubu v Cembi 1947 NAC (N&T) 101; Masoka v Mchunu 1951 NAC (N-E) 327; Mzizi v Pamla 1953 NAC (S) 71; Raphela v Ditchaba 1940 NAC (N&T) 29; Sacosi v Sacosi 1976 ACCC (C) 118.
 86. Olivier et al 221. These principles were clearly enunciated in Qotyane v Mkhari 1938 NAC (N&T) 192.
 87. Raphuti and another v Mametsi 1946 NAC (N&T) 19; Matchika v Mnguni 1946 NAC (N&T) 78.
 88. Dlamini v Kuboni and another 1953 NAC (S)S 230; see also Cheche v Nondabula 1962 BAC (S) 23.
 89. Ntshumayelo v Mbuli 1948 NAC (C) 3.
 90. Titus v Gogo 1947 NAC (C&O) 27.
 91. Ntsimango v Ntsimango 1949 NAC (S) 143; see contrary decisions in Mbani v Mbani 1939 NAC (C&O) 91; Gama v Gama 1937 NAC (N&T) 77; Sikweyiya v Sizakwe 1941 NAC (C&O) 126.
 92. Ngxozana v Msutu 2 NAC 190 (1911); Zondi v Gwane 4 NAC 195 (1919); Matchika v Mnguni 1946 NAC (N&T) 78; Tonjeni v Tonjeni 1947 NAC (C&O) 8; Ngcwayi v Ngwayi 1950 NAC (S) 231; Nkambula v Linda 1951 1 SA 377 (AD); Kumalo v Kumalo 1954 NAC (S) 54 it was said that dissolution is automatic, Simons and the provisions of the Code do not apply.
 93. Simons (1968) 161-2; see also Peart (1981) 72 et seq.
 94. Olivier et al 221.
 95. Ggamse v Stemele 1 NAC 113 (1906); Zondi v Gwane 4 NAC 195 (1919); a contrary decision was given in Guma v Guma 4 NAC 220 (1919).

96. Olivier et al 239.
97. s3 of the Act 70 of 1979.
98. s4 of Act 70 of 1979.
99. Hahlo & Sinclair 22 et seq; see also J Church "The black family and the law" in F Bosman (ed) Social welfare law (1982) 300.
100. Mpoko v Vava 3 NAC 198 (1912).
101. Olivier et al 222. The decree of divorce itself will be regarded as a judgement in rem, but not the ground of divorce.
102. s4(1) of the Divorce Act.
103. Raphuti and another v Mametsi 1946 NAC (N&T) 19.
104. Matchika v Mnguni 1949 NAC (N&T) 78; Tobiae v Mohatla 1949 NAC (S) 91; Nkambula v Linda 1951 1 SA 377. (A); Ledwaba v Ledwaba 1951 NAC (N-E) 398; Mzizi v Pamla 1953 NAC (S) 71; Sgatya v Madleba 1958 NAC (S) 53.
105. Peart (1981) 59.
106. Qotyane v Mkhari 1938 NAC (N&T) 192; Gwala v Cele 1978 BAC (N-E) 27.
107. Fuzile v Ntloko 1944 NAC (C&O) 2; Matchika v Mnguni 1946 NAC (N&T) 78; Tobiae v Mohatla 1949 NAC (S) 91; Mzizi v Pamla 1953 NAC (S) 71; Sgatya v Madleba 1958 NAC (S) 53.
108. Olivier et al ibid.
- 108.(a) Church (1982) 301.
109. Raphuti v Mametsi 1946 NAC (N&T) 19.
110. s10 of Act 9 of 1929. Three such courts have been established and their divisions coincide with the divisions of the appeal court for commissioners' courts established in terms of s10(2) of Act 9 of 1929.
111. Simons (1968) 174.
112. EJH Yates "Bantu civil courts in South Africa" 1971-72 Speculum iuris 45; HP Klopper & TF Coertze Bantu divorce courts 2 ed (1976) 6.
113. Hahlo & Kahn (1960) 332; Simons (1968) 174.
114. Mtiyane v Mtiyane 1952 NAC (N-E) 229.

115. Makalima v Tswayi I NAC 76 (1904); Matchika v Mnguni 1946 NAC (N&T) 78; Gwala v Cele 1978 ACCC (N-E) 27.
116. Church (1975) 25.
117. Simons (1968) 175.
118. Simons (1968) ibid; JJ Büchner "Swart egskeidingshof; regsonbevoegdheid in lobolo-aangeleentede" 1982 De Rebus 64.
119. Hebe v Mba 12 E D C 6 (1897).
120. Simons (1968) 179.
121. Büchner 64 on the causa continentia rule.
122. Büchner ibid: On the adaptation of customary law to suit modern conditions by the courts see JJ Büchner "Inheemse gewoontereg: regskepping deur die appélhowe vir kommissarishowe" 1982 De Rebus 159-160.
123. Makalima v Tswayi 1 NAC 76 (1904); Sekonyella v Leaha 1951 NAC (C) 19.
124. Nyale v Tafeni 1916 EDL 377; cf Kanisa v Ngodwane 5 NAC 49 (1927) where their practice of the commissioner's courts is preferred because an order for return of ilobolo without divorce would place the husband in possession of both his lobolo and his wife, and this is undesirable because it is contrary to customary law, and it could also lead to collusion and fraud; see also Sekonyella v Leaha 1951 NAC (C) 19; Ntshumayelo v Mbuli 1948 NAC (C) 3.
125. Kanisa v Ngodwane 5 NAC 49 (1927).
126. See chapter X above and Olivier et al 223.
127. Mbonjiwa v Scellam 1957 NAC (S) 41.
128. Fuzile v Ntloko 1944 NAC (C&O) 2.
129. 1 NAC 202 (1908).
130. Somzamana v Bantshi 4 NAC 84 (1921).
131. Possibly if they were decided later they might have been decided differently.
132. In Ntshumayelo v Mbuli 1948 NAC (C) 3 the wife had died six years after the conclusion of the marriage. The court refused to return ilobolo. This decision followed the decision in Gidja v Yingwana 1944 NAC (N&T) 4.

133. Olivier et al 223; Bekker & Coertze 261.
134. See chapter X above.
135. See chapter X above.
136. Tobiea v Mohatla 1949 NAC (S) 91.
137. Tobiea v Mohatla 1949 NAC (S) 91; Mrubata and Another v Dondolo 1949 NAC (S) 174.
138. Mbuyisa v Mtshali 1937 NAC (N&T) 162; Nzimande v Phungula 1951 NAC (N-E) 386.
139. Tobiea v Mohatla 1949 NAC (S) 91; Mrubata and Another v Dondolo 1949 NAC (S) 174; Desemele v Sinyako 1944 NAC (C&O) 17; Makedela v Sauli 1948 NAC (C&O) 17.
140. Raphuti and another v Mametsi 1946 NAC (N&T) 19.
141. Peart (1981) 46.
142. Nbono v Manoxoweni 6 EDC 62 (1891); Mqolora v Meslani 1 NAC 97 (1905); Mzilikazi v Kwaza 1934 NAC (C&O) 42; Desemele v Sinyako 1944 NAC (C&O) 17; Ngqungiso v Gobo 1946 NAC (C&O) 10; Mavuma v Mbebe 1948 NAC (C&O) 16; Mrubata and another v Dondolo 1949 NAC (S) 174; Sefolokele v Thekiso 1951 NAC (S) 25; Dumezweni v Monye 1962 BAC (S) 81.
143. Dumezweni v Monye 1962 BAC (S) 81.
144. Mqolora v Meslani 1 NAC 97 (1905).
145. Olivier et al 225.
146. Mqolora v Meslani 1 NAC 97 (1905); Mggongo v Zilimbola 3 NAC 186 (1914); Joloza v Geza 4 NAC 93 (1922); Jonas v Yalezo 4 NAC 92 (1922); Sisilana v Galo 6 NAC 12 (1928); Jobela v Gqitiyeza 1929 NAC (C&O) 19; Qabuka v Dlisondabambi 1937 NAC (C&O) 187; Cosi v Nongomazi 1941 NAC (C&O) 85.
147. Ma-Auwa v Maganikehle 1 NAC 167 (1907) Ntlongweni v Mhlakaza 3 NAC 163 (1915).
148. 1944 NAC (C&O) 17.
149. Ntlongweni v Mhlakaza 3 NAC 163 (1915); Makedela v Sauli 1948 NAC (C&O) 17; Tobiea v Mohatla 1949 NAC (S) 91.
150. Tobiea v Mohatla 1949 NAC (S) 91.
151. Olivier et al 229; Simons (1968) 181.

152. Matthews 16.
153. Ntame v Mbede 3 NAC 94 (1912); Mggongo v Zilimbola 3 NAC 186 (1914); Jonas v Yalezo 4 NAC 92 (1922); Sisilana v Galo 6 NAC 12 (1928); Qabuka v Dlisondabambi 1937 NAC (C&O) 187; Nomadudwana v Tosholo 1938 NAC (C&O) 43; Raphuti and another v Mametsi 1946 NAC (N&T) 19; Tobiea v Mohatla 1949 NAC (S) 91; Dumezweni v Monye 1962 BAC (S) 81.
154. Peart (1981) 64.
155. Mbuli v Mehlokhulu 1961 BAC (S) 66; Msomi v Msomi 1968 BAC (N-E) 29; Ramokhoase v Ramokhoase 1971 BAC (N-E) 163. Madlala v Madlala 1978 ACCC (N-E) 96; cf Mvunyiswa v Mayile 1964 BAC (S) 25.
156. Hahlo (1975) 125.
157. Hahlo (1975) 459 et seq; Spiro 30-31.
158. Madlala v Madlala 1978 ACCC (N-E) 96.
159. Ramokhoase v Ramokhoase 1971 BAC (N-E) 163; Madlala v Madlala 1978 ACCC (N-E) 96.
160. Msomi v Msomi 1968 BAC (N-E) 29;
161. Mbuli v Mehlokhulu 1961 BAC (S) 66.
162. s29(4) of the KwaZulu Act.
163. s6(3) of the Divorce Act.
164. s6(1) of the Divorce Act.
165. s6(3) of the Divorce Act; s5(1) of the Matrimonial Affairs Act 37 of 1953; s29(5) of the KwaZulu act.
166. Hahlo (1975) 460-3.
167. Zwane v Zwane & Twala 1945 NAC (N&T) 59; Nkosi v Ngubo 1949 NAC (N-E) 87; Mkize v Mkize 1951 NAC (N-E) 336; Gumede v Gumede 1955 NAC (N-E) 85.
168. Peart (1981) 66.
169. AJ Kerr The customary law of immovable property and of succession 2 ed (1976) 124; Olivier et al 421; Bekker & Coertze 268; s84 of the KwaZulu Act.
170. Kerr (1976) 126.
171. Mgoza and another v Mgoza 1967 2 SA 436 (A).

172. Biyela v Ngema 1940 NAC (N&T) 9; Mkize v Memela 1953 NAC (N-E) 18.
173. s146(1) of the Code; s111(1) of KwaZulu Act; Ngcobo v Mkize 1950 NAC (N-E) 249.
174. Ngcobo v Mkize 1950 NAC (N-E) 249.
175. Thus he becomes liable even if he received less by way of inheritance than the liabilities that he has to incur. As a result he is supposed to meet these from his own property - see Maguga v Scotch 1931 NAC (N&T) 54; Mekoa v Masemola 1939 NAC (N&T) 61. A similar rule applied in early customary law.
176. s116 of the Code; Nyembe v Mafu 1979 ACCC (N-E) 186.
177. Dhlamini v Dhlamini 1967 BAC (N-E) 7.
178. Hlatshwayo v Buthelezi 1977 BAC (N-E) 252; Nyembe v Mafu 1979 ACCC (N-E) 186.
179. s152(2) of the Code; s117(2) of KwaZulu Act.
180. s22(6) of Act 38 of 1927; s39(1) of KwaZulu Act.
181. Bekker & Coertze 248.
182. This has repealed Regulation 2(d) of the Regulations of the Distribution of the Estates of Deceased Blacks Government Notice R34 of 1966. This means that the provisions of the Succession Act 13 of 1934 will apply.
183. Except those who have studied law or who know something about law.
184. JD Sinclair "Financial provision on divorce - need, compensation or entitlement?" 1981 SALJ 469.
185. s2(c) of Regulations for the administration and distribution of the estate of deceased Blacks Government Notice No 34 of 1966.
186. s2(d) of Government Notice No 34 of 1966.
187. Gasa v Gasa 4 NAC 162 (1921); Khumalo v Zulu 1976 BAC (N-E) 201.
188. Olivier et al 230.
189. s29(4) of KwaZulu Act read with s63 of KwaZulu Act.
190. s77 of the Code.

191. JM Pauwel "Nullity of marriage and divorce: relevance of a western distinction to modern African law" in S Roberts (ed) Law and the family in Africa (1977) 226.
192. Pauwels 227.
193. Pauwels 231.
194. s84 of the Code; Ngcobo v Kumalo 1942 NAC (N&T) 47; Sibiya v Sibisi 1946 NAC (N&T) 60; Mlaba v Mvelase 1951 NAC (N-E) 314; Radebe v Bhengu 1954 NAC (N-E) 126; Mpungose v Shandu 1956 NAC (N-E) 180; Ndhlovu v Phetha 1964 BAC (N-E) 101; Mbanjwa v Mbanjwa 1964 BAC (N-E) 122; Khanyile v Zulu 1966 BAC (N-E) 35.
195. s137 of the Code.
196. Peart (1981) 68.
197. Peart idem 69.
198. Peart idem 70.

CHAPTER XII

ILOBOLO AND RELATED DEMANDS

12.1 INTRODUCTION

In this chapter it is proposed to deal with certain demands or claims which have become closely associated with although they are not part of ilobolo. It is also necessary to analyse the significance of these demands or claims to ilobolo.

12.2 IZIBIZO

Izibizo are articles or money generally demanded by the father of the girl at the commencement of the negotiations for the delivery of ilobolo. Although Doke and Vilakazi in their dictionary describe these as articles "claimed as part of lobolo or as compensation",¹ izibizo are strictly speaking not part of ilobolo. They are an indication of the seriousness of purpose on the part of abakhongi, and enable negotiations to be proceeded with.²

These izibizo have various names some of which are symbolical, for example, imvulamlomo, ingqaqamazinyo, isimbo, isikhwehlela and ubikibiki. Of these imvulamlomo (mouth-opener) is the most important. As the word denotes, it is demanded to persuade the father of the woman to speak because he feigns that his lips are tight and he cannot speak. Indeed without this payment which is generally R10-00, he will refuse to speak on the marriage proposal.³ The amount payable varies from place to place, and today it is mostly payable in cash or in kind.⁴

According to some writers⁵ izibizo are utterly foreign to original Zulu custom. Indeed there is no sufficient information on when they started. Little is heard of them during the times of the early Zulu kings. According to Whitfield⁶

imvulamlomo "looks like nothing better than blackmail by the father and bribery by the umkhongi". Although one cannot agree with him that this is a form of bribery and blackmail, it is indeed conceded that if it is acceded to, marriage negotiations will be facilitated. He further says:

"These isibizo are an introduction of more recent origin, say, since the establishment of stores where the various things which the isibizo are intended to cover can be bought. The European part of the bride's equipment and the presents for the relatives of the bridegroom are paid out of the isibizo-sum. No case is known in which the imvulamlomo and isibizo fees have not been paid, in spite of the fact that the Government frowns upon these ex actions".⁷

Other writers are of the view that izibizo have become "institutionalized" and form part of the very fabric of Zulu marriage negotiations.⁸ What is nonetheless conceded is that what is demanded today is far more than was demanded in earlier Zulu society.⁹ It is, however, not disputed that izibizo are demanded on a regular basis in any marriage negotiations whether it be by traditionalists or non-traditionalists. So regular are they that "there is a definite plan of activities and priorities, and people know that now that such-and-such has taken place, a gift or a ceremony must follow to take the negotiations a step further than they were before, so that even a stranger can have a clear idea what is to follow next".¹⁰

Although even non-traditionalists demand izibizo, among them the pattern may not be exactly the same as among traditionalists. Although it has been said that these are not economically motivated, or a product of any "objective diversification of needs",¹¹ they can in fact be commercialised as it will be shown here below.

Besides imvulamlomo, other izibizo may be demanded. They may be for the father and mother of the girl or even for other close relatives. Especially among traditionalists

these may be symbolical. They often consist of clothing, implements, food, and money. Most of them are a form of compensation for the loss the parents have suffered in one way or another because of the marriage relationship from which the prospective bride was born.

Although it has been contended that these are not economically motivated, they do compensate, albeit psychologically, the parents for some loss suffered in the upbringing of the bride. Moreover, they provide them with things of lasting value. Ilobolo settled in cash is easily dissipated by the marriage expenses, but articles given as izibizo may last them for a long time, thus maintaining the memory of their daughter and all that she stands for. It is this sentimental aspect of izibizo which is largely responsible for their persistence even in the face of legislative prohibition.

Some examples from empirical research will illustrate the point. According to one case the parents of the girl demanded a refrigerator as part of izibizo. It cost R750. In another case the mother demanded a charcoal stove and a fur coat, this besides the imvulamlomo of R10, which altogether cost more than R500. According to yet another case the father demanded a suit plus shoes and a hat. The mother demanded eight rugs not only for her, but also for other close relatives. Besides that she demanded eight bags of potatoes, 25 kg of sugar, a crate of tomatoes, 20 l paraffin and a packet of matches.¹³ Examples could be multiplied, but these sufficiently illustrate the point.

Although this may raise a sense of horror, it may not necessarily frustrate the marriage negotiations. The bridegroom may not necessarily pay all of them. As long as he pays some to enable the negotiations to proceed, it is deemed sufficient. The rest may be paid later. Some may not be paid at all. After marriage it may not be easy to demand them because even the woman will protest on behalf of

her husband because she needs that money for herself and her children.

Although izibizo do not form part of ilobolo, they influence the amount of ilobolo which the bridegroom has ultimately to give. Although on paper the number of cattle may be ten, the bridegroom may have paid more by way of izibizo. Thus if he settled ilobolo in cash the bridegroom would have paid R600, but because he may have paid izibizo to the value of R300 he ends up paying R900. This shows that izibizo may enable a person to contravene the limitation of the amount of ilobolo to be given.

Section 95(1) of the Code provides that no claim to payments known variously as invulamlo, ubikibiki; inhlawulo; umnyobo; ingqaqamazinyo; isikhwehlela and the like in respect of any proposed customary marriage shall be recognized. These payments made may be either regarded as forming part of ilobolo or refunded to the payer. Should the proposed marriage not materialise, such payments are recoverable.¹⁴ The purpose of this section was most probably to prevent the circumvention of the limitation of ilobolo imposed by s 87 of the Code. Yet this is not the only way by which the father could circumvent this limitation. In fact the efficacy of this prohibition is doubtful. Both traditionalists and non-traditionalists require the payment of izibizo. Some of them are unaware of the provisions of the Code. Others are aware, but deliberately ignore them. At the same time the bridegroom, if he is interested in getting his wife, has to comply. Resorting to legal action is a step he would not lightly take because it might inter alia mar the relationship between him and his parents-in-law.

Although the viewpoint that izibizo are illegal demands has been criticised,¹⁵ the KwaZulu select committee on the status of Zulu women recommended that these should be discouraged

or controlled.¹⁶ It is perhaps for this reason that the prohibition of izibizo is still retained in the KwaZulu Act.¹⁷ They tend to make marriage a commercial business.

Where payments such as imvulamlomo, izibizo, umnyobo; and ubikibiki have been made during the engagement, they are treated as sisa.¹⁸ In some cases such payments have been regarded as ilobolo, and its equivalent in cattle calculated on the scale of s 86 of the Code.¹⁹

In Mdhluli v Zuma²⁰ it was held that isibizo, which was not disclosed at the time the full ilobolo amount was registered, is a contravention of the prohibition limiting the number of ilobolo cattle and is not recoverable because the parties are in pari delicto. Although izibizo are not claimable from the bridegroom, once he has paid them the recipient must hand them over to the rightful heir and cannot keep them as a present made to him.²¹

The demanding of izibizo like any unchecked practice may be open to abuse. Izibizo are invariably demanded in marriage negotiations, and to regard them as illegal does seem ineffective and thus illusory. Yet the retention of s96 has a salutary effect in that it helps to keep in check those parents who demand too much. At the same time it provides a remedy to a bridegroom who feels definitely aggrieved by the actions of his parents-in-law. In fact it has been decided that if he pays izibizo under protest, he may be entitled to reclaim them and will not be met with the par delictum rule.²² This limitation, however, does not apply to Zulu or other blacks residing outside Natal and KwaZulu who stipulate ilobolo for their daughters even if the bridegroom might be resident in Natal.²³

No historical parallel for the institution of izibizo could be found among both African and non-African customary legal systems. The closest analogy that could be found is that

of rutsambo of the Shona in Zimbabwe. As it was said above rutsambo is a monetary aspect of rovoru which is strictly speaking not part of it. An interesting analogy is that even there, there is statutory limitation of ilobolo.

