

NOTES / AANTEKENINGE

SHOULD WE ABOLISH THE DELICT OF SEDUCTION IN CUSTOMARY LAW: *QUO VADIS* SOUTH AFRICA?

1 Introduction

Consensual sexual intercourse between a male and a virgin is not universally forbidden in Southern Africa because it constitutes a wrongful act for some cultural groups, and it is not a wrongful act for others. On the contrary, the impregnation of a non-virgin with her consent outside the confines of lawful marriage is a wrongful act and is forbidden by many indigenous cultures, if not all of them, in the Southern African Development Community (SADC) (Gluckman “Zulu Women in Hoe Cultural Ritual” 1935 *Bantu Studies* 255–271; May *Virginity Testing: Towards Outlawing the Cultural Practice that Violates Our Daughters* (LLM Theses, University of Western Cape) 2003 7–11). This disapproval of pre-marital sexual intercourse is reflected in the customary practice of *ukusoma* (this is thigh sex that does not involve penetration; it is also referred to as *ukuhlobonga* in Zulu) and virginity testing. The latter mentioned cultural practices serve the purpose of safeguarding against seduction.

The defloration of a virgin and the impregnation of an unmarried non-virgin is a delict and actionable under customary law. Notably, it is not easy or practical to institute legal action against the seducer when defloration is not followed by pregnancy. Moreover, common sense dictates that it is highly unlikely for a woman to reveal her private sexual life just because her father or guardian has to claim seduction damages (Dlamini “Seduction in Zulu Law” 1984 47 *THRHR* 28).

Because under customary law sexual delicts are not only limited to the defloration of a virgin but also the impregnation of an unmarried non-virgin, any male person who impregnates a virgin or non-virgin will be expected to pay seduction damages that normally comprise an *inquthu* beast, an *imvimba* beast, and an *ingezamagceke* beast (Himonga, Nhlapo, Maithufi, Weeks, Mofokeng and Ndima *African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* (2014) 203–205). An *inquthu* beast is received by the mother of the impregnated unmarried woman. It serves as compensation to the mother for all the pain and suffering that she incurred during her own pregnancy and childbirth. For this reason, it is often referred to as *inkomo yesifociya* (the beast of the pregnancy belt). It is also referred to as *inkomo kanina* (mother’s beast) as it also aims to compensate the mother for protecting her daughter’s virginity.

Besides an *inquthu* beast, an *imvimba* beast is payable for each pregnancy thereafter (Himonga *et al African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* 203). The father or guardian of the impregnated unmarried woman receives the *imvimba* beast because each child that is born out of wedlock diminishes the social value of the girl and thus the amount of *lobolo*. The *imvimba* beast, therefore, compensates him for prospective loss of *lobolo*. Moreover, another beast called *ingezamagceke* (purification or cleansing of the homestead) is slaughtered outside the homestead for ritual purification of the homestead (Dlamini 1984 *THRHR* 28). In fear of contagious ill-luck, the slaughtered beast is only eaten by elderly women and men. This practice is rooted in the belief that, should young maidens eat it, they could suffer the same fate as the seduced girl. Given the sacred element behind the delict of seduction, it goes without saying that it would not be an easy exercise to abandon it for fear of supernatural punishment by ancestors.

Although some people still practice and enforce the customary delict of seduction, some scholars such as Bohler-Muller, advocate for its abolition. Bohler-Muller argues that the delict of seduction contravenes the woman's right to equality and that it places a monetary value on her virginity and prospects of marriage. Bohler-Muller expresses this view as follows:

"The presence or absence of virginity would define a woman and her value to a man and this would be a stereotype which oppresses women because the continuation of this stereotype would amount to cultural imperialism where the value of women would be more likely to be exploited, and even be abused if they are not virgins. Therefore, the answer would be upholding the right to gender equality at the expense of such delicts." (Bohler-Muller "Cultural Practices and Social Justice in a Constitutional Dispensation: Some (more) Thoughts on Gender Equality in South Africa" 2001 22(1) *Obiter* 142–152; Bohler-Muller "Of Victims: Seduction Law in South Africa" 2000 *CODICILLUS*)

In view of the above argument, this note investigates whether or not the time is ripe for South Africa to abolish the delict of seduction. The legislature has not yet abolished the delict of seduction in customary law. In addition, there are a growing number of academic commentators who are in full support of Bohler-Muller's recommendation for the abolition of the delict of seduction in customary law. (Knoetze "Fathers Responsible for the Sins of their Children? Notes of the Accessory Liability of a Family Head in the Customary Law of Delict" 2012 2 *Speculum Juris* 48–49; Himonga *et al African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* 206). In investigating whether it is ripe for South Africa to abolish the delict of seduction under customary law, the first part of the note discusses the existing problems in customary law governing the delict of seduction. The second part discusses four challenges that might be created by its abolition under the following sub-topics, namely (a) social advantages for prohibiting pre-marital sexual intercourse; (b) religious consequences of pre-marital sexual intercourse and advantages for discouraging pre-marital sexual intercourse; (c) the link between the delict of seduction under customary law and the payment of *lobolo*; and (d) the relationship between the customary law delict of seduction and the value of gender equality. The third part of the note discusses the possible solutions to the problems.

2 Problems of the delict of seduction in Customary Law

Two problems plague the customary law delict of seduction. First, for the claim of seduction to succeed “there must be a physical defloration of a girl and the defloration must have occurred as a result of the seductive conduct of the man” (Bohler-Muller 2001 *Obiter* 142–152). This poses a problem in the country’s new constitutional dispensation because the current application of the delict of seduction perceives that only men are capable of seducing or leading a girl astray. It is also possible, however, for a woman to seduce a man. For example, nowadays there are reported instances where a much older woman seduces a younger partner, called a “Ben Ten”. This raises the question of whether this very young boy would be entitled to legal redress or protection in terms of the law of seduction. It is submitted that in light of the demands of the Constitution young boys too should be entitled to equal legal protection against predatory women.

Finally, should a girl decide to personally institute legal action against her seducer in terms of the common law, nothing prevents her father or guardian from claiming seduction damages under customary law. The authors argue that this situation can result in the problem of double jeopardy on the part of the seducer (See also Himonga *et al African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* 203). This problem of double jeopardy is visible in the decisions of the Native Appeal Court below.

2 1 *Booi v Xozwa*

In this case, the plaintiff sued the defendant for £25 on the summons wherein he alleged that in or about the winter season of 1920 the defendant seduced and impregnated the plaintiff’s sister (Amelia Xozwa). The defendant admitted that in or about July 1920 he seduced and impregnated Amelia and that in or about March 1921, Amelia claimed damages for seduction from him and that thereupon it was settled between the defendant and Amelia that she accepts the sum of £25 that would be paid in instalments of 30 cents per month. The defendant submitted that he had regularly paid such instalments and denied being liable in any way to the plaintiff. The Magistrate, after referring to the case of *Cebisa v Gwebu* (4 NAC 330), gave judgment for the plaintiff as prayed for in the particulars of the claim. It is noted by the authors that the case of *Booi v Xozwa* quoted above was incorrectly cited by the Native Appeal Court in the case of *Cebim v Gwebu* and therefore the correct citation of the case is *Cebisa v Gwebu* (*supra*).

The Native Appeal Court “admitted that no case similar to the one now under discussion has previously been before this court and no analogous case of any tribunal has been brought to the notice of the court” (*Booi v Xozwa* 4 NAC 310). The question before the Native Appeal Court to decide was “whether, when [a] woman has fully exercised her personal rights, the seducer is also liable to pay her guardian the damages otherwise claimable by him according to custom” (*Booi v Xozwa supra*). The Native Appeal Court acknowledged that the basic principle for the guardian’s claim for seduction

damages is that his ward's or family inmate's marriageable value for dowry purposes has depreciated and that appears to be the ground upon which the magistrate based his decision in favour of the plaintiff. The Court made it clear that the plaintiff had well-defined rights under native custom to the property that is acquired or accumulated by his family inmates and if he has failed in his duty to exercise his rights, he has himself to blame. The Court further held that

"[t]o compel the defendant to pay him [the] full damage claimable when [these] have already been paid to his ward who apparently does not recognize the authority which a native guardian exercises would be placing the Plaintiff in an unduly privileged [position] on which on this court's opinion, was not contemplated, and could well lead to consequences which would be contrary to the principles of justice".

The above extract makes it clear that the reason for the failure of the plaintiff's claim for seduction damages is that according to native custom he has rights over the property accrued or accumulated by the family inmates. This power of the guardian or family head to the control of the family property is illustrated in the case of *Mlanjeni v Macala* (1947 NAH 1 (C & O) 1–2), where the court held:

"The basic principles of Native Law in general regard the family as a collective unit with joint responsibilities and assets. All property accruing to members of the family goes into a common pool and is administered by the kraal head; liabilities incurred by members of the kraal are satisfied from such property. The family unit thus resembles a partnership of which the head of the kraal is the manager. The difference is that in a partnership the relationship between the partners is based upon agreement, whereas in the family unit the relationship is based on native custom."