The conclusion to be drawn from this is that izibizo are a form of reaction against statutory limitation of ilobolo. This is strengthened by the fact that these are found only where there is statutory limitation of ilobolo and nowhere else. In fact they are a convenient or respectable way of circumventing the provisions of the Code.

Another payment that is closely connected with although not part of ilobolo is ingquthu beast.

12.3 THE NGQUTHU BEAST

12.3.1 What it is

Besides ilobolo the prospective bridegroom is expected to deliver a beast to the mother of the bride-to-be unless it has already been paid by the bridegroom in respect of the woman's seduction or the woman has previously been seduced by a different man.²⁴ This beast is known as inkomo yengquthu or simply ingquthu.²⁵

Section 1(1) of the Code defines ingquthu beast as "a beast which is payable by the husband or seducer, as the case may be to a woman, or the house to which she belongs upon the entrance into a customary union or the seduction of her daughter".

The ngquthu beast is known by other names among various Zulu tribes namely, inkomo kanina wentombazane, inkomo yhlanga, inkomo yesifociya or inkomo yokuqholisa or umqholiso.²⁶ It is not part of ilobolo, nor is it returnable in the case of dissolution of the marriage.²⁷ But it can, be refunded

in the case of the marriage being declared a nullity.²⁸

The word ingquthu is a traditional hlonipha word (euphemism) for the female sex organ. Inkomo yengquthu or simply ingquthu is therefore a head of cattle for the female sex organ. In the context in which it is used the name does not clearly indicate which female's sex organ it refers to, the girl's or the mother's. This ambiguity has caused a controversy. Some writers are of the opinion that it is a gift to the bride's mother for having given birth to and brought up the bride while, others are of the view that it is given to the mother for her protecting the virginity of the bride.²⁹

The term ingquthu is not frequently used, especially not among the Christians, because although among the traditionalists it may be regarded as a euphemism among the Christians it is objectionable.³⁰ For this reason they prefer the use of inkomo kanina wentombazane which in fact points out that the mother of the bride is the one who has to receive this beast. Other names seem to bring out more clearly the purpose or function of this beast. These are the umqholiso (beast of honour)³¹ or inkomo yesifociya literally meaning a beast for the pregnancy belt. Isifociya is a belt made of grass or leather, about eight centimetres wide, which is used by traditionalist women to support their bellies, especially after giving birth. Often it is used for whipping children if need arises.³²

From this it appears that inkomo yesifociya is given to the girl's or bride's mother for the discomfort she had to undergo in her conception, birth, and education of her daughter.³³ The term ingquthu refers to the mother's organ which had to suffer pain because of childbirth. For such pain, she has to be compensated.³⁴ Another name for this beast, as it has been pointed out, is inkomo yohlanga or uhlanga.³⁵ The word uhlanga here refers to a reed that was

used in traditional Zulu society for the administration of an enema. This denotes that the mother of the bride or seduced girl "administered therapeutic leechcraft to her daughter during childhood",³⁶ and as such is a token of appreciation. Among some tribes this appellation does not refer to the equivalent of ingquthu, but to a token payment of about four rand, as an expression of gratitude to the mother for the fact that "uyichathile intombazane ngohlanga", meaning she did administer an enema to the child by means of a reed.³⁷

12.3.2 The significance of ingquthu beast

The function of this beast has been in dispute especially particularly in relation to seduction. In fact it has been shown above that the cause of the controversy has been to which sex organ the word, ingquthu refers, the mother's or the girl's. The answer to that question is therefore of crucial importance because it at the same time signifies to the function of this beast.

Krige says "According to Whitfield an ingquthu is payable to the mother in respect of the hymen of the girl".³⁸ This means that this beast is given to the mother for looking after her virginity.³⁹ There is also support for this view. Ingquthu is regarded as a thanksgiving to the girl's mother for her care of the daughter and is associated with the girl's virginity.⁴⁰

According to De Clercq, on the other hand, ingquthu should not be connected with the virginity of the girl. To him it has nothing to do with the mother's protection of the girl's virginity which in any case was never her function, but that of amaqhikiza, but he regards it as compensation to the mother for the pain and suffering she had to endure at giving birth to her daughter.⁴¹ Although it is difficult to disagree with him that this beast does not refer to the

girl's sex organ, we cannot agree with him when he categorically denies that the beast has anything to do with the mother's protection of her daughter's virginity. One must always bear in mind that in the early traditional society fine distinctions were not frequently made. In this context the view of Sibiya is more acceptable.

According to Sibiya an institution acquires multiple functions in its historical development. As a result it would be fallacious to single out one function of ingquthu beast and exclude others. He correctly points out that the protection of the girl's virginity is one of the many duties entrusted to the mother although custom allows her to enlist the assistance of amaqhikiza (elder girls) in the protection of her daughter's virginity. That it is mostly performed by amaqhikiza does not imply that it is not the mother's. He concludes:

"It is the daughter's virginity, above all, which gives testimony that she did make an effort to mould her into a young woman (intombi) approximating the tribal ideal. For this she has to be thanked by the first man who ravages her daughter's virginity be it a seducer or a bridegroom. A father's duty is to protect the reproductive capacity of his daughter, and not virginity, this being the mother's responsibility. For his daughter's reproductive capacity, he receives ilobolo".⁴²

Although Sibiya's view is said to be preferred, it must be pointed out that De Clercq's view was corroborated by informants from Mahlabatini and Hlabisa. This obviously means that there are either local variations or that through historical development ingquthu beast has picked up certain functions which it did not have. That this beast has something to do with the mother's protection of her daughter's virginity is further fortified by the fact that the mother is only compensated for her daughter and not for a son. One would expect even the son to be expected to pay a beast in appreciation for the pain and

suffering experienced by his mother in giving birth to him. But no such beast is payable. Yet law is not always a product of logic.

A qualification on Sibiya's view is that this beast today is not a gift, but a demand, and failure to deliver it is actionable in court.⁴³ Moreover, today emphasis is not on the protection of virginity, but on the mother's contribution in the education of the daughter. Today, unlike in the past, the protection of virginal chastity has remained a fiction.⁴⁴ Payment of ingquthu still continues.

12.3.3 To whom payable

The ngquthu beast is payable to the girl's mother if she is still alive, and together with its progeny constitutes her property which she can use as she pleases. If she is no longer alive, it is payable to the house to which she belonged; but it may not be attached except for her personal debts.⁴⁵ Where the girl's mother has been divorced or has intentionally divorced her husband or abandoned him, it is still payable to the house to which she belonged.⁴⁶ This beast is payable to the girl's mother even though the girl is illegitimate and the mother is unmarried, but it does not belong to the house of the mother's mother.⁴⁷ The ngquthu beasts of the daughters of a deceased indlunkulu wife belong to indlunkulu. A woman whose house has been affiliated to indlunkulu is not entitled to these beasts.⁴⁸

Ingquthu beast should be treated as quite distinct from damages payable to the girl's father. It is not part of ilobolo, but belongs to the girl's mother and can be claimed whether or not there is an engagement.⁴⁹

12.3.4 Ownership of ingquthu beast

The ngquthu beast with its increase is the property of the girl's mother. She can deal with it for the benefit of

her house.⁵⁰ If the girl's mother is divorced through no fault of her husband's or when she has wilfully deserted her husband through no fault of his, her right to ingquthu ceases, and it becomes the property of the house to which she belonged.⁵¹

Ownership of ingquthu beast passes to the mother as soon as it is delivered as a result of seduction of a daughter. A specific beast must, however, be identified and appropriated from the lobolo cattle before ownership passes.⁵² Although ingquthu does not form part of ilobolo, it is customary to deliver it with ilobolo cattle. The beast must be pointed out on the day it is delivered by the bridegroom or by the girl's father publicly at a family gathering. Without this identification, ownership does not pass to the mother.⁵³ In the case where ilobolo is settled in cash the value of the mother's beast is usually higher than that of each lobolo beast, although the tendency in some areas is that even the lobolo cattle are not of equal value.

As the capacity of a woman to own property in customary law is an exception rather than the rule, ownership must be clearly canvassed and the onus of proving that is quite heavy.⁵⁴ Because of this all property at the homestead is presumed to belong to the family head. A woman claiming attached property as being her ingquthu beast and its progeny must clearly prove her claim because there is a tendency among litigants to procure their wives to claim attached property as ingquthu beast and its progeny. Because of its frequent use, the subterfuge must be guarded against to protect the interests of the judgment creditors.⁵⁵

This should be because it is easy for the wife to allege that cattle attached at her husband's homestead are the progeny of ingquthu beast given to her and this allegation will be incontrovertible on the part of the creditors. As a result evidence tendered on her behalf must be cautiously sifted.⁵⁶

The actual beast must be delivered to comply with the customary requirement. Where money is paid in lieu of ingquthu beast and a heifer is bought with it, the beast and its progeny remain the separate property of the woman.⁵⁷

Because ingquthu becomes the exclusive property of the bride's mother, she may alienate it as she deems fit. As a result she has the power to give it and its increase to her younger son. She may sell it, slaughter it or give it away. It does not necessarily become house property,⁵⁸ although under normal circumstances it will not be treated separately. Moreover, as ingquthu belongs exclusively to the girl's mother, her guardian does not have the power to remove it from the homestead of his late father in the exercise of his discretionary powers as the woman's guardian.⁵⁹

Although a widow is free to dispose of ingquthu beast as she pleases, it is an act of disinherison of the house heir. If she is still under the guardianship of her guardian, she must inform him if she alienates it.⁶⁰ The guardian is entitled to sue on behalf of the mother for the ngquthu beast, which is in the unlawful possession of a third party. It is more correct for the mother to sue, assisted by the guardian, but this technicality may be overlooked by the court.⁶¹ When duly assisted, the mother is entitled to sue for the beast because it is her property.⁶²

The ngquthu beast and its increase, if not disposed of during the lifetime of the mother, becomes the house property upon her death and is inheritable by the eldest son of the house.⁶³ As long as ilobolo continues the practice of giving ingquthu beast will continue despite the shift of emphasis from protection of virginity, and, despite the change in the mores of the people.

Because it has been said that ingquthu beast does have

relevance to the seduction of a girl, it is necessary to deal with the effect of seduction on ilobolo.

12.4 ILOBOLO AND SEDUCTION

12.4.1 Rights to personality in customary law

African law does recognize rights to personality,⁶⁴ the infringement of which grounds an action for satisfaction. In the past self-help could be used.⁶⁵ Thus in early customary law young men of the group of a seduced girl could proceed to the village of the seducer armed, and seize a head of cattle and kill it outside the home to clear the defilement associated with the seduction.⁶⁶ The basis of this is collective or group liability and rights according to which all rights and obligations are not vested in the individual, but he shares them with the group of which he is a member. This group is mostly represented by the head of the group who acts on its behalf.⁶⁷ Authority within the group has its basis in guardianship which is a shared subjective right.⁶⁸

A person who has committed a wrongful act incurs liability although the group is also liable because of shared rights and obligations. The family head represents the group because of his rank within the group.⁶⁹

12.4.2 Seduction in general

In the early Jewish community, just as in the early Zulu society, virginity was regarded as the most important qualification for marriage. So great was the importance placed on virginity that the mohar (marriage consideration) was, among other things, regarded as the pretium pudicitiae (i.e. the price for virginity).⁷⁰ If a man violated the chastity of a virgin, the rule was aut ducere aut dotare⁷¹ (to marry or to endow her).

In the early Zulu society a virgin fetched full ilobolo value on marriage. The preponderance placed on virginity has led some writers to regard ilobolo as an aid in protecting virginity and preventing immorality in that every woman would desire to protect her virginity so that on marriage her father could get full ilobolo for her.⁷²

Despite the cogency of this argument, ilobolo cannot be regarded as the panacea for pre-marital sexual misbehaviour. This is evidenced by the increase in seduction despite the continued popularity of ilobolo.

In early Zulu society loss of a woman's virginity had social, legal and even religious consequences. Not only was a violation of the woman's chastity a serious criminal offence, but the woman's father could also institute an action for damages against the wrongdoer for the injury caused to him by the seduction of his daughter.⁷³

Seduction has been defined as sexual intercourse between a male and a virgin with her consent outside the confines of lawful matrimony⁷⁴ or what the parties, because of their religious convictions, regard as a binding marriage.⁷⁵ In South African law seduction means essentially the defloration of a virgin. This definition is narrower than in customary law as it relates only to the physical ravaging of the hymen. In customary law it includes not only the seduction of a virgin, but also the pregnancy of an unmarried non-virgin, and especially among the Zulus the law provides for a claim for each and every pregnancy of an unmarried woman.⁷⁶ Among some black tribes, however, only the seduction of a virgin is actionable and not the subsequent pregnancies.⁷⁷ Among others it is only for the first pregnancy and not for the subsequent ones that an action lies as this is regarded as enabling a man to profit from his daughter's immorality.⁷⁸ In Zulu customary law such a rule never developed owing to the relative absence of successive pregnancies for an unmarried woman. In early Zulu society a woman who was

seduced could be given in marriage even to an elderly man. As a result a woman could not procreate a string of children outside marriage. In recent times the requirement of the woman's consent to a marriage has rendered such "forced marriage" illegal. It is therefore possible for a woman to bear a number of children outside marriage, and her father can claim for each pregnancy as in Zulu law there is no rule against such an action. In practice, however, a man will only claim for one or two pregnancies.

Various methods were adopted in early Zulu society to protect virginity and prevent seduction. Unmarried women were regularly inspected by elderly women for signs of seduction. This custom was known as ukuhlola (to inspect). Proof of virginity was the presence of the hymen which was in a sense arbitrary because the hymen could be lost in other ways than through seduction. Because of the fear of the consequences, seduction was by way of exception.

Besides ukuhlola, young girls (amatshitshi) were under the strict surveillance of their elder counterparts (amaqhikiza). Although pre-marital sexual intercourse accompanied by penetration was not permissible, marriageable girls could practise external sexual intercourse with their lovers. This practice is known as ukusoma⁷⁹ (some call it ukuhlobonga and in Xhosa it is ukumetsha). This was no delict and therefore not actionable. Seduction accompanied by penetration led to collective action by the woman's age-group against her as her defloration affected not only her personally, but also all members of her age-group, for which they sought ritual purification and revenge.⁸⁰

The custom of ukuhlola has generally fallen into disuse. Although no statutory provision has abrogated it, if a dispute relating to it came before the court it is doubtful whether the court would not declare it to be contrary to public policy.⁸¹ In Mvubu v Chiliza⁸² the court did not

regard this practice as being contra bonos mores. In any case the question whether or not this practice is contrary to public policy was not in issue. What was in issue was whether to declare that an unmarried girl was umfazi (used in a derogatory sense for married woman implying loss of virginity) was defamatory when this had been uttered during the course of a customary inspection it having later appeared that the woman was in fact a virgin. The court decided that the presence of the animus iniuriandi had not been proved because the words had been uttered during an accepted customary inspection, and they had been uttered by the woman in the execution of her duties, and according to her knowledge and experience. It is doubtful whether this is an oblique recognition of the custom by the court.

The Code of Zulu law does not refer specifically to this practice. There is no reason, however, why the court cannot take cognizance thereof in terms of s 144 (3) of the Code. The disappearance of ukuhlola custom has led to seduction not followed by pregnancy being difficult to prove. Pregnancy provides irrebutable proof of seduction although it is known that pregnancy can ensue even without penetration. Such cases are, however, exceptional.

12.4.3 The action for seduction

In Zulu law, as in English law, it is the father and not the girl herself who is entitled to sue for seduction. In English law the right of the father to sue derives from the assumption that the seduction deprived him of his daughter's services. In actual fact he is compensated for the interference with parental rights and the injury caused to "his pride, self-respect, sense of honour and feelings as a parent".⁸³

The Code provides that the seduction of an unmarried woman grounds an action against the seducer in damages for

ingquthu beast.⁸⁴ As in South African law, this action is anomalous in that the consent of the woman is no defence. This is because an unmarried woman in customary law is not competent to consent to such a matter. It is her father by virtue of his comprehensive power of guardianship who has the capacity to consent to seduction. In early customary law this consent was procured by the slaughter of a goat called umeke, immediately after marriage.

12.4.4 Damages for seduction

The Code stipulates that the beast payable for seduction is ingquthu beast whereas some writers⁸⁵ assert that it is definitely not ingquthu beast but inhlawulo (a fine). It is important to ascertain which beast is payable for seduction as that will enable us to know who actually has the right to sue for this beast; is it the father of the seduced woman or her mother and the father merely sues on her behalf? This is particularly important if one bears in mind that the Code also provides that the mother is entitled to ingquthu beast if it has not already been paid for seduction.⁸⁶ The question then is: does ingquthu beast belong to the father when paid as damages for seduction, and to the mother when delivered in contemplation of marriage?

Before dealing with the basis of the action for seduction in Zulu law it must be pointed out that besides ingquthu beast a beast is payable for every pregnancy.⁸⁷ The court will not award more damages than those fixed by the Code even if there had been an agreement between the parties that more should be payable,⁸⁸ or on the basis of a local custom,⁸⁹ the girl's education⁹⁰ or even the rank of the girl's father.⁹¹ The latter view has had a fossilizing effect on the law and has prevented it from adapting to the changing conditions.⁹² This has been offset by the fact that a seduced woman is entitled to claim damages in terms of South African law and if she claims in terms of that law

she is not restricted to customary damages.⁹³ If the father has already claimed his customary damages, damages claimed by the father will be taken into account when assessing damages for the woman.⁹⁴

The use of the term damages in s137(1) of the Code when referring to ingquthu beast has been criticised, because if this beast is delivered by the intending bridegroom and the termination of virginity takes place within the confines of a customary marriage there can be no question of a delict for which damages are claimable. If the seduction takes place extra-maritally, there is a delict committed. There are also peculiar features of this beast: the damages are limited to one beast, and there is no assessment of damage which normally takes place in an action for damages. Such damages take the form of a fine.⁹⁵ Moreover, in terms of s 162(1) of the Code seduction is regarded as an offence.^{95(a)} Some Zulu non-traditionalists even use the word amademeshe (damages) for avoiding the traditional Zulu terms.

Although the concept "damages" as used in Roman-Dutch law does not fit into customary law, it must be borne in mind that in early Zulu customary law the beast payable was quite substantial. It was taken to have adequately compensated the injured person. As a result it would not be necessary to take into account a number of considerations. There was also a tendency in customary law to standardise the private law claims. One must also bear in mind that this claim is a private one and not a fine exacted by the chief. A chief could also claim. Although this beast is also payable even without the seduction, as a gift to the girl's mother, that is not a serious objection. If paid as a result of seduction it constitutes damages more particularly because the seducer may not even marry the woman. If paid in contemplation of the marriage, it is paid to the mother as a token of appreciation to her for the proper upbringing of the intended bride.

The beast that is payable for every pregnancy is known as imvimba (which literally means to close up). It is aimed at compensating the father for the diminished ilobolo that he will receive for his daughter.⁹⁶ When ilobolo is delivered, the bridegroom may either deliver full ilobolo in which case a beast will be given to him by the father, or he may deliver ilobolo cattle less one beast for the child born.⁹⁷ The latter is more convenient and simple. The close relationship between ilobolo and seduction and pregnancy is also responsible for the demanding of the maximum number of cattle provided for in the Code.⁹⁸ This is because to demand less implies that the woman is no longer a full maiden thereby implying that she has borne a child.

If a child or children is born during the subsistence of an engagement, no claim for damages is allowed except if the marriage falls through.⁹⁹ Should the seducer marry the woman, payments other than ingquthu beast made in respect of the seduction are deemed to form part of ilobolo.¹⁰⁰ This is logical since such payments compensate the father for the prospective diminution of ilobolo.

In addition to damages for seduction, parents in certain areas in KwaZulu and Natal claim an umgezo or ingezamagceke beast¹⁰¹ (literally the cleanser of the premises). This beast is not mentioned in the Code. In other areas this is not a beast but a goat or a fee. In the case of Sitole v Ngcobo¹⁰² it was decided that umgezo fee will only be allowed if there is a recognized local custom which the court may take cognizance of under s144 of the Code. As a result evidence must be led as to the existence of a recognized custom in a particular area to pay the umgezo fee. This is treated as something apart from ingquthu payable for seduction.