However, in our modern society, children and family inmates no longer constitute parts of the wealth of the group (Bennett and Peart *A Sourcebook of African Customary Law for Southern Africa* (1991) 345–346). In terms of section 6 of the Recognition of Customary Marriages Act (120 of 1998), spouses in a customary marriage have equal status and capacity to enter into contracts, acquire assets and dispose of them, and to be delictually liable. Therefore, it is argued that a wife who commits a delict should be personally liable. This also applies to all family inmates who obtain majority status in terms of section 9 of the Recognition Act which provides for the application of the Age of Majority Act (57 of 1972), which initially fixed the age of majority to 21 years. Subsequently, section 313 set the age of majority at 18 years of age (38 of 2005). Therefore, a family inmate would obtain proprietary capacity at the age of 18, which implies the power to acquire and to dispose of it (Bennett *Customary Law in South Africa* (2004) 322). In view of the latter developments, it is argued that the case of *Booi v Xozwa* (*supra*) is not relevant in solving a problem of double jeopardy today. This is so because the guardian or family head is no longer in control of property that is owned by family inmates that have reached the majority age.

2 2 *Vilapi v Molebatsi* (1951 NAC (C & D))

The plaintiff sued the defendant for £100 as damages for breach of promise to marry, £100 as seduction damages, a monthly instalment of £4 as

maintenance and support of the child born to the plaintiff. The defendant admitted the paternity of the child born to the plaintiff and pleaded that the plaintiff and her father had, through an attorney, demanded payment from him of £200 as damages for seduction and pregnancy of, and breach of promise to marry the plaintiff; that it was agreed that he should pay an amount of £50 in instalments of £2 and 10 cents per month; that he had paid an amount of £42 and 10 cents and was willing to pay the balance of £7 and 10 cents in accordance with the agreement. After hearing the evidence, the Native Commissioner gave judgment for the plaintiff for £20 as damages for breach of promise to marry and £40 as seduction damages.

The defendant appealed the judgment of the Native Commissioner on the following grounds: (a) the judicial officer made an error by ignoring the fact that the action was first initiated in terms of native law and a settlement was arrived at and carried out by the defendant; and (b) that having regard to the previous settlement and the benefit received by the father of the plaintiff under native law, the damages awarded to the plaintiff in the action was excessive. On appeal, the Native Appeal Court relied on the case of *Booi v Xozwa (supra)* and held that the “[p]laintiff is entitled to bring an action against defendant under the common law although her father has received a fine under native custom, but the amount received by her father must be taken into consideration when awarding damages to her” (*Vilapi v Molebatsi supra* 11). The court considered the fact that the defendant had already paid £42 to the plaintiff’s father and concluded that was equivalent to a substantial amount of *lobolo*. At the time of judgment, a cow had a value of £3. Under these circumstances, the Court held that damages in the sum of £5 would be sufficient and the decision of the Native Commissioner was set aside.

3 Possible solutions

In view of the above-mentioned problems, the authors note that according to the present position there lurks a lacuna in the field of the law relating to seduction law in South Africa as there is no legislation or case law that adequately addresses the problems identified above. The note advances two possible solutions to the problems confronting the law of seduction in South Africa. The first option begs the challenge of developing the delict of seduction to streamline and refine areas of uncertainty as indicated above. The second option would be to abolish the law relating to seduction in customary practice only in the (unlikely) failure of the first development.

3.1 *Development of Customary Law*

The Constitution protects the right to culture in many provisions, which refer to cultural diversity in the South African population. The Preamble to the Constitution, for instance, clearly stipulates that we, the people of South Africa, “believe that South Africa belongs to all who live in it, united in our diversity” (Preamble to the Constitution of the Republic of South Africa, 1996). It goes without saying that the Constitution recognises and protects the right to culture. It is also clear that no one person or group ought to be unfairly discriminated against on the grounds of, *inter alia*, culture.

Furthermore, the Constitution goes on to protect the right to culture in section 30, which stipulates that “everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.” In a similar vein, section 31 also protects the right to culture. A study of sections 30 and 31 indicate that the sections contain internal limitation clauses which make it clear that the practice of the right to culture may not be exercised in a manner that is inconsistent with the Bill of Rights. Moreover, the Constitution also provides for the establishment of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (s 185 and 186 of the Constitution). The functions of the Commission include, *inter alia*, the advancement of respect, tolerance, and national unity among cultural, religious, and linguistic communities-based equality; it also has the authority to conduct research and report on matters regarding the rights of cultural, religious, and linguistic communities. Moreover, it may report any issue within its jurisdiction to the South African Human Rights Commission (SAHRC) for investigation. For such rights, protecting cultures, to have meaning and genuine protection it is necessary to start by developing customary-law and/or common-law rules under the Constitution whenever possible to nudge towards abolition only as a last resort.