The Sitole v Ngcobo decision is in conflict with earlier decisions which held that damages for seduction will not

exceed those provided for in the Code, and that a local custom which allows greater damages will not be recognized.¹⁰³ It is therefore doubtful whether this decision will be followed in later cases. If the guardian or father sues for damages for seduction in terms of customary law, the weight of authority is in favour of the view that the court cannot exceed the amount fixed by the Code.¹⁰⁴ Should the guardian claim more than the number provided therein, the court will deprive him of his costs.¹⁰⁵

It has also been decided that there is no claim in Zulu law for loss of services of a girl while she was staying with the seducer.¹⁰⁶ Nor can the action include claims based on common law.¹⁰⁷ Damages may be paid in cattle or in cash. It may be inequitable nowadays to refuse such costs to be recoverable owing to the high cost of bringing up a child. Whereas in traditional society the upbringing was inexpensive, and the child contributed by way of services and claim for ilobolo in the case of a girl, which advantages far outweighed the inconvenience involved, this is not so today.¹⁰⁸ This may only be mitigated by the fact that the woman can sue in terms of South African law for the maintenance of the child.

In Mthiyane v Ndaba¹⁰⁹ the plaintiff, an unmarried non-virgin who had admitted previous pregnancies by other men claimed for her impregnation by defendant damages for expenses incurred in transport to hospital, hospital charges, clothing for the expected child and loss of earnings or alternatively maintenance. It was decided that despite the fact that the woman was no longer a virgin, this did not exempt the defendant from expenses for confinement and maintenance of the child. But as the plaintiff was no longer a virgin, she could no longer claim for loss of wages as personal damages, but this could be used as a basis for calculating maintenance to be paid as part of lying-in expenses for a reasonable period, during and a reasonable period after confinement,

but the amount payable as lying-in expenses need not be commensurate with wages or income lost.

12.4.5 The basis of the action for seduction

What is the basis of this claim? Does the woman's father claim the beasts for himself or for his wife? Besides, is his claim based on the infringement of a personality property right or is it an infringement of a proprietary right, namely the right of guardianship and the consequent diminishing of ilobolo for his daughter?

This question is important because the answer to it will bring out clearly the distinction between a claim for seduction and one for pregnancy. Because of the falling into disuse of the custom of ukuhlola, the impression may be created that an action for seduction unaccompanied by pregnancy has equally fallen into disuse in Zulu law. In Mbhele v Mthethwa¹¹⁰ this question was answered in the negative. Although there was no customary inspection of the seduced girl by women, the father had her medically examined after she reported the seduction. The examination confirmed the seduction. Although no pregnancy had resulted, the girl's father was held to be entitled to claim damages for seduction, and although there was no timeous reporting of the seduction to the defendant, this was not regarded as entirely prejudicing the plaintiff's claim in favour of defendant. In coming to this decision the court took into account the circumstances of the parties, viz that they were residing in an urban area where strict adherence to tribal custom is not always possible. This was also evidenced by the fact that the plaintiff took his daughter to the doctor and not for customary examination by elder women. It is therefore convenient for proper analysis to separate the two claims.

According to the view that the beast payable for seduction is not ingquthu, but inhlawulo, ingquthu beast is not given to the mother of the girl for the protection of her virginity. Support for this view is further found in the fact that according to customary law ingquthu was not delivered with ilobolo, but later on.¹¹¹

Although this argument is forceful, there is an equally strong argument to the effect that ingquthu beast is relevant to the protection of the girl's virginity.¹¹²

Owing to the disappearance of ukuhlola custom, however, it is not the seducer who pays ingquthu beast but the person who marries the woman. The seducer only pays the ngquthu beast when seduction has been followed by pregnancy or when he also marries the woman. The possibility that the bridegroom has to pay ingquthu beast although the woman has been seduced by somebody else means that he not only marries the woman but also that he bears responsibility for her "sins". According to customary law where seduction is unaccompanied by pregnancy two beasts were payable, namely ingquthu beast and ingezamagceke which was slaughtered for ritual purification of the homestead from the defilement caused by the seduction.¹¹³ The Code only recognized ingquthu beast and not the other.

If it is accepted that ingquthu beast is the one that is claimable for seduction, it means that the provisions of the Code are not entirely incorrect. Similarly, if ingquthu beast is claimable for seduction, the person who is entitled to that beast is the mother and the father is merely claiming on her behalf, naturally because in terms of customary law he is the person having the necessary capacity to do so. If the mother of the seduced girl has been duly assisted, she is competent to sue for this beast.¹¹⁴ The object of her claim is the compensation for the protection of the girl's virginity, the pain and suffering she experienced during

pregnancy and at child-birth, and for her contribution in the education and upbringing of the girl. No doubt the compensation is by today's standards nominal. It is merely a token of appreciation and not compensation in any real sense. This is the position when seduction has not been followed by pregnancy.

Seduction accompanied by pregnancy is the delict normally actionable today in Zulu law. According to the Code two beasts are payable for the latter, namely ingquthu and imvimba or imvala.¹¹⁵ According to the view that does not regard ingquthu as a beast claimable for seduction, the two beasts claimable for seduction followed by pregnancy are inhlawulo and ingezamagceke. The inhlawulo belongs to the father, being compensation for the prospective loss of ilobolo. Ingquthu is not involved.

The acceptable view is that ingquthu beast is also relevant. According to this view three beasts should be payable, that is, in terms of customary law, namely ingquthu, imvimba and ingezamagceke.¹¹⁶ The latter is slaughtered for purposes of ritual purification. The ingquthu and imvimba belong to the mother and father of the woman respectively. Although three beasts are supposed to be given, in practice today fewer are given owing to the decaying of the traditional religion and because the Code only recognizes two. Besides, according to early custom the beast to be slaughtered was forcibly taken by young men of the injured group without the consent of the owner. This will not be permissible today.

12.4.6 The action at common law

At common law the action for seduction is available to the girl and not to her father. When this action is instituted by a person in his capacity as father and natural guardian of the girl the presumption is that the common law will apply,

and the action is the girl's and not the father's.¹¹⁷ But this claim will not include claims from Zulu law such as ingquthu and invimba.¹¹⁸ When the woman herself sues, she cannot sue in a chief's court because its jurisdiction is limited to cases involving customary law.¹¹⁹ She is only entitled to sue the seducer and not his family head because ^{NB} the joint liability of the family head for the delicts of his wards is a customary law principle and not a common law one.¹²⁰ She cannot succeed unless she was a virgin,¹²¹ but the onus is on the seducer to disprove¹²² virginity.

The seducer is liable to compensate the victim by way of damages for the loss of her virginity and the consequent impairment of her marriage prospects.¹²³ The damages are sentimental as the woman is entitled to compensation without any calculable pecuniary loss having been suffered.¹²⁴ Reservations have been expressed about the anomalous position of the action for seduction in South African law.¹²⁵ Because of the liberated status of the woman, the action has come to be regarded as being out of touch with the present mores, and as merely facilitating revenge to a jilted woman. The action seems justifiable only when seduction was procured by fraud.¹²⁶

12.4.7 The choice of actions

Because of the parallel existence of two separate actions, the father and the daughter have to decide who will sue. Their choice of actions is limited. If the father is married by customary law, he is entitled to sue.¹²⁷ But if he is a partner to a civil marriage the status of the girl is determined by common law, and as a result she is the one competent to sue for the seduction and not the father.¹²⁸ Practice may differ.

The question is whether both father and daughter can sue at the same time, one at common law and the other at customary

law. In earlier cases, the appeal court had taken the view that this was permissible, and if damages had already been awarded to the father this would be taken into account when awarding damages to the woman.¹²⁹ More recently the view taken by the court is that where a customary law action for seduction and pregnancy has been instituted, a common law action for damages flowing therefrom cannot be allowed at the same time.¹³⁰ Although it is "inequitable that the seducer should be twice mulcted in damages for the same offence",¹³¹ this has not been accepted. There is no decision precluding the father and daughter from suing separately as long as the two actions are not mixed. The court will take into account that the father has already been awarded damages if the woman sues as well. There is also no bar against the father claiming for seduction and pregnancy in terms of customary law while the woman sues for maintenance of the illegitimate child in terms of the common law.¹³²

12.4.8 Ilobolo claims and the action for seduction

It is an open question whether the father should be entitled to claim full ilobolo if his seduced daughter who claimed damages herself later on marries. Here one must distinguish between two possibilities, namely where the daughter marries the seducer and where she marries someone else.

Regarding the first possibility the question whether a woman can sue a man if there is still a prospect of marrying her, may seem academic. The Code does not allow an action for seduction during the subsistence of an engagement.¹³³ But the Code refers to a customary law action and not one in terms of common law. The possibility cannot be excluded that a man might seduce a woman on promise of marriage, but afterwards fail to honour his promise in which case the woman can sue for seduction. But the man may later repent, forgive the woman and decide to marry her. According to customary law the damages claimed by the father for seduc=

tion and pregnancy are deemed to form part of ilobolo when it is claimed. Ingguthu does not form part of ilobolo. But on what principle can damages claimed by a woman herself be treated as forming part of ilobolo?

The question is whether the father should forfeit his ilobolo beast if his daughter has sued for damages or whether he should claim in full. That he should claim in full may be justified on the ground that the two actions are based on separate grounds; the woman claims for injury done to her personality and for diminished marriage prospects, and the father sues for the diminished ilobolo he will receive for his daughter. If the woman marries the same man, the question is: if damages are calculated as part of ilobolo, on what basis are they supposed to be calculated, on the basis of common law or customary law? In other words although, for instance, the woman sued and obtained R500 as damages, should the father when receiving ilobolo for her, claim full ilobolo minus one beast for seduction and pregnancy or should there be a calculation of what the value of ilobolo as a whole is and the R500 be set off against ilobolo to be received?

The problem is that ilobolo is an institution that is based on customary law while a civil marriage is based on common law. The courts have taken the view that when ilobolo is delivered in contemplation of a civil marriage its principles will be modified by those of a civil marriage if these principles are in conflict with those of a civil marriage.¹³⁴ Unfortunately there does not seem to be any principle of a civil marriage to regulate this problem. Ilobolo is not an essential requirement of a civil marriage. Furthermore, at common law the seduction and subsequent pregnancy do not diminish ilobolo value of a woman because none is required. Seeing that ilobolo is an institution that is essentially based on customary law,¹³⁵ the principles of customary law must apply. But the problem is that the

father has not claimed anything. Two approaches suggest themselves.

The one approach is that the father should not claim full ilobolo because his daughter has already claimed damages for seduction. Although the father has not strictly speaking received anything, his family has benefitted, and he indirectly benefitted as well, and this must be taken into account when he eventually demands ilobolo. Support for this has to be found in the fact that according to customary law emphasis is not so much on the individual as on the group. In line with this reasoning, the father has benefitted and should forego claiming full ilobolo. His ilobolo will be reduced by one beast for the pregnancy as would be the case in customary law. Moreover, it should mean that the mother should forfeit her ingquthu beast even though she did not receive anything because according to the Code that beast is payable for seduction together with imvimba for the pregnancy. Whether that is so in practice is difficult to say because cases where this was in issue have not come before the courts.

The second approach is more radical. According to this one, the father should claim full ilobolo if the woman marries the seducer where the father did not claim in terms of customary law. The underlying reason is that the father has not sued for anything. In any case the child born is the seducer's.

Of the two approaches, the first one is more in accord with the spirit of customary law where emphasis is on the equitable solution of the problem rather than purity of principle. Yet it may be wrong to sacrifice principle to provide an equitable solution unless one is able to justify that action. The second approach seems to be clear on principle, but it is a harsh principle: the father has not claimed anything and should not have his ilobolo diminished.

The bridegroom cannot complain because the child is his.

If one questions this approach as being in conflict with what was suggested earlier, that if the father sues, then the daughter should be precluded from suing on the basis of the same seduction and vice versa, the answer is that in this latter problem, the facts are entirely distinguishable from the case where both father and daughter sue, basing their claims on the same seduction but deriving their rights from two separate legal systems. In this particular case the father is not suing for seduction but for his ilobolo. The daughter claims damages for seduction.

The Code provides that if damages are claimed from the seducer who eventually marries the woman, the damages should be treated as forming part of ilobolo.¹³⁶ But the Code refers to damages claimed by the father and not by the woman. In this case it is the woman who has sued. To extend the interpretation of damages to include damages claimed by the woman would be to stretch the meaning of this term beyond the context which was intended by the legislator.

Another alternative may be to apply a fiction to the effect that the damages received by the woman are deemed to have been received by the father. But this may also give rise to problems. According to customary law, the father is only entitled to receive two head of cattle or their equivalent whereas a woman who claims in terms of common law is not confined to damages fixed by customary law. This problem may be resolved by resorting to another fiction, namely that damages claimed by the woman are deemed to have been equivalent to customary law damages, and as a result the father should forfeit only two head of cattle or their equivalent in money. Yet this does not seem quite acceptable.

A question may further be asked whether allowing the father to claim full ilobolo is not tantamount to punishing the seducer who marries the girl more than the seducer who decides not to marry her. Obviously this approach is inclined towards that direction. Since marriage is of more importance than the father's claim for ilobolo, it is submitted that the father should reduce his ilobolo claim by taking into account that the woman has already claimed damages. This has been the approach of the courts where both father and daughter sued for seduction.¹³⁷ To do otherwise might be calculated to restrict marriage. Any discouragement of marriage is contrary to public policy.¹³⁸

If the seduced woman marries somebody else the father cannot claim his full ilobolo from the bridegroom because she is no longer a full maiden. This is so even if the father has not claimed anything for the seduction and pregnancy.

As to the approach to be used in reducing ilobolo, it is submitted that the court should use the customary law approach of subtracting the monetary equivalent of two head of cattle. Any other approach would in effect deprive the woman of her damages thus making her action at common law futile.

12.4.9 Contraception

Seduction under customary law is today generally actionable if followed by pregnancy, whereas in terms of common law only seduction is actionable and not pregnancy although a woman may claim for lying-in expenses. This means that the person who eventually pays for the seduction under customary law is the bridegroom. With the advent of contraception among blacks it means that pregnancy will only take place when desired. Assuming that a girl who desires pregnancy will neither sue personally nor enable her father to sue, this may spell the death of the action for seduction and

pregnancy in customary law. Yet the practice of contraception has not become totally acceptable among traditionalists. It is mostly non-traditionalists who make use of the "pill". The wide acceptability of contraception will result in women being free "to sin" without the inconvenience of pregnancy, and fathers will receive full ilobolo for their daughters irrespective of their state of chastity.

From the foregoing it appears that the seduction and consequent pregnancy of a woman in Zulu law reduce her ilobolo value. The question may be posed as to whether this is not a justification of the reproductivity theory. In answer to that it may be said that the diminishing of ilobolo may be attributable to the fact that by giving birth to a child her child-bearing capacity, which is the essence of the wife, is diminished. Her "value" therefore as a wife diminishes. This, as was indicated above, is not necessarily a justification of the reproductivity theory.

If one takes as a point of departure that ilobolo is a customary institution, and retains its features to a large extent even though attached to a civil marriage, then it is logical that the lobolo should be reduced when attached even to a civil marriage. It must, however, be pointed out that the correctness of this approach is doubtful. Although this is general practice, there are few instances where Christian Zulus have dispensed with it and delivered full ilobolo even for a woman who had given birth to a child by somebody else. This approach is to be preferred.

12.5 PREGNANCY OF A WIDOW OR DIVORCED WOMAN AND ILOBOLO

Customary Zulu law allows an action for damages not only for seduction but for pregnancy. In the preceding discussion seduction has been used as a term of convenience. In some cases it has been used as a generic term for seduction coupled with pregnancy. In fact it should be reiterated that

the two actions are entirely distinguishable although in practice they have been treated as concurrent. Damages for seduction are claimable only once in the form of ingguthu whereas damages for pregnancy will be claimable for each child born.¹⁴⁰ In this case there may be no seduction because at the time the pregnancy took place the woman may no longer have been a virgin.

The granting of an action for extra-marital pregnancy means that not only will damages be awarded for the pregnancy of an unmarried woman but also of a widow or a divorced woman.¹⁴¹ This is based on the principle that the death of a male partner to a customary marriage does not dissolve the marriage.¹⁴² Similarly if a customary marriage is dissolved by divorce the woman has to revert under the guardianship¹⁴³ of her father in which case he is the person competent to sue.¹⁴⁴ The emancipation of Zulu women has, however, changed this.

Section 137(2) of the Code stipulates that any person having "illicit intercourse" with a divorced woman or widow as a result of which a child is born is liable in damages to the father or guardian of such woman to the extent of one beast for each child born. The use of the phrase "illicit intercourse" creates the impression that intercourse per se between a male and a widow or a divorced woman is a delict. The view held by the appeal court has been that such intercourse unaccompanied by pregnancy is not a delict and, therefore, not actionable.¹⁴⁵ Yet in R v M¹⁴⁶ the court decided that sexual intercourse with an unmarried girl is illicit. Its interpretation of s137(2) is to the effect that only lawful sexual intercourse in terms of customary law is one that takes place between married spouses except in the case of an ukungena union in terms of s162(3) of the Code. The term "illicit" was interpreted as meaning improper or irregular or not sanctioned by law, rule or custom.¹⁴⁷ Of the two decisions the former is preferable.

The Code further provides that if the woman who has borne a

child subsequently marries the father thereof, any payment made shall be deemed to form part of ilobolo demanded for her.¹⁴⁸ This is because the lobolo which the guardian has to receive for her has to be reduced accordingly. It is doubtful whether this should still be so. The provision of the Code that the father or guardian should claim damages for illicit sexual intercourse of a divorcee or widow seems to belong to the mores of a bygone age. The only reason for its retention may simply be for purposes of demonstrating that the right of a person entitled to ilobolo is protected.

12.6 ADULTERY AND ILOBOLO

Adultery is a delict, and the husband is entitled to sue the adulterer for damages.¹⁴⁹ In some areas the husband is entitled to send the wife away to her guardian to fetch a beast for purposes of ritual purification of the homestead. What is important, however, is that adultery committed by the wife in terms of customary law does not necessarily entitle the husband to reclaim ilobolo given for the wife, from her guardian. As long as she has divulged the name of the adulterer, the husband need not divorce her. It is where she conceals the name of the adulterer, and she persists in her adultery that the husband may sue for divorce on the grounds of adultery and reclaim ilobolo.¹⁵⁰

If the husband repudiates the adulterine child, which is free to do, there will be no deduction for that child from the lobolo to be returned. It is only where he does not reject the child that a beast will be deducted for him as well.¹⁵¹

12.7 DEFAMATION AND ILOBOLO

Customary law allows an action for defamation.¹⁵² The question is whether the defamation of a woman will affect ilobolo to be delivered for her, if for instance somebody imputes witchcraft to her or her father.

There is unfortunately no decided case on this point. The only case where there was an allegation to this effect is Biyela v Shamase d a,¹⁵³ but this was not strictly speaking a case involving defamation. It was a case of insult in terms of s 133 of the Code which provides that the impeaching of the chastity of a woman is actionable. In this case it was alleged that defendant by imputing rottenness to the plaintiff's vagina lowered her esteem and consequently her ilobolo value as it implied that she was a person of loose morals. The court rejected this interpretation and held that this was not a question of defamation as defamation in terms of the Code,¹⁵⁴ should involve a malicious statement alleging evil conduct which was not the issue in this case.

It is submitted therefore that an action for defamation will not be regarded as a factor reducing ilobolo to be delivered for a woman.

The above exposition has been concerned with claims which either come from the bridegroom or from the wrongdoer and which are relevant to the lobolo to be delivered for the woman. Although ingquthu beast is not part of ilobolo it is relevant to the question of how much the bridegroom eventually pays in settling ilobolo for his wife. It is thus important to refer to it. Let us refer to payments by the woman's father.

12.8 UKWENDISA BEAST

Although ingquthu beast does not form part of ilobolo, this beast is customarily delivered with ilobolo cattle. It might give a complete picture to deal with some other cattle that are given in connection with a marriage although in this case they pass not from the bridegroom or his guardian, but from the father of the bride. One of these beasts is known as ukwendisa or endisa beast, or umgano beast or inkomo yobhoko¹⁵⁴. This beast or two is usually given by the

father of the girl or relative as a gift.¹⁵⁵ It is also called isigodo, ukuhlambisa beast or ishoba beast and in many cases is given with an eye to the festivities.¹⁵⁶

The Xhosa have a similar beast called ubulunga.¹⁵⁷ The beast among the Xhosa has some ritual significance.¹⁵⁸ As a result it is selected from among the sacred cattle of the bride's ancestors. From the brush of its tail hairs are plucked and fashioned into necklaces which form charms to protect the wife and children from evil spells and the plucking of hairs is a symbolical sacrifice to the spirits. The man has no right in this beast.¹⁵⁹ It is carefully chosen and is preferably a heifer so that it may bear progeny.¹⁶⁰

This beast is not slaughtered unless it is required by the illness of a family member. Nor will it be sold. But generally it mixes with other cattle.¹⁶¹ This particular beast resembles the Roman law dos which came from the woman's father and became the property of the husband although it differs from it and is not connected with ilobolo.¹⁶²

Ubulunga beast has been wrongly equated with the Zulu law beast of ukwendisa.¹⁶³ Although these beasts share some similarity in that they are provided by the father of the woman, they differ in material respects and should not be treated as the same.¹⁶⁴

The custom of delivering ukwendisa or inkomo yobhoko is not recognized in the Code. Yet the Code provides that when a girl enters into a customary marriage, her father may give her goods or cattle, and they become the property of and belong to the house established by the marriage.¹⁶⁵ Although this does not specifically mention the beast by name it implicitly covers it.¹⁶⁶

According to research done among abakwaMkhwanazi at Mpukunyoni it appeared that they do have this practice of giving inkomo yobhoko. This beast, according to them, is merely a gift by the father to his daughter which does have some ritual significance. Yet there is no legal obligation resting on the father to provide it. Moreover, this beast is slaughtered after the celebration of the marriage and does not remain for long.¹⁶⁸ The purpose of slaughtering this beast is to bring the bride as a person under the protection of the bridegroom's ancestral spirits.¹⁶⁹ As a result mbeko beast cannot be regarded as equivalent to the Roman law dos. Informants, however, did mention that the father is free to give his daughter some other beast if he feels like it, but this is different from ukwendisa beast.¹⁷⁰

A few cases have come before the courts relating to this beast. In Vilakazi v Nkambule¹⁷¹ the court held that it was customary among the Zulu in the past and it is to some extent at present that a father or guardian of a bride send one or two head of cattle to the bridegroom's homestead at the time of the marriage. These are regarded as a gift. If two were given, the second would be ishoba. Mgano is another name for mbeko. According to the court, Zulu law never imposed a legal obligation on the father to provide the beast. It was entirely dependent on him.

The cattle known by the various names isigodo, mbeko, endisa become the property of the bride's house and fall under the control of the husband.¹⁷² These cattle have been regarded by the courts as a form of dowry, which is not quite correct. It has been pointed out above that a father could give his daughter a beast or two for "milking purposes". But these should be distinguished from mbeko beast. Furthermore, there is no custom whereby the father of the bride offers endisa cattle to the bridegroom's father on condition that more ilobolo cattle in excess of the number to which he is

legally entitled, be given to him. Any cattle given are "an out and out gift".¹⁷³

Where a dispute arises about a beast given to a woman for milking purposes and the beast has increased, the presumption is that it was a gift and not a loan.¹⁷⁴ It is unusual for a beast given to enable a wife to drink milk at her husband's family home to remain the property of the giver.¹⁷⁵ The beast accrues to the house to which she belongs.¹⁷⁶ The giving of ukwendisa beast is gradually disappearing for several reasons.¹⁷⁷

It is important to distinguish between the hlambisa beast and the mbeko beast. The first one has nothing to do with festivities, but it is aimed at enabling the woman to obtain articles for ukuhlambisa or ukugezisa (literally meaning to enable one to wash) or ukwaba (to distribute gifts). This practice consists of the giving of a number of articles of various sorts by the bride to her parents-in-law and close relatives.¹⁷⁷ It underlies the reciprocity that permeates Zulu law. Even the words used for this practice are quite significant. The words ukuhlambisa or ukugezisa are connected with the Zulu saying that izandla ziyagezana, literally meaning that hands wash each other, figuratively meaning that good deeds are reciprocated. In the context of the marriage gifts, it means that because the bridegroom has done a good thing by delivering ilobolo, the bride must do likewise. It is also an expression of goodwill by the bride to her in-laws.

At the celebration of the marriage the bride has to make these gifts to the relatives of the bridegroom. Sometimes the father gives his daughter a beast or two to cover expenses on ukwaba.¹⁷⁸ It is this beast which has been confused or equated with inkomo yobhoko. In Vilakazi v Nkambule,¹⁷⁹ for instance, it was held that mgano is another name for mbeko. In addition the court said that hlambisa

may be a beast or may consist of money and articles such as mats, given to the bride by her father, her relatives and friends. The last view is correct.

Although there is no legal obligation on the part of the bride to hlambisa, and although there is no fixed custom as to the amount of such umabo, there is a strong customary obligation to do so.¹⁸¹ Should she omit to do that it will be regarded as a disgrace. The practice differs from place to place. In some cases, however, umabo may be dispensed with.¹⁸²

12.9 ILOBOLO AND OTHER MARRIAGE EXPENSES

Besides umabo and other gifts, the practice among traditionalists and non-traditionalists is that after the delivery of ilobolo, the woman will ask for money from her father to buy furniture and other articles. Thus, the father is expected to provide his daughter with a trousseau, furniture, household utensils and crockery.¹⁸³ Besides this, among the traditionalists a woman pays a visit to her relatives to cimela, to bid farewell to her relatives and to be presented by them with various types of gift.

Because of the spirit of competition and because of inflation, the father may have to pay more than what he receives, as a result of marriage expenses.¹⁸⁴ Thus if the father of the bride demands R1 000 as ilobolo it might at a glance appear to be too high an amount, but it is actually not much considering the expenses which have to be incurred by the father, and the property so bought will be given to the wife. As a result the whole exercise amounts to receiving property with one hand and giving it back with the other. This is why some traditionalists insist that ilobolo should be settled in livestock rather than in cash. Yet demanding livestock may be too costly for the bridegroom. This is off-set by the fact that the whole lobolo is not delivered at

once. Moreover, most women work and may buy some of the property from their own income.

Because of the futility of receiving property with one hand and giving it back with the other, some parents try to arrive at an equitable settlement with the bridegroom. They simply ask him how much he can afford, and instead of asking him to give that as a conventional ilobolo, they request him to use a certain portion to buy household goods and use the balance for wedding expenses. The father of the woman then contributes towards wedding expenses. This practice is simple and equitable. Yet it lacks the customary flavour and is not yet acceptable among traditionalists.¹⁸⁵ In this sense ilobolo assumes the nature of a marriage settlement. It is submitted that more and more people will adopt this approach. This will be facilitated by the disappearance of the traditional religion. As it was pointed out above, the bridegroom may bargain (through abakhongi) with his parents-in-law by offering that they should not buy furniture and goods for umabo thereby inducing them to demand a lower amount of money as ilobolo.

From the foregoing, it is clear that just like in later Germanic law, a customary right has developed whereby a woman receives a portion of ilobolo as a form of dowry. With this she buys goods which fall under the control of the husband. This means that there is no profit which the father of the woman makes from ilobolo received.¹⁸⁶ Above that it means that the man receives part of ilobolo back. This ought to be taken into account when ilobolo is reclaimed on divorce.

12.10 SUMMARY AND CONCLUSION

A number of payments connected with ilobolo, although they are not part of it, either reduce or increase ilobolo eventually to be settled by the bridegroom depending on who gives the demands. Thus izibizo increase the amount to be paid by the bridegroom, but ukuhlambisa and the purchase of

goods by the wife reduce it.

The ngquthu beast occupies a position of its own. It enables a woman to receive something for her daughter. It is definitely a remarkable recognition of the contribution of the mother in the upbringing of her daughter. The payments connected with ilobolo should be kept within limits so that they do not discourage marriage. When the marriage is dissolved they ought to be taken into account in determining the amount of ilobolo to be returned. In fact the return of ilobolo may amount not to a return of ilobolo at all, but a penalty to the father of the woman if these payments are not taken into account. Although in the past the return of ilobolo was justifiable, today it has become economically unjustifiable and logically untenable especially in a civil marriage. Its return in the context of a civil marriage is only attributable to the courts' treatment of ilobolo as a purely customary institution even when attached to a civil marriage.

FOOTNOTES

1. CM Doke & BW Vilakazi Zulu-English Dictionary (1964) 80; see also JC Bekker Zulu legal terminology (1978) 4.
2. Vilakazi (1962) 64.
3. Vilakazi idem 63; Krige (1974) 130; Sibiyi 193.
4. Vilakazi ibid.
5. HP Braadvedt "Zulu marriage customs and ceremonies" 1927 South African Journal of Science 553; Whitfield 121.
6. 121.
7. ibid.
8. Vilakazi 63; Msimang 267.
9. Msimang ibid.
10. Vilakazi 65. He therefore rejects the view of Reader that these gifts are sporadic. He points out that throughout the negotiations these gifts are anticipated because they are institutionalized and reciprocal.

11. Vilakazi 63; E J Krige & J D Krige The realm of the Rain-Queen (1947) 63.
12. De Clercq 238 mentions examples to illustrate this.
13. For similar examples see Sibiya 196.
14. s95(2) of the Code; s70(S) of KwaZulu Act.
15. Vilakazi 63-64.
16. Report of Select Committee 40.
17. s70(5) of KwaZulu Act.
18. Zuma v Sibiya 1923 NHC 60.
19. Mkize v Mkize 1941 NAC (N&T) 125.
20. 1938 NAC (N&T) 164.
21. Mkize v Mkize 1941 NAC (N&T) 125.
22. This was in the case of exceeding the amount of ilobolo prescribed in s87, but applies equally to izibizo.
23. Nzimande v Dhlamini 1935 NAC (N&T) 18; Shoyisa v Dhlamini 1953 NAC (N-E) 9.
24. S 96(1) of the Code; s71(1) of KwaZulu Act.
25. Olivier et al 150; Krige (1974) 13; Bekker & Coertze 340-341; Sibiya 228.
26. Breytenbach 133; De Clercq 226 et passim; Reader 189; Sibiya 228 et seq; Other black tribes refer to it as mqoba, sidwangu; isihewula or ndzadze - Bekker & Coertze 340.
27. s96(5) of the Code; s71(5) of KwaZulu Act.
28. S 84 of the Code; Qulo v Qulo 1940 NAC (N&T) 4; Ngcobo v Kumalo 1942 NAC (N&T) 47; Sibiya v Sibisi 1946 NAC (N&T) 60; Mlaba v Mvelase 1951 NAC (N-E) 314; Radebe v Bhengu 1954 NAC (N-E) 126; Mpungose v Shandu 1956 NAC (N-E) 180; Ndlovu v Phetha 1964 BAC (N-E) 101; Mbanjwa v Mbanjwa 1964 BAC (N-E) 122; Khanyile v Zulu 1966 BAC (N-E) 122; Ndebele v Ndebele 1971 BAC (N-E) 70; Myende v Chiliza 1973 BAC (N-E) 304.
29. De Clercq 226; Sibiya 230 et seq.

30. Reader 189; De Clercq 226.
31. Bradley 81 rightly points out that among the Mandlakazi there is a difference between the umqholiso beast and the ngquthu one.
32. Sibiya 230; HS Schoeman "A preliminary report on traditional beadwork in the Mkhwanazi area at Mtunzini district" 1968 African Studies 273.
33. De Clercq 227; Sibiya 232.
34. De Clercq 227.
35. Zulu v Mhlongo 1951 NAC (N-E) 302.
36. Sibiya 231.
37. De Clercq 227.
38. At 158.
39. Krige 131-2; Bradley 80.
40. Bekker & Coertze 341.
41. De Clercq 227. This is the idea which he got among abakwaMzimela.
42. 232-233.
43. Nomcimbi v Vayivayi 1921 NHC 1; Mbutho v Cele 1977 ACC (N-E) 247.
44. Bradley 81.
45. s96(1) & (2) & (4) of the Code; Mbutho v Cele 1977 ACCC (N-E) 247.
46. s96(3) of the Code; Ngcobo v Kumalo 1942 NAC (N&T) 47.
47. Ngcobo v Kumalo 1942 NAC (N&T) 47.
48. Ndhlovu v Phetha 1964 BAC (N-E) 101.
49. Msweli v Hlekwayo 1941 NAC (N&T) 119.
50. s96(2) of the Code; Sibiya v Sibisi 1946 NAC (N&T) 60.
51. s96(3) of the Code.
52. Mbuyisa v Ntombela 1939 NAC (N&T) 93.
53. Zulu v Mhlongo 1951 NAC (N-E) 302.
54. Zulu v Mhlongo 1951 NAC (N-E) 302; Mhlaba v Mvelase 1951 NAC (N-E) 314.

55. Mhlaba v Mvelase 1951 NAC (N-E) 314.
56. Radebe v Bhengu 1954 NAC (N-E) 126.
57. Khanyile v Zulu 1966 BAC (N-E) 35.
58. Qulo v Qulo 1940 NAC (N&T) 4; Mbanjwa v Mbanjwa 1964 BAC (N-E) 122.
59. Mbanjwa v Mbanjwa 1964 BAC (N-E) 122.
60. Ndebele v Ndebele 1971 BAC (N-E) 70.
61. Sibiya v Sibisi 1946 NAC (N&T) 60.
62. Mbutho v Cele 1977 ACCC (N-E) 247; In Zuma v Sokele 1929 NAC (N&T) 159 it was held that it is undesirable that the woman herself should sue for the beast although it does happen in some cases: Se also Dhlalisa v Mdhlalose 1952 NAC (N-E) 24; Biyela v Mfeka 1953 NAC (N-E) 119.
63. Ndebele v Ndebele 1971 BAC (N-E) 70.
64. AC Myburgh "Reflections in delict among the South African Bantu" 1969 Ethnological and linguistic studies in honour of NJ van Warmelo 145; AC Myburgh "Die persoonlikheidsreg by die Suid-Afrikaanse Bantoe" in JF Eloff & RD Coertze (ED) Etnografiese studies in Suidelike Afrika (1976) 182.
65. Myburgh (1969) 148.
66. Myburgh (1969) *ibid.*
67. Myburgh (1969) 146; J Church "Guardianship as an incident of customary law of parent and child" 1979 CILSA 326.
68. LP Vorster "Die meerderjarige vrou in die Transkei" 1975 Codicillus vol 16 27-30; Church (1979) 327.
69. LCJ Maree "Observations on delict in Zulu law" 1980 IPSVT Bulletin vol 4 no 2 28; Church 327.
70. Neufield 100-106.
71. Deutoronomy 22: 28-29.
72. HHJ Marwede and GG Mamabolo Shall ilobolo live or die? (1945) 12.
73. PJ Schoeman "Gevalle van onwettige bevrugting by die Zoeloe" 1940 Annale van die Universiteit van Stellenbosch 19.

74. Stander v Rudy 1908 EDC 7; Mc Donald v Stander 1935 AD 325.
75. Sanicharee v Madho 1956 2 SA 94 (N); F P van den Heever Breach of promise and seduction (1954) 42.
76. Bekker & Coertze 339. This is also the position among the Pondo and the Tsonga.
77. Bekker & Coertze ibid.
78. Schapera (1955) 264; J L Comaroff & S Roberts "Marriage and extra-marital sexuality: the dialectics of legal change among the Kgatla" 1977 Journal of Africa law 100.
79. De Clercq 216; Olivier et al 255.
80. De Clercq 221-2.
81. S 11(1) of Act 38 of 1927.
82. 1972 BAC (N-E) 66.
83. Simons (1968) 228; Gatebe v Selepe and Another 1948 NAC (C) 39; Dhlalisa v Mdhlalose 1952 NAC (N-E) 24; Biyela v Mfeka 1953 NAC (N-E) 119.
84. S 137 of the Code.
85. De Clercq 218.
86. S 96 of the Code.
87. S 137 (1) of the Code; s102(1) of KwaZulu Act.
88. Mcunu v Mapumulo 1943 NAC (N&T) 53.
89. Nxumalo v Nzuzza 1936 NAC (N&T) 36.
90. Kambule v Kunene 1932 NAC (N&T) 18.
91. Dhlamini v Sibeka 1939 NAC (N&T) 80.
92. Simons (1968) 229.
93. Ex parte Minister of Native Affairs : in re Yako v Beyi 1948 1 SA 388 (A).
94. Kumalo v Zungu 1969 BAC (N-E) 18.
95. Mbube v Mdibaniso 1943 NAC (C&O) 29; Olivier et al 266; Bekker & Coertze 339; on Germanic law see P Pauw "Aspekte van seduksie" 1978 De Jure 78.

95. (a) M Lupton "The Natal Code of Bantu law - a legal dinosaur" 1978 SALJ 152-5.
96. Msonti v Dingindawo 1927 AD 531.
97. De Clercq 229.
98. S 87 of the Code.
99. Proviso to s 137(1) of the Code.
100. Proviso to s 137(1) of the Code; see also Mtembu v Mngwaba 1940 NAC (N&T) 67.
101. De Clercq 225.
102. 1948 NAC (N&T) 12.
103. Nxumalo v Nzuzwa 1936 NAC (N&T) 36; Mseleku v Majola 1937 NAC (N&T) 67; Mcunu v Mapumulo 1943 NAC (N&T) 53.
104. Kambule v Kunene 1932 NAC (N&T) 18; Nkuta v Maakane 1943 NAC (N&T) 47; Mcunu v Majola 1943 NAC (N&T) 53.
105. Mcunu v Mbatha 1943 NAC (N&T) 62.
106. Ntuli v Xulu 1945 NAC (N&T) 95.
107. Yapi & Yapi v Mququ 1974 BAC (S) 398.
108. Simons (1968) 230.
109. 1979 ACCC (N-E) 250.
110. 1979 ACCC (N-E) 220 cf Buthelezi v Vilakazi 1927 NHC 40.
111. De Clercq 225-227.
112. Sibiya 232-3.
113. Sibiya 149.
114. Mbutho v Cele 1977 BAC (N-E) 247.
115. S 137 (1) of the Code; s102(1) of KwaZulu Act.
116. De Clercq 225.
117. Mvemve v Mkatshwa 1950 NAC (N-E) 284; Mkize v Makatini 1950 NAC (N-E) 207.
118. Yapi & Yapi v Mququ 1974 BAC (S) 398; Jama v Sikosana 1972 BAC (S) 21; Olivier et al 266.

119. Jeni v Jaca 1953 NAC (N-E) 31.
120. Mokgohla v Senomadi 1951 NAC (N-E) 325.
121. Kanye v Ngubane 1938 NAC (N&T) 147.
122. Mnyapa v Hlongwane 1933 NAC (N&T) 26; Mgbade v Zuma 1949 NAC (N-E) 128.
123. R G McKerron The law of delict (1970) 162.
124. Botha v Peach 1939 WLD 153.
125. McKerron 162; N J van der Merwe & P J J Olivier Die onregmatige daad in die Suid-Afrikaanse reg (1980) 461-2.
126. Pauw 84-5.
127. Bekker & Coertze 47.
128. Olivier et al 243; C Bekker & Coertze 53 footnote 68.
129. Gwayi v Gwija 1 NAC 235 (1909); Vilapi v Molebatsi 1951 NAC (C&O) 8; Kumalo v Zungu 1969 BAC (N-E) 18.
130. Yapi & Yapi v Mququ 1974 BAC (S) 398.
131. G Seymour Wood "Olivier: Die privaatreë van die Suid-Afrikaanse Bantoe" 1968 Speculum iuris 69-70.
132. On the action for isondlo in customary law see Hlengwa v Maphumulo 1972 BAC (N-E) 58. This decision has been criticised for being a radical departure from the customary law idea of isondlo and equating it with common law maintenance - T W Bennett "Maintenance of minor children : a problem of adapting customary law to meet social change" 1980 Acta Juridica 121 et seq; Bekker & Coertze 241-242.
133. Proviso to s 137(1) of the Code.
134. Fuzile v Ntloko 1944 NAC (C&O) 2.
135. Hlengwa v Mpahumulo 1972 BAC (N-E) 58.
136. Proviso to s 37(1) of the Code.
137. Kumalo v Zungu 1969 BAC (N-E) 18.
138. Hahlo (1975) 29-33.
139. Sibiya 160.

140. Proviso to s 137 (1) of the Code.
141. S 137 (2) of the Code.
142. Olivier et al 319; Mönnig 205; Schapera 167.
143. This is because she remains a minor even after divorce - s 27 of the Code; s16 of KwaZulu Act has changed this.
144. Kumalo v Zungu 1969 BAC (N-E) 18.
145. Shange v Mpofu 1942 NAC (N&T) 29.
146. 1949 4 SA 975 (N).
147. For a criticism of this interpretation see Olivier et al 322.
148. S 138 of the Code.
149. S 138 of the Code.
150. Olivier et al 162-3.
151. Olivier et al ibid.
152. S 132 of the Code.
153. 1977 ACCC (N-E) 258.
154. Ntamane v Nkosi 1935 NAC (N&T) 20; De Clercq 276; Olivier et al 146.
155. Olivier et al ibid.
156. Mtshali v Mhlongo 1944 NAC (N&T) 71; Vilakazi v Nkambule 1944 NAC (N&T) 57.
157. Olivier et al 146; Koyana 46; see also D S Koyana "The legal significance of the ubulunga beast" 1974 Speculum iuris 3 et seq; Bekker & Coertze 147 et seq; Whitfield 105 et seq; Van Tromp 52.
158. Koyana (1980) 47; Olivier et al 146; Hunter 235; Van Tromp 53; Stafford and Franklin 179-80.
159. Stafford and Franklin ibid.
160. Olivier et al 66; Bekker & Coertze 140; Van Tromp 53.
161. Koyana 48.
162. Koyana idem 49.
163. Bekker & Coertze 141; Olivier et al 146.

164. Koyana (1980) 51.
165. S 107 of the Code.
166. Olivier et al 147.
167. Olivier et al 147.
168. They hold the view that if it remains for very long it might give rise to disputes.
169. De Clercq 276.
170. Bradley 81 says that among the Mandlakazi this beast is known as umqholiso beast and is given to the bride as a parting gift. Among other tribes it is usually slaughtered in the father's homestead before the wedding.
171. 1944 NAC (N&T) 57.
172. Mtshali v Mhlongo 1944 NAC (N&T) 71; Butelezi v Mtetwa 1952 NAC (N-E) 22.
173. Mtshali v Mhlongo 1944 NAC (N&T) 71.
174. Masikane v Masikane 1936 NAC (N&T) 63.
175. Ntamane v Nkosi 1935 NAC (N&T) 20.
176. Shezi v Zungu 1957 NAC (N-E) 142.
177. Soga 283.
178. Soga ibid.
179. 1944 NAC (N&T) 57.
180. Vilakazi v Nkambule 1944 NAC (N&T) 57.
181. Mdakane v Kumalo 1938 NAC (N&T) 219; Qwabe v Qwabe 1940 NAC (N&T) 15; See Olivier 82.
182. This may take place because of an understanding between the bridegroom and the bride. In some cases the bridegroom may suggest this so that his parents-in-law may not be too high in their demand for ilobolo.
183. Soga 283.
184. Vilakazi 67 gives two examples of such cases which confirm that ilobolo which the father may receive may be very little taking into account the expenses he has to incur.

185. It is some non-traditionalists who have adopted this approach.
186. Simons (1968) 92.

CHAPTER XIII

ILOBOLO : PAST, PRESENT AND FUTURE

13.1 INTRODUCTION

It has already been reiterated that any meaningful development of customary law should take cognizance of the past, present and future.¹ In considering the past, present and future of ilobolo, it is sought to isolate a few agents of change and put them under a magnifying glass, and to determine to what extent the contents of the "oughts" of contemporary customary law have been moulded by the past.² To forecast the possible future of an institution like ilobolo therefore depends on an analysis of the present forces that are working within the black community.

From the above exposition it is obvious that the custom of ukulobola has undergone change for various reasons. It has adapted itself to the changed circumstances and the mores of the people that observe it. Although in some respects the law has been updated to reflect the present trends, in others it has not. A few agents of change which have been instrumental in fashioning the practice of ilobolo should now be considered. These include the practice of the people, legislation and judicial decisions.

13.2 THE PAST

Ilobolo is an old custom of the Zulu people which they practised even before the white encounter. After contact with whites it had to weather many storms. Yet it could not remain unaffected by the new lifestyle brought about by westernization.

13.2.1 The people

The people themselves are a creative source of law.³ By their customary practices they make or unmake law. As Allott⁴ puts it, "custom has a sustaining role as well as a creative one: if a customary norm ceases to be sustained by the habitual practice of the people, it will fall into desuetude or change its legal character".

In following or ceasing to follow a particular custom, people may be influenced by a number of factors. The chief factors which have influenced the Zulu people in their practice or attitude towards ilobolo may be regarded as economic, social, educational and religious. These factors have changed the value system of the Zulus, and their practices have changed accordingly. The change, needless to say, does not go according to a fixed pattern, but depends on the degree of acculturation and value system of the individual. Values are not facts but concepts which are imposed on particular facts. The impact of these considerations can be seen on the attitude of the people to the function of ilobolo. It was noted above that a number of new functions have been attributed to ilobolo.⁵ For instance ilobolo has inter alia been regarded as a form of compensation for the loss of the woman which the parents have suffered, or alternatively, for the expenses they have incurred in her upbringing. This argument was criticised above as being a deviation from the original significance of ilobolo. But the question is whether it is desirable that ilobolo should be regarded as a form of compensation.

The view that is adopted here is that there is nothing wrong with change in the institution of ilobolo because it must in any case take its shape from the practices of the people. If the attitude and practices of the people change, it obviously ought to change, otherwise it becomes obsolete. It is, however, undesirable that ilobolo should become a

form of compensation because of another consideration. If ilobolo is taken as an ordinary requirement of a marriage, and in most cases it is not regarded as such, then it should not impede marriage. Making it a form of compensation obviously implies that it will be too high an amount. This will mean that the bridegroom will be unable to settle it. As a result it will tend to frustrate marriage. Discouraging marriage leads to illicit unions, illegitimacy and immorality. That is destructive of the society. No law should not encourage that.

Another change which has been effected by the practice of the people due to the change in the economic set up is the use of money as a medium of ilobolo. The social and legal implications thereof have already been adverted to, but what is important to state here is that this practice has even been entrenched by legislation and judicial decisions. The change to money has been necessitated by the unavailability of cattle while cash is available, and urbanisation. The change in the religious belief of the people has also facilitated this.

The change in the religious belief of the people has also altered the views on the significance of this institution. Thus instead of its being a religious symbol for the cementing of the relationship between the two family groups, it has become simply a material consideration which is valued for what it is although it still retains its symbolical character. The materialistic attitude has therefore inflated it. This has also been exacerbated by the element of taking into account the educational qualifications of the woman particularly among non-traditionalists. Yet the courts have not confirmed this practice. This tendency is suspect and it will not enjoy widespread practice because it turns ilobolo into a "real price" for the woman.

The increased individualism brought about by westernization has also weakened kinship ties and caused ilobolo to be the main concern of the bridegroom, rather than of the kin.⁶

Although the settlement of ilobolo for a son by a father in traditional black society has been justified on the grounds of shared rights and obligations, it was in fact based on practical considerations. Its basis, it is submitted, was also economic. There would be no sense in demanding ilobolo from the son who was not working and consequently who could not acquire personal property. It was only sensible that the father, partly because of his power of guardianship and partly because of his "ownership" of property, be responsible for settling ilobolo for his sons' first wives.

Although ilobolo was earlier criticised on religious grounds, there is no evidence that this was based on sound scriptural authority. What is important, however, is whether Christianity can be said to have altered the views of the Zulu people on ilobolo. Judging from the continued popularity of ilobolo even among Christian Zulus, it can be said that Christianity has not diminished the popularity of ilobolo. It may have changed the religious character of this institution in that although Christians demand ilobolo, they do not regard it as validating the marriage in a religious sense, but it has definitely not discouraged it.

More examples of the change in ilobolo effected by the people may be mentioned, but the above suffice in illustrating the fact that ilobolo is a dynamic institution. This tendency to be modernised accounts for the continued delivery of ilobolo even under changed conditions. The blacks' disillusionment with rapid westernization and the consequent erosion of the black institutions may be responsible for the blacks' retention of certain customary institutions like ilobolo. It gives them a sense of pride in their cultural heritage.

13.2.2 Legislation

Although the above discussion has dealt with people as makers of law, it has dealt with them in only one aspect, namely where they create law by their actions and practices. There is also the overt aspect of making law by legislation. This may even modify custom or it may be an express recognition of custom. In this way the law is made more certain,⁷ and there is a greater possibility of the uniform application of the law. Although this is so, in a rapidly changing society like the black society, to have rigid rules that will be applied uniformly, may not be equitable. What is essential is to individualise the claim and the law applicable in a particular case in accordance with the reasonable expectations of the parties. This may lead to the attainment of better results than the striving after legal certainty.

The transition from customary law to legislation is important in any changing society. Customary law is by nature conservative because it places emphasis on traditional relatively static patterns of behaviour. Those subject to it act as their forefathers did. This, as it has been shown above, does not mean that customary law is immutable, but what it means is that the change may be slow unplanned and devoid of any rational understanding of the requirements for a change in conditions.⁸ This results in legal rules that are uncertain, diffuse, static, lacking in effectiveness in application and being ill-adapted to the society because of lack of "planned, rational, reflective articulation and alteration of norms".⁹

In early Zulu society reliance was mostly not placed on overt legislation in adapting ilobolo to changed conditions. This was largely because in various ways the society itself was a law-maker. As a result legal rules would have to be sufficiently acted upon before invoked or formulated by

those who had the authority to enunciate them. The result was that people participated in the making of the law. This in turn strengthened the law because of the actions of those who had to comply with the law. Thus, those in authority had merely to enunciate the law, and not to impose on the Zulus their personal views.¹⁰

This is particularly important. The coming of whites and the exercise of authority over blacks resulted in a sharp cleavage between the government and the governed. This meant that although the customary law would continue to apply, it could not be applied by people who had expert knowledge of the law. This also applied to legislation.

As is well known, the chief piece of legislation relating to ilobolo is the Code. What was included in the Code did not necessarily always reflect the practices of the people. This obviously means that what the written law was would differ from the law as practised by the people. A few examples of the aspects of ilobolo which have been modified by legislation will be mentioned.

It has been said above that ilobolo was originally not fixed, but dependent on the ability of the bridegroom. Today it is, of course, fixed by legislation.¹¹ The impression must not, however, be given that every legislative modification of ilobolo has been ineffective. The fixing of the number of ilobolo has been definitely effective in practice. So effective has it been that it has been attributed to the Zulu king Cetshwayo.¹² From empirical research it appeared that people observe this limitation. The compliance is facilitated by the fact that people regard it as reasonable.

A legislative modification that has not been entirely successful is the exclusion of ilobolo from the essentials of a customary marriage.¹³ Practice in this respect obviously differs from the letter of the law. Another

provision of the Code which has not been effective, is that of prohibiting the payment of izibizo.¹⁴ Even the provision that ilobolo payable before the celebration of the marriage is treated as ukusisa, is seemingly an innovation that was brought about by legislation.

The discrepancy between written law and practice is the product of various factors. The law that is made may not comply with the needs and demands of the society. As law cannot compel action, but merely persuades a person to a particular course of action,¹⁵ it means that even in the face of a sanction a person may contravene the law. Although some of these innovations may succeed, many of them may fail. As a result they weaken the law of which they form part.¹⁶

There is also a great temptation in some modern societies for the legislator to be at odds with the people for whom he legislates. This results in the imposition of his own ideas on the societies rather than expressing the legal views of the people in legislative form. Thus, the abolition of the customary marriage and the substitution therefor of the western family system was not entirely successful in the Ivory Coast.¹⁷

Another cause of lack of compliance with written law is the inability of the people to know what the law is. It was discovered from research that people are ignorant of many provisions of the Code relating to ilobolo. As a result they continue to follow their customary practices even if these deviate from the black-lettered law. This was not the case in early Zulu society as the law was known by almost all the older members of the society because they were initiated into the law and participated in the making thereof. Today, however, the society has become complex. The effective transmission of the legal message is consequently difficult. A recent survey has demonstrated that not only in

black society, but even in the South African society in general, ignorance of the law is endemic.¹⁸

In short this means that a number of changes have been effected to ilobolo by legislative innovation. Whether these modifications have been effective depends on whether they are based on the changes that comply with the views and aspirations of the people. Those modifications which are out of step with the views and aspirations of the people become a dead letter. The only time when they are activated is when a dispute comes before the courts. The courts obviously have to apply the law as it is laid down.

13.2.3 The decisions of the courts

Although the law may be customary or statutory, its practical application is effected by the courts in the event of a dispute. Although the courts have disclaimed any competence to make law,¹⁹ their role in interpreting and modifying law may be important in that they may be influenced by popular views on what the law is or ought to be. In addition there is the realist view that law is what the courts will apply in practice.²⁰

Courts that apply customary law may be classified into customary courts and statutory courts.²¹ The rules that apply to these courts differ. Whereas the commissioners' courts and appeal courts for the commissioners' courts are bound by the stare decisis rule, for the chiefs' courts this is ineffective. The judgments of the appeal court may not even reach the chiefs, and even if they reach them, they may be utterly meaningless for them owing to the technicality and complex reasoning of western legal judicial officers.²²

The main indictment which has been levelled against courts charged with the duty of applying customary law has been that they tend to be less innovative, and hence apply rules that

are obsolete in the name of customary law.²³ The underlying reason is that courts follow the stare decisis rule, and tend to avoid adopting a creative function which may create uncertainty in the law, or which may be construed to be a usurpation of the legislator's function.²⁴ As a result they have been reluctant to adapt customary law to the changed social and economic circumstances. This has led to the fossilization of customary law in important respects which is counter-productive for people who are undergoing rapid social change. For this reason it has been strongly advocated that the courts applying customary law should not necessarily follow the stare decisis rule,²⁵ but that they should assume a creative role so that they can bring customary law in line with modern conditions.²⁶ This need not be done by legislation, but should be regarded as immanent from the very nature of their function of having to apply law that is in transition. Moreover, the argument runs, the objection that courts are not makers of law is merely theoretical.²⁷ South African courts do make law by interpreting, widening or narrowing the scope of an existing rule or even declaring it to be abrogated by disuse.²⁸

Courts in general regard their function as ius dicere and not ius facere.²⁹ Indeed this is their primary role. Yet in applying the law the courts, do have a measure of discretion. Lord Reid³⁰ portrays this in the following metaphoric tones:

"There was a time when it was thought almost indecent to suggest that judges make law - they only declare it. Those with a taste for fairy tales seem to have thought that in some Alladin's Cave there is hidden the Common law in all its splendour and that on a judge's appointment there descends on him knowledge of the magic words Open Sesame ... But we do not believe in fairy tales anymore".

In the words of Lord Denning³¹

"the judges lay down the law under the thinly veiled pretence that they are not making law".

Although it is admitted that judges do make law, their role in law-making is not unlimited. As Hahlo and Kahn³² put it:

"... it is only in a secondary sense that a judge makes law. He fashions it as far as possible out of materials at hand. He does not conceive himself as having, like Parliament, a tabula rasa, a blank sheet on which he may write as he wills. By training and tradition he damps down the law-creative side of his activities".

In a similar vein Kahn³³ observes:

"The judiciary acknowledges that, in a secondary sense, it does make law. It does not regard itself as having a blank sheet on which to write its unrestrained will; it fashions a rule within the fabric of the existing law, taking into account, as it considers fit, desiderata such as apt analogies, logic, justice, equity, social utility and trends, public and individual interests, current moral standards, common sense, equality, freedom of the individual, good international relations and persuasive material from other legal systems and legal writers of repute. Courts of law are never beyond the age of childbearing, but they wish to produce legitimate offspring".

Kemp's³⁴ observation is equally instructive:

"Die realistiese erkenning van die regskeppende rol van die houe beteken geensins dat die beginsel vervat in die spreuk jus dicere non jus facere, tot 'n blote brutem fulmen gereduseer is nie. Regskepping moet deur 'n uitbouing en verfyning van die fundamentele beginsels van die betrokke regstelsel geskied. Die houe het nie die bevoegdheid om erkende regsbeginsele oorboord te gooi en met nuwe beginsels te vervang nie, veral nie in 'n geval waar sodanige stap verrykende beleidsimplikasies het nie".

Although it is contended that the courts applying customary law should be creative, this cannot be done arbitrarily, but it has to comply with certain minimum requirements otherwise it would cause an uncertain state of affairs. These requirements are: that there must be sound knowledge of

customary law for its correct interpretation; it must be acceptable for that community; there must be an inquiry as to the changes in the rule concerned as well as its flexibility and adaptability to the needs of the people to whom it applies, and it must be ensured that the rule will create stability by the individual's compliance therewith.³⁵

This approach is commendable because it will eliminate rigidity in the law, and ensure that the "living law" of the people receives judicial confirmation. The emphasis placed on the suitability of the officers applying customary law is also to be commended because another criticism which has been levelled against officers applying customary law has been that they are ill-equipped for the task they have to perform.³⁶ Without an intimate acquaintance with the law they have to apply, as well as the social and economic background of the litigants, it is natural that they should seek shelter behind the stare decisis rule. This creates the impression that customary law is fundamentally different from western law and is incapable of growth and adaptation whereas this is not so. Both systems deal with comparable matters in various fields.³⁷ In fact even the judgments of the appeal court for commissioners' courts have been criticised for being short and unsatisfactory³⁸ as against the elaborate and analytical judgments of the South African judges.³⁹ But this objection may not be serious as a judicial officer can give sufficient reasons for his decision or adapt the law to new situations in a short judgment.⁴⁰ What is important is a thorough grasp of the issues involved and the law applicable.

Failure on the part of the court to adapt the law to the new environment may lead to a difficulty of determining when judicial or popular disregard of a customary rule means that it has been abrogated by disuse, and loses therefore the force of law.⁴¹ Yet the advantage of judicial creativity is that it maintains the characteristic of legitimacy,

namely that the law is accepted by those to whom it is applied,⁴² and although it may provide for new needs it may not lose the character of being a rule of customary law.

Although judicial creativity is encouraged, it cannot be regarded as the panacea for all the problems of customary law. Although judicial law-making has decided advantages, it suffers from some limitations. These limitations are that a court can only declare the law applicable to the facts before it. As a result its legislative function is ad hoc, and its development of the law is therefore haphazard and lacking in uniform planning. It may also take time before a principle can be regarded as settled by judicial decisions.⁴³ Yet, before the radical overhauling of the law by legislation, the decisions of the court may help in developing the law. The imposition of this duty on the courts applying customary law means, as has been said, that they are charged with a greater responsibility than that of the other courts.⁴⁴

Despite the existing defects, it has been said that the courts applying customary law have performed "a heroic deed under challenging and trying circumstances".⁴⁵ For this reason it is necessary to look at the approach of the courts in actions involving ilobolo claims.

A single factor which has been responsible for the modification of ilobolo by the courts is the incorporation of ilobolo in a Christian or civil marriage. Although the courts had earlier on adopted the view that ilobolo was per se contra bonos mores, it was decided quite early that ilobolo attached to a civil marriage is not contrary to public policy.⁴⁶ Although the legal position of ilobolo attached to a civil marriage was quite controversial, the view held at the moment is that it is entirely ancillary to a civil marriage, and its principles will be modified by the principles of a civil marriage if they are contrary to those

of a civil marriage.⁴⁷ The courts have therefore used the principles of a civil marriage in "civilizing" ilobolo. Thus the rules for the return of ilobolo on divorce have been modified by those of a civil marriage;⁴⁸ the enforcement of ilobolo is also by way of court action; the guardianship of children has also been held to be governed by common law, and not by customary law in the case of a civil marriage despite the delivery of ilobolo,⁴⁹ and the lobolo has also to be delivered for a valid marriage. If delivered for a marriage concluded during the subsistence of a valid civil marriage, it is not refundable if that purported marriage is annulled because of the operation of the par delictum rule.⁵⁰

Courts have also shown willingness to depart from a custom in the fixing of ilobolo. Thus, in a case that originated from the Transvaal the court was prepared to limit the number of ilobolo cattle to ten despite the non-applicability of the provisions of the Code in the Transvaal. The underlying reason was to prevent ilobolo from being commercialised and so exploited.⁵¹

On the negative side it may be pointed out that the courts have refused to recognize an action for breach of engagement on the ground that customary law does not recognize that action.⁵² Moreover, the courts have not taken into account the changed economic circumstances in determining ilobolo to be returned.⁵³ This is a serious drawback because to order a refund of ilobolo without taking into account the payments made and expenses incurred in the marriage, may unfairly prejudice the lobolo-holder. Generally, the courts have tended to be reluctant to update ilobolo if demanded in respect of a customary marriage. And even in a civil marriage they have only adapted it, if its customary principles conflict with those of a civil marriage. Where there is no such conflict, they have maintained that customary law applies, and by customary law, they meant the traditional law irrespective

of whether it does accord with the modern economic and social circumstances.

Examples could be multiplied, but these sufficiently illustrate the fact that the treatment of ilobolo by the courts has not been entirely progressive and yet not entirely regressive. In some instances the courts have shown innovation whereas in others they have shown reluctance to adapt ilobolo.

Even before contact with western culture, there is no doubt that customary law did undergo change. Obviously this change was reflected in the decisions of the chiefs' courts. The change that took place before the coming of whites was no doubt slow and unnoticed. As a result there was no need for the courts to adapt customary law constantly. The advent of whites introduced a revolutionising influence for which accommodation had to be made in the law.

13.3 THE PRESENT

Although customary law as a governing body of rules was originally permitted as a temporary measure, it soon became clear that it would not be superseded. This led to the parallel existence of legal systems which was an outcome of "practical considerations of expediency rather than of a priori reasoning".⁵⁴ The entrenchment of ilobolo by legislation ensured that courts would not question its legality.⁵⁵ The position of ilobolo at the moment is that it continues to be practised on a wide scale.

In dealing with the position of ilobolo at present it is appropriate to deal with the provisions of KwaZulu Act on the Code.⁵⁶ This is because this Act has completely revolutionised Zulu law of persons and family law. It is not necessary to deal with this in detail, but only to have an assessment of the changes it has brought about in ilobolo.

The Act has re-enacted the greater bulk of the provisions of the Code on ilobolo.⁵⁷ Thus it has retained the section that regards ilobolo settled before marriage as sisa as well as the subsection that requires deaths within fourteen days to be replaced.⁵⁸

An innovation of the Act is that it entitles women who have been vested with the sole guardianship of their children to stipulate and receive ilobolo for their daughters.⁵⁹ This is one of KwaZulu's major contributions on the status of women. It is a clear modification of customary law in terms of which women were precluded from receiving ilobolo for their daughters. This is because a black woman is no longer a perpetual minor according to Zulu law, but becomes a major on attaining the age of twenty-one or on marriage.⁶⁰ Obviously a woman will fall under the guardianship of her husband if she marries by customary law.⁶¹ An unmarried black woman is, however, a guardian of her illegitimate child, although if she is still a minor the guardianship of the child vests in the mother's guardian until the mother attains majority.⁶² The widow is also the guardian of all her minor children.⁶³

Despite the attainment of majority by a woman, and despite the fact that the consent of the woman's guardian is not necessary upon her entering a marriage, the right of any person entitled to receive ilobolo for her is protected.⁶⁴ By this provision, it is submitted, the KwaZulu Legislative Assembly wanted to remove the impression that it intended to deprive parents of the right to receive ilobolo for their daughters, because ilobolo remains popular.

Ilobolo still remains a non-essential of a customary marriage. A commissioner or magistrate is empowered to make an administrative enquiry into the complaint of unreasonable refusal by the woman's guardian to give consent to their marriage. The commissioner is also entitled to make an order as to the amount of ilobolo to be delivered.⁶⁵

Although the Act provides that ilobolo may be received by the woman, it nowhere says that the woman becomes the owner of the lobolo so received. The conclusion to be drawn from this is that the woman receives ilobolo on behalf of the heir who will inherit it, and who may at the time be a minor,⁶⁶ except in the case of a civil marriage where the woman may inherit the ilobolo as part of the deceased estate on intestacy because South African law of intestate succession applies in that respect.⁶⁷ Yet this conclusion may not be entirely correct as a woman is now a major and therefore capable of acquiring property.

Another innovation in the KwaZulu Act is the amount fixed per beast in the case of a dispute. Whereas in the Code it was R10, in the Act it is R100.⁶⁸ This provision is to be commended because it is more realistic than the nominal R10 provided for in the Code. Yet it has not completely solved the problem of fixing ilobolo settled in cash. The R100 stipulated will not be regarded as unreasonable, however, because parties are free to agree on any amount per beast as the amount is dependent on agreement.⁶⁹

Despite what was said above about the provision of ilobolo, the Act has re-enacted the provisions similar to those of the Code.⁷⁰ This may be attributed to the legislative assembly's reluctance to interfere unnecessarily with customary law of ilobolo. It is to be regretted, however, that the Act still contains a provision granting the commissioner a discretion to order return of ilobolo on the death of a woman without surviving issue within twelve months of her marriage.⁷¹ Nonetheless, the legislative assembly did manage to remove some of the controversial provisions of the Code relating to ilobolo.

From the above exposition it is obvious that ilobolo has changed considerably, owing to the influence of the factors mentioned above. Yet despite the changes it still shows

signs of persistence. There is also still room for improvement. The courts could be of great assistance in this regard.

This is ample evidence that ilobolo is capable of change without losing its character as a customary law institution. With the passing of KwaZulu Act more principles of South African law have been incorporated into ilobolo and customary marriage. Yet the legal status of a customary marriage remains unchanged despite the change of name from "customary union" to "customary marriage". Thus one can say that at this time we are at the time analogous to the period of reception of Roman law in Western Europe during the Middle Ages.

The modification of ilobolo and the reception of common law rules in customary law in general puts into issue the statement by Verloren van Themaat,⁷² who says:

"Die reg is deel van 'n volk se kultuur, en elke besondere volk het sy eie kultuurpatroon. Die eiesoortigheid van 'n kultuur verdwyn nie sonder meer met opvoeding en beskawing nie, die kultuur van een groep is nie maar net die kultuur van 'n ander groep in vroeëre stadium van ontwikkeling nie".

He, however, concedes that acculturation does enable separate legal systems to influence each other.⁷³ Although it is true that law is part of a culture of the people, and although the peculiarity of the culture may not disappear because of education and civilization, culture is definitely not something inborn; it is rather acquired. In fact it was pointed out above that some of the institutions of African law are not necessarily unique, but historical parallels have been found in other legal systems. The legal system may be influenced by the economic and social organization of the time.⁷⁴ As human beings react almost in similar fashion to a similar environment, the law that results bears strikingly similar features. The phenomenon of reception shows that law may be naturalised into a system and society not

of its origin.

The institution of ilobolo remains popular. In an investigation carried out around KwaDlangezwa, it was obvious that both educated and uneducated, married and unmarried, student and staff were in favour of the retention of ilobolo although some were in favour of its modification to facilitate marriage. It is in this light that attempts at modifying it are commendable. What of its future?

13.4 THE FUTURE

Since, as has been stated above even young unmarried blacks are in favour of the continued existence of ilobolo, it means that ilobolo will not die out immediately, but will continued for a long time to come. Various reasons have already been advanced as to its continued popularity.⁷⁵ One needs to mention one further reason, namely that if the father of the woman wants ilobolo the bridegroom has to deliver it whether he likes it or not. Its retention may also be an effort to stimulate national pride and self-consciousness to emphasize everything that is African, and everything that is valuable in the African past.⁷⁶

For ilobolo to continue it must continue to adapt to the new environment. Its continuance today is evidence that "it has been a good mother, and like all good mothers she yields her rights over her charge reluctantly".⁷⁷ What will obviously facilitate change is the decaying of the tribal emphasis on the community rather than on the individual. Ilobolo will continue, but its future form will have changed completely. This was evident from the discussion of the marriage payments for other legal systems above.⁷⁸ This shows that the complete metamorphosis of ilobolo need hardly surprise one. Even in English and South African law many legal institutions of today are often "the ghosts of the social institutions of yesterday so that it is possible that new African law will be able to retain and entrench some of the fundamental

principles upon which family law of the past was based".⁷⁹

What has been strongly advocated is the reform of ilobolo.⁸⁰ Abolition would not be effective as it would go against the views and wishes of the people who practise ilobolo. Imposing by legislation on the people a view which they do not hold will result in the failure of the law made. This has already been adverted to above.

It has been shown above that the barring of ilobolo in Natal and KwaZulu in the past was not successful. It led to many social evils which forced the legislature to reintroduce the claiming of ilobolo by way of legal action.⁸¹ Nor did prohibition by missionaries achieve better results.⁸² The suspension of bogadi among Kgatla did not succeed, and it had to be reinstated. The only tribe among the Tswana that appears to have abandoned the practice completely is the Ngwato where Kgama deliberately abolished it.⁸³ As a result the abolition of ilobolo is not a feasible solution in practice in future.

A possible future development of ilobolo is that ilobolo may develop into a settlement in favour of the bride. The father may retain a symbolical gift.⁸⁴ As was pointed out above, in Germanic law the pretium nuptiale eventually developed into a dowry.⁸⁵ Already among the Zulus a practice has developed whereby the bride receives a portion of ilobolo delivered for her. Future developments will obviously take this to its logical conclusion. This trend will avoid burdening the bridegroom.⁸⁶

The conversion of ilobolo should not arouse fears of the marriage as an institution being harmed because it has been well cemented into the social structure of the blacks.⁸⁷ In fact reform is aimed at preventing it from harming marriage. The conversion must, however, be preceded by the mental conversion as well as the change of will of the people practising it because the success depends on them. The realisation that marriage is an indissoluble union for life,

and need not depend on ilobolo will produce the attitude conducive for change and reform.⁸⁸

13.5 REFORM OF ILOBOLO

It is apposite to consider in conclusion some possible reforms of ilobolo. The question is what can be done at this moment?

Ilobolo is only one institution of customary law. Reform cannot be confined to it only. What is recommended is a comprehensive reform of customary law as a whole. The new Act of KwaZulu has partly done this. The reform of ilobolo or customary law in general, will obviously depend on the aim of such reform. Studies in African law in general have shown that African law has been reformed for purposes of modernisation, unification, liberalisation, mobilisation and Africanisation.⁸⁹ This has a direct bearing on ultimate results. At times these "informing principles", often latent, may be cumulative in one law reform project.⁹⁰ Often the most, though by no means the only, important objective is modernization of law in bringing it into line with prevailing conditions.⁹¹

Besides the aims of law reform, it is essential to note that to be effective law reform must be based on a sound theory of law reform.⁹² As it has been said above a casuistic approach which aims at isolating one aspect and ignores the others is unsatisfactory.⁹³ A sound theory of law reform takes into account the rule that is enacted, the society for which it is made, and the social implications as well as the practical efficacy thereof.⁹⁴ Sanders⁹⁵ aptly summarises this in the following words:

"Law reform being an art - namely, the art of making normative response to ever-changing social reality - it must be performed in an artistic, yet disciplined manner. In going about his task, the law reformer must, first of all, restate the existing law in scientific but understandable fashion. secondly, he

must ascertain and formulate the aspirations and realities of the society. Thirdly, he must set about drafting new law when necessary. All this he can do successfully only if he acts in full understanding of the law as official norm, social fact and ethical value, and accordingly makes use of the interdisciplinary and comparative law methods of consultation. Law reform is not just an ordinary law-job, but one that asks for considerable jurisprudential skill and enough jurisprudential humility for the law-reformer to be unafraid of consulting others".

A practical suggestion for a uniform reform of customary law is the establishment of a Law Reform Commission which will deal with the problem of restating the law, and consulting the public on any suggested law reform as well as drafting resultant legislation.⁹⁶ The South African Law Reform Commission has done a lot of work in this respect,⁹⁷ but unfortunately it does not concern itself with customary law. It would really be a time- and money-saving device if its scope could be extended to include lawyers skilled in customary law, so that it could deal not only with South African law, but also with customary law, because many aspects of customary law affect even urban Blacks.⁹⁸

13.6 SUMMARY AND CONCLUSION

Ilobolo is an institution that has undergone a lot of changes because of economic, social and even religious reasons. Some of these changes have been incorporated into the law regulating ilobolo by legislation and consequently confirmed by the courts in practice. Others have not. This requires the reform of ilobolo because it is evident that this institution will not disappear in the near future. Although its continuance is ensured, continued adaptation through legal process is essential for its survival in an acceptable form. But the reform of ilobolo cannot be done in isolation. It has to be done in the wider context of customary law as a whole. To reform only one aspect of customary law and to ignore the others, is both unsatisfactory and unscientific.

Despite the reform of ilobolo it is quite obvious that due to various factors it will eventually become a marriage settlement or dowry for the bride rather than a gift to the father of the bride, although the symbolical gift to the father will remain as long as ilobolo continues.

In conclusion the words of Mambolo⁹⁹ are appropriate:

"If we have to continue as a race of Africans we must have an Africa that is unbaffled by the change of custom - an Africa with its national lore hitched on loftier ideals than these on which lobolo rests. Let us indeed remain Africans, but Africans dynamic, progressive and always forging ahead".

FOOTNOTES

1. Verloren van Themaat (1968) 45.
2. Dias 424.
3. On people as law-makers see AN Allott "The people as law-makers: custom, practice, and public opinion as sources of law in Africa and England" 1977 Journal of African law 1 et seq; Allott (1980) 68 et seq.
4. Allott (1977) S.
5. Chapter 5 above.
6. Vilakazi (1962) 40.
7. On the question of certainty of the law see JD van der Vyver "Regsekerheid" 1981 THRHR 269 et seq.
8. Allott (1980) 51.
9. Allott ibid.
10. Allott (1980) 68 et seq.
11. s87 of the Code; s65 of KwaZulu Act.
12. Myburgh (1965) 11; Myburgh (1944) 230.
13. s59 of the Code; s42 of KwaZulu Act.
14. s95(1) of the Code.
15. Allott (1980) 45-6.

16. Allott idem 68.
17. Allott ibid; on the failure of the western marriage system see KO Adinkrah "Ghana's marriage ordinance: an inquiry into the legal transplant for social change" 1980 African law studies 1 et seq; JH Crabb The legal system of Congo-Kinshasa (1970) 31.
18. On the problem of ignorance of the law and the methods of popularization of the law see MK Robertson "Popularization of the law" 1982 CILSA 1 et seq.
19. Allott (1977) 5; see also Zwana v Zwana and another 1945 NAC (N&T) 59; cf Hlengwa v Maphumulo 1972 BAC (N-E) 58.
20. Van der Vyver (1981) 272 and the exponents of the realist school referred to.
21. On a discussion of these courts see RS Suttner "Towards judicial and legal integration in South Africa" 1968 SALJ 439 et seq; RS Suttner "Problems of African civil law" 1974 De Rebus (1) & (2) 266 et seq; 311 et seq; RS Suttner "Legal pluralism in South Africa: a reappraisal of policy" 1970 International and comparative law quarterly 142 et seq; JC Bekker "Regspraak soos beoefen in die noord-oostelike Bantoe-appélhof" 1975 De Jure 150 et seq; DJ Swanepoel "Appelle vanaf kapteinshowe na Bantoesakekommissaris-howe in siviele sake" 1977 De Jure 350 et seq, 1978 De Jure 113 et seq; JC Bekker "The future of indigenous courts in Southern Africa" in AJGM Sanders (ed) (1981) op cit 185 et seq; JJ Büchner "Inheemse gewoontereg: regskepping deur die appelhowe vir kommissaris howe" 1982 De Rebus 158.
22. Bekker (1981) 191.
23. Suttner (1970) 137, 141-145; Suttner (1968) 448 et seq; Suttner (1974) 312-313; Simons (1938) 239; Bekker (1981) 191; Büchner (1982) 159.
24. Bekker (1981) 191; Büchner (1982) 159.
25. Bekker (1981) ibid; Büchner (1982) 161; Suttner (1970) 145.
26. Bekker (1981) ibid; Suttner (1970) 145; Suttner (1968) Acta Juridica 152-154; Suttner (1968) SALJ 450.
27. Bekker (1981) 191.
28. The judges of the highest court in South Africa have taken liberty in a number of cases to update Roman-Dutch law to the needs of a modern society. This process has continued up to date. A few cases where

- this has been done may be mentioned: Henderson v Hanekom (1903) 20 SC 513; Blower v Van Noorden 1909 TS 890; Green v Fitzgerald 1914 AD 88; Conradie v Rossouw 1919 AD 279; Jajbhay v Cassim 1939 AD 537; Regal v African Superslate (Pty) Ltd 1963 1 SA 102 (A); Phame (Pty) Ltd v Paizes 1973 3 SA 397 (A); Minister Polisie v Ewels 1975 e SA 590 (A); Administrateur, Natal v Trust Bank van Afrika Bpk 1979 3 SA 824 (A).
29. Hahlo & Kahn (1973) 147, 307.
 30. "The judge as law-maker" 1972 JSPTL 22.
 31. "The restatement of law: its place in the English courts" 1951 American Bar Association Journal 329 quoted by Hahlo & Kahn (1973) 305.
 32. 306.
 33. E Kahn "The development of South African substantive law" in HF Mellet et al (ed) Our legal heritage (1982) 136; Dias 195.
 34. KJ Kemp "Die skuldvereiste by laster: 'n onlangse belangwekkende beslissing" 1982 De Jure 141.
 35. Bekker (1981) 192; Büchner (1982) 161.
 36. Suttner (1968) 446-447; Suttner (1970) 142-143; Simons (1938) 239; Suttner (1974) 11.
 37. Lewin (1968) 160.
 38. Suttner (1974) 12; Bekker (1976) 154.
 39. Hahlo & Kahn (1973) 261.
 40. Bekker (1975) 154.
 41. Allott et al (1969) 11.
 42. Farrar (1977) 10.
 43. PQR Boberg "Oak tree or acorn? - conflicting approaches to our law of delict" 1966 SALJ 150 at 155; see also Hahlo & Kahn (1973) 307.
 44. Ex parte Minister of Native Affairs : in re Yako v Beyi 1948 1 SA 39 (A).
 45. Van Niekerk (1966) 186.
 46. Dikeni v Klass 5 NAC 41 (1924).
 47. For a full discussion of this and the relevant case law see chapter 11 above; see also AJ Kerr "Christian

marriage and the lobola contract" 1959 South African Outlook 26 et seq.

48. Mbonjiwa v Scellam 1957 NAC (S) 41.
49. Madlala v Madlala 1975 BAC (N-E) 96.
50. See chapter 11 above.
51. Thela v Nkambule 1940 NAC (N&T) 113; see also J Lewin "The courts and lobolo" 1941 South African Outlook 126.
52. See chapter 9 above.
53. See chapter 10 and 11 above.
54. A Phillips "The future of customary law in Africa" 1955 Journal of African Administration 151.
55. Proviso to s11(1) of Act 38 of 1927.
56. Although at the time of writing information had been received that it had been signed by the State President, it had not yet been promulgated as a binding law.
57. Chapter 8 of the Act deals with ilobolo although other chapters do refer to it.
58. s62 of the Act.
59. s63 of the Act.
60. s16 of the Act.
61. s29(3); s14 of the Act provides that every black is either a family head or an inmate of the family subject to the family head in all matters.
62. s18(1) of the Act; s29(2) of the Act.
63. s29(4) of the Act.
64. s42(2) of the Act.
65. s43 of the Act.
66. s84 of the Act.
67. s83(3) of the Act.
68. s64 of the Act.
69. s65 of the Act.
70. s5 68-70 of the Act.

71. s70(3).
72. (1968) 47.
73. ibid.
74. Suttner (1968) 448.
75. See chapter 5 above.
76. Allott (1965) 219; Marwede & Mamabolo 6, 13.
77. Marwede & Mamabolo 23.
78. See chapter 2 above.
79. Allott (1965) 239-40; Crabb 31.
80. Reuter 237; Marwede & Mamabolo 11, 17, 27-29.
Church (1981) 33.
81. See chapter 3 above.
82. Reuter 237.
83. Schapera (1955) 146; Schapera (1970) 150.
84. Myburgh (1965) 12; Simons (1968); Reuter 240;
Church (1981) 34.
85. See chapter 2 above.
86. Reuter 240; Marwede & Mamabolo 24.
87. Marwede & Mamabolo 27.
88. Reuter 241.
89. Allott (1965) 233 et seq; Allott (1980) 174 et seq;
AN Allott "Reforming the law in Africa - aims,
difficulties and techniques" in AJGM Sanders (ed) op
cit 228 et seq discusses the aims, difficulties and
techniques of law reform in Africa and England in
general.
90. Allott (1981) 230; Allott (1980) 175 et seq.
91. Allott *idem* 231; Allott (1980) 177.
92. AJGM Sanders "In search of disciplined law reform" in
Sanders (ed) op cit 237.
93. Sanders ibid.
94. LL Kato "Methodology of law reform" in GFA Sawyer (ed)
East African law and social change (1967) 279 et seq;

Sanders (1981) 238 et seq.

95. op cit 243.

96. Sanders (1981) 244.

97. Some aspects of the law they have recommended to be reformed are the divorce law and the matrimonial law. The one has resulted in the Divorce Act 70 of 1979. The other has resulted in the Matrimonial Property Bill which is still pending in Parliament.

98. The South African Government still has a responsibility for the law affecting the status of urban blacks - see Carmen Nathan "The legal status of black women in South African society" in Sanders (ed) op cit 6-7; Verloren van Themaat (1980) 254.

99. Marwede & Mamabolo 30.

CHAPTER XIVCONCLUSION AND RECOMMENDATIONS

Ilobolo is an institution whose origins in Zulu society are obscure. It is a common practice almost throughout the whole of Africa although its form and significance vary. Yet its prevalence in Africa is not convincing evidence of its Africanness. Similar institutions have been found in other legal systems, both ancient and modern, which are not African. This is hardly surprising as human beings have the tendency to react in similar fashion to their environment. This means that ilobolo belongs to a particular type of society, a society which is partriarchal although some societies of this nature have not had a similar practice.¹ That this institution was fashioned by and for a tribal society which was self-sufficient is no serious objection. There are many institutions of South African law which exist today, but which were originally created for an agrarian community of Roman times. Their usefulness has not been abated by changed economic and social circumstances. On the contrary, they have been adapted to meet the needs of the twentieth century technologically advanced society. The relevant question is whether the institution concerned still has a meaningful role to play. According to the present views of the black community ilobolo still has a role to play even in modern society. The continued practice of ilobolo among blacks in general and Zulus in particular, despite socio-economic and religious changes, is inspired, among others, by the very conviction that it is a unique African institution, and is therefore regarded as a sacred heritage from the African past that serves the purpose of identifying even an educated African with his tribal brother.

Although ilobolo is regarded as a traditional African institution, it does not mean that it still retains all its traditional features. Many of them have been discarded for

economic and social reasons. The western technologically advanced economy brought about strains on the traditional subsistence economy.² Although the social structure of the subsistence economy was responsive to its problems, it could not meet the demands of modern industrial society. Thus polygyny which was prevalent in the subsistence economy culture and which depended on availability of cattle, is decaying today because it becomes a problem in a modern cash economy.³ Similarly, although ilobolo in a subsistence economy was settled in livestock, especially because they were the chief means of exchange, and because of their religious significance, the introduction of the money economy has not resulted in ilobolo dying out, but in money being used instead of or together with cattle as ilobolo. Besides various social and economic implications, the settlement of ilobolo in cash has some legal consequences. One such implication is the problem of fixing ilobolo settled in cash.

Although there is in Natal and KwaZulu no fixed amount per ilobolo beast, the amount fixed for a beast in the case of a dispute⁴ has caused controversy. The raising of that amount by the KwaZulu Act has partly settled the controversy.⁵ The amount of R100 is not, as has been understood, the value per ilobolo beast. The amount per beast still depends on agreement. The amount fixed by the Act comes into play only where there is a dispute as to the monetary value per beast delivered if there was no agreement as to its monetary equivalent when ilobolo was demanded. This will rarely happen as it was stated above that when the father of the girl demands ilobolo he first states the number of cattle he is entitled to, and then the monetary equivalent per beast. Negotiation will ensue until consensus is reached on the value per beast.

It is obviously undesirable that the amount per beast be fixed by legislation, although there is a need for

legislative control of ilobolo. The fixing of the amount per beast by agreement allows scope for flexibility. The legislative fixing of the amount per beast will inexorably lead to the parents demanding the fixed price in all cases. But allowing the amount per beast to be dependent on agreement enables the parents to consider the personal circumstances of the bridegroom, namely his ability to settle ilobolo. Needless to say even when the maximum value is fixed parents are free to demand less. But fixing the amount per beast by legislation also leads to rigidity. Even though the market price of cattle may rise, that one for ilobolo remains constant. If not so, the legislature has to resort to updating the amount now and again which may be undesirable.

Although lack of the fixing of the value per beast may lead to exploitation of the bridegroom, this is offset by the fact that abakhongi are entitled according to custom to negotiate for the reduction of the price per beast. Moreover, the parents of the bride are also keen not to frustrate the marriage of their daughter, and the bridegroom is not expected to settle the whole amount all at once. The legislative fixing of ilobolo will be difficult to implement. Any official control of ilobolo would be interpreted as excessive interference in a matter that is basically private. Yet the registration of the amount of ilobolo given may be a restraint against exorbitant amounts.

It is also recommended that the R100 amount that is fixed in the case of a dispute should not be the only consideration taken into account. It should rather be regarded as a guideline to be considered with other factors in determining the value of a beast that is disputed. Using the R100 equivalent in all cases of dispute as a rule of thumb will be prejudicial.

The shift from cattle to money has facilitated the settlement

of ilobolo even in urban areas where cattle cannot be used. The incorporation of ilobolo in an urban situation has led to a number of new functions being attributed to it. Although ilobolo still continues to be regarded as a validating factor; a purchase of the reproductive capacity of the woman; a guarantee of good conduct on the part of the woman, and good treatment on the part of the man; compensation for the loss of the woman and for the expenses incurred in her upbringing, new functions like the payment for marriage expenses, the test of the suitor's honest intentions and his ability for being a future provider, and being a sound national custom, have been put forward as justification for the continued popularity of ilobolo.

Although these are regarded as functions of ilobolo they are not legal functions, but merely social functions. They are, however, not legally irrelevant. They express the community's views of what they regard as a valid marriage. Yet some of the alleged functions do not necessarily stand the test of critical analysis. When subjected to analytical scrutiny, they resolve themselves into mere justifications or rationalizations for the continued practice of ilobolo. This means that they still have an important psychological effect on the parties to the marriage. Even the earlier functions of ilobolo reveal certain weaknesses which make them open to doubt.

The view that ilobolo is a guarantee of good treatment of the bride by the bridegroom is open to doubt as it is not borne out by the facts. The fear of the husband's forfeiture of his ilobolo cattle is a mere fiction. The woman's fear of her parents' forfeiture of ilobolo cannot be regarded as an adequate sanction against her misbehaviour. Sound structural reasons rather existed in traditional society which accounted for marital stability. Although ilobolo contributed, it was not the only factor. As a result it cannot be regarded as a panacea for all marital ills. The

increase in the divorce rate among blacks today despite the continued popularity of ilobolo attests to this. Ilobolo, shorn of all the traditional checks and balances fails to ensure the stability of the marriage. Something else should be attributed to its persistence.

The view that ilobolo purchases the reproductive capacity of a woman is also open to criticism. There is no evidence that in Zulu law an aspect of a human being's body could be alienated, no less his or her biotic aspect. That ilobolo to be received for a daughter could be ceded is not disputed, but this was simply done because once promised the lobolo to be given is material with which a debt can be settled. The deduction of one beast for each child born is entirely arbitrary as before ilobolo was limited by legislation in Zulu law, there was no a priori agreement as to how many children could be borne, so that the number of children did not correspond to the number of cattle given. The very fact that when a child is young only one head of cattle is deducted, but when she marries ten head are given for her ilobolo makes this all the more difficult. The fixing of the head of cattle to be delivered at ten can only be attributed to the number ten having been a reasonable number to be demanded then, and most probably the number that was customarily demanded. Its acceptance shows that it rested on a sound practice of the people. To regard ilobolo as compensation for the loss of the daughter or for the cost of her upbringing may be regarded as a later development owing to new economic demands. This is evidenced by the fact that in early customary law ilobolo was not fixed, and even when it became fixed it would not depend on the "worth" of the woman or expenses incurred in her upbringing, but on the father's status. Moreover, that the father did not bring up the child did not deprive him of her ilobolo. Yet the recent trend of taking into account the educational qualifications of a woman is a direct negation of the earlier practice. This practice will undoubtedly not receive

judicial confirmation as such a step would be calculated to discourage marriage. Moreover, it rests on a precarious base of a father's attempting to shift the legal obligation of supporting his daughter to somebody else.

It is better to regard ilobolo in a customary marriage as an ordinary prerequisite for the conclusion of a valid marriage and the consequent bearing of legitimate issue; as concrete evidence that a marriage rather concubinage is intended; as securing the consent of the father to the marriage of his daughter and thereby releasing his power of guardianship over his daughter, and in turn as enabling the husband to secure this power of guardianship over the children of the marriage.⁶

The exclusion of ilobolo from the essentials of a customary marriage, means that this marriage will be regarded as valid without the delivery thereof. As a customary marriage will hardly take place without the delivery of ilobolo, it means that the law as codified and applied by the courts is obviously different from the law as practised by the people. The exclusion of ilobolo from the essentials of a customary marriage may have a salutary effect in that a woman's father may not withhold consent to the marriage of his daughter on the grounds that he has not received ilobolo for her, but it places ilobolo in an uncertain position. Moreover, its exclusion was obviously motivated by the underestimation of its practical strength. The bride herself will not be keen to conclude a marriage without ilobolo.

The exclusion of ilobolo from the essentials of a customary marriage implies that ilobolo in a customary marriage is put in the same position it occupies in a civil marriage, namely that it has to depend on a separate agreement. This is the position in Natal and KwaZulu. The emancipation of Zulu women, and the fact that the father's consent is not required for the marriage of his major daughter, means that

the legal influence which ilobolo once had on the validity of a customary marriage has been completely eliminated. The repeal in respect of KwaZulu by KwaZulu Act, of the provision of the Black Administration Act requiring the giving of the father's consent to the marriages of women who might be of age in Natal and Transvaal means that whatever influence ilobolo had on the conclusion of a civil marriage has been obliterated. Although ilobolo is not a legal requirement of a civil marriage, it is well known that the father's consent to the marriage of his daughter in black society is secured and is conditional upon his receipt of ilobolo.

Although the consent of the father is no longer necessary for the marriage of his major daughter, the right of a person entitled to receive ilobolo is protected. Although this protection appears to state the obvious, it was essential that it be expressly made because of the radical change of Zulu law affecting the status of a Zulu woman. Not to have provided for this specifically would have caused confusion. It would mean that a parent would have no claim to ilobolo for his daughter as it is not an essential of a customary marriage, and because a woman would in any case not require his consent. Yet considering the popularity of ilobolo, it was apparently unnecessary to provide for its protection. The reason for such express protection is that the legislature did not want to create the impression that by raising the status of women it also deprived parents of ilobolo for their daughters. Outside Natal and KwaZulu ilobolo continues to occupy the same position it occupied in traditional customary law.

The contracting of a civil marriage by blacks has not led to ilobolo falling into disuse. Instead ilobolo has been incorporated into a civil marriage. This leads to a conflict of laws situation. Although earlier decisions were inclined to brand ilobolo as contrary to public policy per se, and

thereby illegal, the view adopted later was that ilobolo attached to a civil marriage was not immoral per se, but was valid and enforceable. Ilobolo was only regarded as invalid when attached to a customary marriage where it was branded as "consideration given for future immoral cohabitation".⁷ This line of reasoning was artificial and unacceptable. It flowed from the non-recognition of a customary marriage as a valid legal marriage. This untenable position was partly cleared by the express recognition of ilobolo in 1927 and prohibiting the courts declaring it contrary to public policy.⁸ Although it was strictly speaking not necessary to grant ilobolo statutory recognition as it could be taken judicial notice of, it was necessary to do that to clear the controversy which had prevailed hitherto. Despite the express protection of ilobolo, some of the less desirable institutions connected with it were not protected especially where ilobolo was demanded in contemplation of a civil marriage.

The recognition of ilobolo, however, did not lead to the granting of formal recognition of a customary marriage as a legal marriage. This is an anomalous situation in that an essential of a customary marriage is recognized whereas the marriage itself is not recognized. The approach has led to a woman of a customary marriage being regarded as a concubine although she is recognized as a wife for certain purposes. Furthermore, it has resulted in the father not having a right of guardianship over his children, which is a direct negation of the function of ilobolo stated above. It has also led to the possibility of a man concluding a valid civil marriage during the existence of a customary marriage which has further complications.⁹ The latter possibility, however, has been prohibited by KwaZulu Act. This means that a partner to a polygynous customary marriage cannot conclude a valid civil marriage during the subsistence of the customary marriage. It is only parties to a monogamous customary marriage that are entitled to conclude a valid civil marriage with one another. This provision, despite its

limitation, is to be commended for eliminating the possibility of a man's discarding women whom he married regularly according to customary law for no fault on their part.

The recognition of ilobolo meant that it could be regarded as valid and enforceable irrespective whether it was concomitant to a customary or a civil marriage. The non-recognition of ilobolo earlier on can be attributed to a misunderstanding of its functions as it was regarded as a sale of a woman which degraded her to the status of a slave. The increase in the anthropological understanding of this institution led to its being accorded proper treatment and recognition. Furthermore, it led to the notion that ilobolo is a sale of a woman, being discarded as inaccurate.¹⁰

Although the attachment of ilobolo to a civil marriage led to a controversy as to its legal significance, the view which has now been settled, is that it is entirely ancillary to the marriage, and its principles have to be modified by those of a civil marriage if they conflict with those of ilobolo. The parties are deemed to have intended that this should be so. What is not recognized is that in practice blacks do not regard ilobolo as something separate from a civil marriage. They regard ilobolo as much a requirement for a valid civil marriage as of a customary marriage. This is why they presume that the legal consequences that flow from ilobolo in a customary marriage should also ensue in a lobolo agreement concluded in respect of a civil marriage. That ilobolo is an ancillary of a civil marriage was therefore not a natural outgrowth of ilobolo adapting itself to a new marriage dispensation, but rather an imposition by the courts.

Attributing the intention to the partners that ilobolo should be ancillary to a civil marriage is a fiction as most of them are ignorant of the principles of a civil marriage. What is more correct is that the law imputes such an intention to

the parties. The real reason behind ilobolo being regarded as modified by a civil marriage is rather the inferior status of a customary marriage of which ilobolo was originally the validating requirement. If the intention of the parties were the criterion, one would expect that the parties would be free to express a contrary intention to the effect that even though they are married by civil rites their lobolo agreement should remain governed by customary law principles even though they conflict with those of a civil marriage. As is well-known, this is not so. Although the courts have attempted to resolve the problem of the position of ilobolo in a civil marriage, it cannot be regarded as a satisfactory solution. This could have been solved by the recognition of a customary marriage as a legal marriage. In that event the demanding of ilobolo in contemplation of a civil marriage would be prohibited. Its prohibition would not be considered obnoxious as in any case there would be an alternative to a civil marriage. A civil marriage would be for those who regarded themselves as having reached a level of sophistication that enabled them to marry without ilobolo without having any qualms about it. Those blacks who still regarded themselves as constrained by custom would then marry according to customary law. They would then be having a choice. As matters are, they have no meaningful choice as a customary marriage is not a legal marriage at all. The supposed solution of the conflict between a civil marriage and ilobolo gives one the impression of a "makeshift solution" and is therefore unscientific.¹¹

The continued popularity of ilobolo even in a civil marriage among blacks is attributable to their inability to conceive of a marriage being valid without the delivery of ilobolo. Thus the validity of a civil marriage among blacks is attributed to ilobolo although legally that is not so.

Even in a customary marriage ilobolo occupies a problematic position. If delivered during the existence of an engagement,

it is regarded as sisa until the celebration of the marriage when ownership passes to the receiver. The position is the same even when ilobolo is delivered for a civil marriage. As a result all losses and increases belong to the depositor. Although these cattle occupy a position analogous to that of sisa, they differ in material respects from sisa cattle. As a result it is incorrect to regard them as sisa cattle. A better approach is that such cattle are delivered conditional upon the conclusion of a marriage, and before the conclusion of the marriage the risk of loss remains with the depositor even though delivery has taken place. What is actually in issue is not ownership, but the risk of accidental loss.¹²

Problems result from an abortive marriage where ilobolo has been delivered during an engagement. As an engagement at customary law does not give rise to legal obligations, breach thereof does not entitle the innocent party to damages. It is the return of ilobolo delivered during the engagement that is claimable. That claim is often resisted by the receiver of ilobolo if the engagement was wrongfully breached by the man. Whether or not an engagement is breached wrongfully and culpably, ilobolo is returned in full except for deductions for seduction and pregnancy. The return of ilobolo despite wrongful breach of an engagement cannot be justified on the retention of ownership by the depositor, because in the event of divorce, ilobolo cattle are returned even though the ilobolo-holder may have acquired ownership in them.

The return of ilobolo in full may be explained on the grounds that an action for breach had not developed before contact with whites. As courts have not been prepared to adapt customary law to the changed circumstances, they have refused to recognize the action for breach of an engagement and the forfeiture of ilobolo as damages in appropriate cases. This inflexible approach is to be lamented because it prevented the healthy development of the law in recognizing the rights of a woman. It has not made customary law respond to the

needs of a changed society. If a common law engagement was breached the courts have been prepared to grant a woman an action, and ilobolo to be returned has been reduced accordingly. Obviously the absence of an action for breach of an engagement was based on the fact that the woman in traditional society did not have a right to her personality. If an engagement was breached, it was rather her father that was injured, and not the woman herself. It was also because of the relative rarity of breach of an engagement so that even where it took place the woman would largely be to blame. In that event she would easily get another man who would deliver ilobolo to replace the one that had been returned.

Although the new KwaZulu Act on the Code does not recognize an action for breach of a customary engagement, it is recommended that the courts should not lightly reject such a claim because a woman's status in terms of the present Zulu law has been elevated. As she has been placed on the same level as a woman born of a civil marriage and therefore subject to common law, the claims to which a woman of a civil marriage is entitled should by analogy be extended to a woman governed by customary law. Courts do grant actions by analogy. Although arguments by analogy should be treated with caution, it does not mean that they should be evaded. They could prove quite useful in assisting the court to reach a just decision where there is no rule of customary law. In claims for return of ilobolo on breach of a customary law engagement, it is suggested that courts should decide the case on its merits. It is recommended that the action for breach of an engagement be recognized in principle. The changed economic circumstances of modern society may warrant that.¹³

Various institutions connected with a customary marriage have been regarded as responsible for the existence of ilobolo, but on a closer scrutiny it is clear that although they have some relationship with ilobolo they are not

necessarily an adequate explanation for the existence of ilobolo. Their gradual disappearance has not affected the continued popularity of ilobolo. This means that ilobolo did not depend on them.¹⁴

Although the early kinship arrangement in a subsistence economy facilitated the provision of ilobolo, the disintegration of the traditional kinship and family system has not affected ilobolo's continued delivery. What it has done is to shift the responsibility for the provision of ilobolo from the bridegroom's father to the bridegroom himself. This has weakened the parents' influence on the marriage of their sons. Furthermore, the traditional communal methods of providing ilobolo are fast disappearing. The disappearance of these under modern circumstances has not seriously affected a man's ability to marry. As today a man is capable of earning income through lucrative employment, which traditional society did not provide, this enables him to amass ilobolo for his intended wife. In this way ilobolo has been accommodated into the modern situation.¹⁵

The changed economic and social climate has led to the escalation of ilobolo delivered. Moreover, certain demands connected with although not part of ilobolo, which continue to be demanded on a wide scale, increase the amount that is eventually to be settled by the bridegroom. Yet taking into account that part of the lobolo is today given to the woman, and another portion is used to pay marriage expenses, there is little profit to be derived by the guardian from ilobolo. This obviously further negatives the idea that ilobolo is a sale of the woman, or that it is compensation for her loss. It merely amounts to the husband giving property with one hand and receiving it with another.¹⁶

Although ilobolo has been modified by the present economic and social conditions, there is no evidence that the courts

take judicial notice of this. Although they do take judicial notice that ilobolo is often settled in cash rather than in kind, they have not extended this approach to other aspects of ilobolo. This is to be attributed to the fact that the courts regard their function as ius dicere sed non facere. This, however, is quite fictitious as courts do, to a limited extent, make law. The reluctance of the courts may be attributed to the fact that they apply law that has been codified. Although the codification of Zulu law did place the law at the disposal of those who were supposed to apply it, it had the undesirable result of rigidity. The growth of law relating to ilobolo has therefore been arrested, so that the law as practised by the people is different from the law as codified and applied by the courts. The term customary law as codified therefore, has been interpreted to mean traditional law. This creates the impression that customary law is static and immutable. On the contrary, customary law has as much potential for change as any legal system.¹⁸

When ilobolo is returned on divorce, the determining factor is the relative fault of the parties, so that if the husband was at fault ilobolo is not returnable. As the courts have not taken into account the necessary and reasonable expenses incurred in connection with the marriage, it means that the return of ilobolo is a fiction. It is rather a fine that is paid by the lobolo-holder for the misconduct of the woman. This is entirely arbitrary under modern conditions as the lobolo-holder has little influence on the behaviour of the woman. Even the deduction of one beast for each child of the marriage is entirely arbitrary. It is merely a remnant of the old practice which ill-accords with the present circumstances where the function of ilobolo has changed. A better approach is that ilobolo should not at all be returned if there is a child or children of the marriage.¹⁷ More unjustifiable is the return of ilobolo on the death within twelve months of a woman without lawful offspring of the marriage. It is obviously contrary to

modern ideas that fault should mostly be a requirement for liability and should be discarded as obsolete.

Although the new divorce law is not based on the fault principle, the return of ilobolo still remains based on fault. The law, however, makes provision for the forfeiture of benefits which takes into account the fault of the spouses.¹⁹ This will logically apply to the question of the return of ilobolo.

Virginity which was the highest qualification for marriage in customary law is no longer so. Yet seduction and pregnancy continue to have an effect on ilobolo to be delivered for a woman. Thus, the bearing of an illegitimate child before marriage, reduces ilobolo eventually to be delivered for a woman although the father of the woman is entitled to claim this from the wrongdoer. Although ingquthu beast continues to be paid, it is today paid not necessarily for the mother's protection of the girl's virginity, but for her contribution in the upbringing and education of her daughter. Owing to the demise of ukuhlola practice, ingquthu beast is not necessarily paid by the seducer, but by the person who eventually marries the woman. Thus the man who marries the woman not only marries her, but also bears responsibility for her misconduct, incidentally providing an analogy to the Roman-Dutch law principle that die de man ofte wijf trouwt, die trouwt ook de schulden. The increase in contraception will obviously mean that pregnancy before marriage will be an exception rather than the rule. This will mean that a father will demand full ilobolo irrespective of his daughter's state of chastity.²⁰

The payments connected with, though not part of ilobolo, either increase or decrease the amount that is eventually paid by the husband depending on who is responsible for the payment. The existence of these counter-performances means that ilobolo eventually to be settled by a man is kept

within reasonable bounds.

Despite many socio-economic and religious changes among blacks in general and Zulus in particular, and despite changes in ilobolo, some of which have been given effect to by the courts and others not, ilobolo continues to be popular. The continued popularity of ilobolo even among unmarried blacks, which is often attributed to nationalistic pride, means that it will continue to be practiced for a long time to come. Needless to say more changes will have to be accommodated. The great possibility is that it will eventually become a settlement in favour of the bride, and the father will receive a symbolical gift. The present practice of giving the bride a portion thereof is enough evidence of this.

Constant reform of ilobolo is recommended. The courts could play a significant role in this respect, before the transformation of the practice by legislation. The change of law by judicial decisions is commendable for its imperceptible modification of the law, and for maintaining the element of legitimacy. This retains respect for law. Although the divorce court, has disclaimed any competence in ilobolo claims, it is recommended that this court's jurisdiction should be extended to cover cases involving ilobolo as this institution is so consistently demanded by blacks even in a civil marriage. On the other hand the special courts for applying customary law have apparently outlived their usefulness. Although they were created for the convenience of blacks, the advantages of their creation have not been realized. Their phasing out may well leave a gap, because their establishment was motivated by the fact that they were to be manned by people well versed in customary law. Their abolition will therefore necessitate the application of customary law by the ordinary courts of law. The added advantage of such judicial integration is that customary law will be treated on a par with the South African common law, and consequently be exposed to the same skills.²¹

Courts therefore will take judicial notice of customary law. Moreover, they will be entitled to call assessors to their assistance on points of customary law with which they are not familiar. In addition customary law will have to form part of the curriculum of every law degree.

Ilobolo is an institution that is deeply embedded in the culture of the black society. Although it is not a legal requirement of a marriage, it is an essential pre-condition for the conclusion of such a marriage in black society. It is symbolical of the social attitudes of the black society and is expressive of the deep-seated values of this society. What those values are could well form the subject-matter of another investigation. What is relevant here, is that any purported reform or modification of ilobolo should take into account the social implications thereof. Although it is not feasible to legislate on the social attitudes of the people, it is important to consider them in any legislative reform, otherwise that law becomes dysfunctional and it consequently diminishes the respect for law of which it is a part. As ilobolo is not prohibited, it will remain to be practised. It is not a legal requirement, but a social prerequisite for the conclusion of a marriage.

The change of ilobolo from an institution that was purely for the benefit of the father to one in which the bride has a claim, which phenomenon is by no means unique having been experienced in other non-African legal systems referred to above,²² is a remarkable development of an institution that once was controversial and misunderstood. It is indeed a strange course of history that the institution which was once thought to be a purchase of a woman will develop into the opposite thereof. Will it be the purchase of a husband with his own coin?

FOOTNOTES

1. The Romans did not have a similar practice.
2. RB Seidman "Law and economic development in independent, English-speaking, sub-Saharan Africa" in TW Hutchison et al (eds) Africa and law (1968) 5.
3. Seidman idem 6.
4. s87 of the Code; s64 of KwaZulu Act.
5. s64 of the KwaZulu Act.
6. See chapter 5 above.
7. See chapter 4 above.
8. s11(1) of the Act 38 of 1927.
9. This position is quite unsatisfactory even today. Not only is this the position in South Africa, but also in Lesotho and Swaziland - see WCM Maqutu "Current problems and conflicts in the marriage law of Lesotho" 1979 CILSA 176 et seq; Joan Church "The dichotomy of marriage by customary and by civil rites - note on a recent Swaziland decision" 1978 CILSA 80 et seq. This has led to a call for the formal recognition of a customary marriage as a marriage more especially after the passing of the Transkei Marriage Act - see Nathan (1981) 7; Van Loggerenberg 18; see also Muriel Horrel The rights of African women : some suggested reforms (1968) 7 et seq.
10. See chapter 5 above.
11. See chapter 11 above.
12. See chapter 7 above.
13. On the position in England and other common wealth countries this action has been abolished - see F Bates "Some directions in marriage law" 1980 CILSA 131 et seq.
14. See chapter 10 above.
15. See chapter 8 above.
16. See chapter 12 above.
17. See chapter 11 above.
18. See chapter 4 above.
19. s9 of Act 70 of 1979.

20. See chapter 12 above.
21. Suttner (1968) 446. Cases on customary law will be reported in the same law reports and will be commented on by academic lawyers. This will facilitate reform of customary law - On the role of academic lawyers and law reform see - JC Smith "An academic lawyer and law reform" 1981 Legal Studies 119 et seq.
22. See chapter 2 above.

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MPOKO V VAVA 3 NAC 198 (1912)
MPSHE V MPSHE 1934 NAC (N&T) 77
MPUNGOSE V MPUNGOSE 1946 NAC (N&T) 37
MPUNGOSE V SHANDU 1956 NAC (N-E) 180
MQOLORA V MESLANI 1 NAC 97 (1905)
MRUBATA AND ANOTHER V DONDOLO 1949 NAC (S) 174
MSELEKU V MAJOLA 1937 NAC (N&T) 67
MSIBI V SLBANYONI 1940 NAC (N&T) 33
MSINGELELI V EDWARD & ANOTHER 3 NAC 237 (1913)
MSOMI V MSOMI 1932 NAC (N&T) 25
MSOMI V MSOMI 1968 BAC (N-E) 29
MSONTI V DINGINDAWO 1927 AD 531
MSWELI V HLEKWAYO 1941 NAC (N&T) 119

MTEMBU V MNGWABA 1940 NAC (N&T) 67
MTEMBU V MTEMBU 1943 NAC (N&T) 65
MTEMBU V MTEMBU 1951 NAC (N-E) 377
MTETWA V LEMBEDE 1937 NAC (N&T) 30
MTETWA V MTETWA 1944 NAC (N&T) 51
MTETWA V MTETWA 1943 NAC (N&T) 15
MTIMKULU V MTIMKULU 1959 NAC (N-E) 7
MTIYANE V MATHE 1957 NAC (N-E) 45
MTIYANE V MTIYANE 1952 NAC (N-E) 229
MTHIYANE V NDABA 1979 ACCC (N-E) 250
MTIMUNYE V MABENA 1939 NAC (N&T) 129
MTOBHOYI V NKOLONGWANA 1914 NHC 190
MTOLO V POSWA 1950 NAC (S) 253
MTSHALI V MHLONGO 1944 NAC (N&T) 71
MTSHALI V MTSHALI 1949 NAC (N-E) 119
MTSHALI V NKOSI 1942 NAC (N&T) 44
MVELASE V MVELASE 1928 NHC 1
MVEMVE V MKATSHWA 1950 NAC (N-E) 284
MVUBU V CHILIZA 1972 BAC (N-E) 66
MVUNDHLA V MVUNDHLA 1940 NAC (N&T) 72
MVUNYISWA V MAYILE 1964 BAC (S) 25
MYENDE V CHILIZA 1973 BAC (N-E) 304
MYENI V MYENI 1956 NAC (N-E) 89
MZILIKAZI V KWAZA 1934 NAC (C&O) 42
MZIMELA V MKWANAZI 1941 NAC (N&T) 12
MZIZI V PAMLA 1953 NAC (S) 71
NALANA V REX 1907 TS 407
NANTO V MALGAS 5 SC 108 (1887)
NBONO V MANOXOWENI 6 EDC 52
NCUBE V MAKHANYA & ANOTHER 1948 NAC (N&T) 8
NDABA V MAZIBUKO 1946 NAC (N&T) 65
NDABA V MBATA 1939 NAC (N&T) 32
NDEBELE V NDEBELE 1971 BAC (N-E) 70
NDHLELA V BUTHELEZI 1941 NAC (N&T) 38
NDHLELA V NDHLELA 1939 NAC (N&T) 91
NDHLOVU V KUMALO 1938 NAC (N&T) 101
NDHLOVU V MASIKANA 1923 NHC 29

NDHLOVU V NDHLOVU & ANOTHER 1954 NAC (N-E) 183
NDLOVU V PHETHA 1964 BAC (N-E) 101
NDLOVU V SHONGWE 1940 PHR 75
NDLOVU V ZONDI 1938 NAC (N&T) 84
NDOPHI V SITA 1917 NHC 77
NDOZI V REX 1909 NHC 5
NENE V XAKAZA 1938 NAC (N&T) 96
NGCANGAYI V JWILI 1944 NAC (C&O) 15
NGCOBO V KHUMALO 1942 NAC (N&T) 47
NGCOBO V MABASO 1935 NAC (N&T) 40
NGCOBO V MKIZE 1950 NAC (N-E) 249
NGCOBO V MSULULU 2 NAC 33 (1910)
NGCOBO V NGCOBO 1931 NAC (N&T) 48
NGCOBO & ANOTHER V NGCOBO 1941 NAC (N&T) 122
NGCOBO V NGCOBO 1946 NAC (N&T) 14
NGCOBO V ZULU 1964 BAC (N-E) 116
NGEKE V MAVELA 1919 NHC 82
NGEMA V NGEMA 1942 NAC (N&T) 27
NGEMA V NGEMA 1950 NAC (N-E) 213
NGQOBELA V SIHELE 10 SC 346 (1893)
NGQONGISO V GOBO 1946 NAC (C&O) 10
NGUBANE V DLAMINI 1922 NHC 3
NGUBANE V NGUBANE 1937 NAC (N&T) 27
NGWANE V NZIMANDE 1936 NAC (N&T) 70
NGWENYA V NDLOVU 1965 NAC (N-E) 47
NJENGAYE V MBOLA 3 NAC 76 (1917)
NKABINDE V MLANGENI & ANOTHER 1942 NAC (N&T) 89
NKABINDE V NKABINDE 1946 NAC (N&T) 2
NKAMBULA V LINDA 1951 1 SA 377 (A)
NKOSI V NGUBO 1949 NAC (N-E) 87
NKOSI V TENJEKWAYO 1938 NAC (N&T) 94
NKUTHA V MAAKANE 1943 NAC (N&T) 47
NKUTHA V MATHIBU 1955 NAC (C) 47
NKWANYANA V XULU 1955 NAC (N&T) 13
NOBANGOMA V MNANJANA 1912 NHC 25
NOJIWA V VUBA 1 NAC 57 (1903)
NOMADUDWANA V TOTSHOLO 1938 NAC (C&O) 43

NOMBOMBO V STOFIE 19 SC 353 (1902)
NOMCIBI V VAYIVAYI 1922 NHC 1
NOTSHILA V NOTSHILA 1948 NAC (S) 12
NOVUNGWANA V ZABO 1957 NAC (S) 114
NTABENI V MLOBELI & ANOTHER 1949 NAC (S) 158
NTAMANE V NKOSI 1935 NAC (N&T) 20
NTAME V MBEDE 3 NAC 12 (1912)
NTLONGWENI V MHLAKAZA 3 NAC 163 (1915)
NTOMBELA V NTOMBELA 1930 NAC (N&T) 142
NTSIMANGO V NTSIMANGO 1949 NAC (S) 143
NTSHUMAYELO V MBULI 1948 NAC (C) 3
NTULI V NALA 1925 NHC 23
NTULI V MKHONZA 1964 BAC (N-E) 97
NTULI V NTULI 1946 NAC (N&T) 58
NTULI V XULU 1945 NAC (N&T) 95
NXUMALO V NDWANDWE 1956 NAC (N-E) 79
NXUMALO V NZUZA 1936 NAC (N&T) 36
NYALE V TAFENI 1916 EDC 377
NYAMANE V BUSAKWE 1944 NAC (N&T) 78
NYATHIKAZI V BHENGU 1931 NAC (N&T) 32
NYAWO V NYAWO 1944 NAC (N&T) 46
NYEMBE V MAFU 1979 ACCC (N-E) 186
NYONGWANA V XOLO 1912 NHC 46
NZALO V MASEKO 1931 NAC (N&T) 41
NZIMANDE V DHLAMINI 1935 NAC (N&T) 118
NZIMANDE V PHUNGULA 1951 NAC (N-E) 385
NZUZA V KHUMALO 1958 NAC (N-E) 78
PANTSHWA V MSI 2 NAC 147 (1911)
PEME V GWELE 1941 NAC (C&O) 3
PIET V GONESO 17 EDC 23 (1902)
PETRUS V ALICE 1916 NHC 85
PHALANE V LEKOANE 1939 NAC (N&T) 132
PHAME (PTY) LTD V PAIZES 1973 3 SA 397 (A)
PHIRI V NKOSI 1941 NAC (N&T) 94
PRESENTI V MASHALABA 1941 NAC (C&O) 78
QABUKA V DLISONDABAMBI 1937 NAC (C&O) 187
QANGISA V MNGWAZI 14 NAC 109 (1922)

QOTYANE V MKHARI 1938 NAC (N&T) 192
QULO V QULO 1940 NAC (N&T) 4
QWABE V QWABE 1932 NAC (N&T) 5
QWABE V QWABE 1940 NAC (N&T) 15
QWABE V QWABE 1945 NAC (N&T) 101
QWABE V QWABE 1953 NAC (N-E) 211
QWELA V MPINI 1907 NAC 33
R V MBOKO 1916 TS 445
RADEBE V BHENGU 1965 NAC (N-E) 126
RADEBE V TSHOPA 1948 NAC (N-E) 36
RAMOKHOASE V RAMOKHOASE 1971 BAC (N-E) 163
RAPHELA V DITCHABA 1940 nAC (N&T) 29
RAPHUTI & ANOTHER V MAMETSI 1946 NAC (N&T) 19
REGAL V AFRICAN SUPERSLATE (PTY) LTD 1963 1 SA 102 (A)
RICHARDSON V MELLISH (1824-34) ALL ER REP 258
RWAMZA V NKANKANE 2 NAC 50 (1910)
SACOSI V SACOSI 1976 ACCC (C) 118
SALIWA V MINISTER OF NATIVE AFFAIRS 1956 2 SA 310 (A)
SAMENTE V MINISTER OF POLICE & ANOTHER 1978 4 SA 632 (EDC)
SAMSON V MBANGA 1 NAC 217 (1908)
SANICHAREE V MADHO 1956 2 SA 94 (N)
SANGWENI V SANGWENI 1945 NAC (N&T) 103
SANTAM V FONDO 1960 2 SA 467 (A)
SEEDAT'S EXECUTORS V THE MASTER (NATAL) 1917 AD 302
SEFOLOKELE V THEKISO 1951 NAC (S) 25
SEKONYELA V LEAHA 1951 NAC (C) 19
SEKUPA V JONKMAN 1966 BAC (S) 20
SEME & ANOTHER V RADEBE 1946 NAC (N&T) 75
SENGQENGE V DENGE 1957 NAC (S) 16
SENOSI V SENOSI 1976 BAC (C) 118
SEPTEMBER V MPOLASE 1937 NAC (C&O) 138
SEREMA V MOGAPI & ANOTHER 1946 NAC (N&T) 25
SGATYA V MADLEBA 1956 NAC (S) 53
SHABALALA V SHABALALA 1953 NAC (N-E) 35
SHANDU V SHANDU 1956 NAC (N-E) 134
SHANGE V MPOFU 1942 NAC (N&T) 29
SHEZI V SHEZI 1945 NAC (N&T) 1

SHEZI V SHEZI 1945 NAC (N-E) 137
SHEZI V ZUNGU 1945 NAC (N-E) 137
SHEZI V ZUNGU 1957 NAC (N-E) 142
SHIWENGA V RAMASHIA 1947 NAC (N&T) 134
SHOYISA V DLAMINI 1953 NAC (N-E) 9
SHOYISA V SHOYISA 1951 NAC (N-E) 309
SIBEKO V MALAZA 1938 NAC (N&T) 117
SIBEYA & ANOTHER V MAKAKULE 1944 NAC (N&T) 2
SIBISI V SIBISI 1950 NAC (N-E) 188
SIBIYA V MBATA 1942 NAC (N&T) 71
SIBIYA V MKWANASE 1925 NHC 1
SIBIYA V MNGUNI 1960 NAC (N-E) 26
SIBIYA V MTEMBU 1946 NAC (N&T) 90
SIBIYA V SIBISI 1946 NAC (N&T) 60
SIBIYA V SIBIYA 1932 NAC (N&T) 1
SICENCE V LUPINDO 3 NAC 164 (1914)
SIFOLO V MOKOU 1911 TPA 426
SIGCAU V SIGCAU 1944 AD 67
SIGQUNGANA V MDHLUME 1915 NHC 151
SIKAKANE V SHANDU 1959 NAC (N-E) 71
SIKUKU V NTSHABA 1 NAC 62 (1903)
SIKWIKWIKWI V NTSWAKUMBA 1948 NAC (S) 23
SIKWEYIYA V SIXAKWE NAC (C&O) 126
SILA & ANOTHER V MASUKU 1937 NAC (N&T) 127
SILANGWE V MBHELE 1937 NAC (N&T) 70
SINDANE V MBHOKAZI 1930 NAC (N&T) 153
SISILANA V GALO 6 MAC 12 (1928)
SITA V MGIDI 1916 NHC 164
SITOLE V NGCOBO 1948 NAC (N&T) 12
SITOLE V SITOLE 1940 NAC (N&T) 115
SITOLE V SITOLE 1943 NAC (N&T) 17
SITOLE V XABA 1945 NAC (N&T) 81
SKOLOZA V MOYA 1908 NAC 60
SOMZAMANA V BHANTSHI 4 NAC 84 (1921)
SOMZANA V CWEJILE 1912 NHC 40
SONGOENGQE V DENGE 1957 NAC (S) 16
SOTSHA V MBHALO 1923 NHC 60

TEKELA V CIYANA 1902 NHC 13
TETANA V SIKUKELA 1 NAC 22 (1897)
TETANI V MNUKWA 1 NAC 38 (1900)
THE QUEEN V FLEISCHMAN & KATRYN (1880) Kotzé 172
THE QUEEN V SOPANA (1880) Kotzé 172
THELA V NKAMBULE 1940 NAC (N&T) 113
THLOPANE V MOTSEPE 1932 NAC (N&T) 35
TITUS V GOGO 1947 NAC (C&O) 27
TIYEKA V SIKAYI 5 NAC 47 (1926)
TOBIEA V MOHATLA 1949 NAC (S) 91
TONYA V MATOMANE 1949 NAC (S) 138
TSHANGASE V MTHEMBU 1928 NAC 14
TSHELEMBE V NHLAPHO 1944 NAC (N&T) 17
TSHOZI V TSHOZI 1941 NAC (N&T) 92
TUMANA V MILA & ANOTHER 1963 BAC (S) 39
TYOBEKA V MADLEWA 1943 NAC (N&T) 40
UMVOVO V UMVOVO 1953 1 SA 195 (A)
VALASHIYA V NTOA 1932 NAC (C&O) 32
VAN BREDA V JACOBS 1921 AD 531
VILAKAZI V NKAMBULE 1944 NAC (N&T) 57
XAKAZA V TSHABALALA 1943 NAC (N&T) 50
XIMBA V XIMBA 1959 NAC (N-E) 18
XOLO V PHEHLUKWAYO 1948 NAC (N&T) 10
XULU V KUMALO 1955 NAC (N-E) 10
XULU V LANGA 1940 NAC (N&T) 117
XULU V MAGWAZA 1954 NAC (N-E) 140
XULU V MTETWA 1947 NAC (N&T) 32
XULU V XULU 1943 NAC (N&T) 88
XULU V ZULU 1951 NAC (N-E) 343
YAPI & YAPI V MQUQU 1974 BAC (S) 398
ZACE V TUKANI 1 NAC 202 (1908)
ZULAKAZI V MTWAZI 1904 NHC 45
ZIMANDE V SIBEKO 1948 NAC (C) 21
ZOMBOVU V NOWALAZA 5 NAC 54 (1927)
ZULU V MOKWANYANA 1935 NAC (N&T)
ZULU V MDLETSHI 1950 NAC (N-E) 203
ZULU V MHLONGO 1951 NAC (N-E) 302
ZULU & ANOTHER V MINISTER OF JUSTICE 1956 2 SA 128 (A)

ZULU V NKOSI 1950 NAC (N-E) 227

ZULU V ZULU 1957 NAC (N-E) 6

ZUMA V SIBIYA 1923 NHC 60

ZWAKALA V NCAPAI 1946 NAC (C&O) 65

ZWANA V ZWANA 1945 NAC (N&T) 59

ZWANE V ZWANE 1937 NAC (N&T) 7

ZWANE V ZWANE & TWALA 1945 NAC (N&T) 59