Section 39 of the Constitution stipulates that when interpreting the Bill of Rights and legislation, and when developing the common law or customary law, a court, tribunal or forum must promote the constitutional values, must consider international law, and may consider foreign law.

In terms of the latter section, the court emphasised in the case of *Carmichele v Minister of Safety and Security* (2001 (4) SA 938 (CC) par 39) that the responsibility to develop common law is not purely discretionary and when common law is not in line with the spirit, purport and objects of the Bill of Rights, the courts have a general responsibility to develop it appropriately. In the case of *Bhe v Magistrate, Khayelitsha* (*Bhe v Magistrate, Khayelitsha*; *Shibi v Sithole*; *SA Human Rights Commission v President of RSA* 2005 (1) BCLR 1 (CC)) the Constitutional Court held that the development of customary law is significant because “once a rule is struck down, that is the end of that particular rule, yet there may be many people who observe the rule.”

The lessons learnt in the *Carmichele* case apply equally to the development of customary law. Whenever a rule of customary law deviates from the spirit, purport, and objects of the Bill of Rights, the courts must develop it to remove deviation (*Bhe v Magistrate, Khayelitsha*; *Shibi v Sithole*; *SA Human Rights Commission v President of the RSA supra* par 215). The authors consider it necessary to develop customary law for two reasons. Once a provision is struck down, that marks the end of it. The second reason is that there may be many people who are still practising it (*Bhe v Magistrate, Khayelitsha*; *Shibi v Sithole*; *SA Human Rights Commission v President of the RSA supra* par 215). In other words, the authors submit that the delict of seduction may still be widely observed in many communities of South Africa. Therefore, as a result, the authors suggest that it would be better to consider developing it.

The suggested development of the delict of seduction is as follows:

- (a) A delict can be developed to permit men to claim from a seducer whenever there is an instance of seduction by elderly predatory women or young predatory women;
- (b) Women who are subject to customary law should be able to personally institute legal actions against their seducers to enjoy equal benefits as their common-law counterparts; and
- (c) once a woman starts personally instituting actions in terms of the common law against her seducer, then the customary-law action should become redundant. Similarly, if a father or guardian of a girl institutes legal action in terms of customary law, by the same token the customary-law seduction action against her seducer should prevail.

3.2 *Considering abolition*

It is argued here that if the courts decide to choose the path of abolition the following arguments can be made against the option of abolition:

- (a) There are social advantages to discouraging pre-marital sexual intercourse for men and women, the community, and the government at large. These social advantages are discussed in detail in the next section of this note. Therefore, abolishing the delict of seduction that is aimed at discouraging sexual intercourse and pre-marital pregnancy without providing an alternative, does not appear to be a viable option.
- (b) In the traditional African world view, the prohibition against the practice of seduction was always not undermined because of the fear of punishment by the ancestral spirits. According to this world view, the spirit of the ancestors was believed not to be isolated from the daily activities of the living family lineage (*Ndaba An African Philosophy for a Dialogue With Western Philosophy – A Hermeneutic Project* (doctoral thesis, University of Fort Hare) 2004 12). Therefore, to turn a blind eye to this reality might lead to “paper law” because the sacral element of practice contributes a lot to its continuation and enforcement for fear of punishment by the ancestral spirits.
- (c) A strong link exists between the delict of seduction under customary law and the custom of *lobolo*. As long as the custom of *lobolo* survives, it will not be easy to abolish the delict of seduction.
- (d) The practice of the delict of seduction under customary law is intended to preserve the woman’s dignity rather than to compromise or attenuate it.

4 **Social advantages for discouraging pre-marital sexual intercourse**

In traditional Zulu society, a virgin was regarded as *intombi nto* or *intombi egcwele* (a full virgin maiden) who thereby earned her respect and dignity. A full maiden did not only enjoy respect from her family but also other maidens in her age group and the community at large. The status of full maidenhood entitled her parents to receive full payment of *lobolo* (Ashton *The Basuto*

(1952) 62–263; *Phefe v Raikana* 1942 NAC (N&T) 16; *Tsweu v Nqakala* 1940 NAC (C&O) 72; Bennett, Mills and Munnick “The Anomalies of Seduction: A Statutory Crime or an Obsolete, Unconstitutional Delict” 2009 25 *SAJHR* 332). This shows the value that is placed on virginity in an African society. Consequently, it is a disgrace for a woman to fall pregnant outside wedlock. This disapproval does not attach merely to the impregnated woman but is believed to even affect her offspring (Holleman *Shona Customary Law* (1952) 216). This belief explains why the customary delict of seduction is still deeply embedded in the mindset of many South African cultures and widely practised (Marwick *The Swazi an Ethnographic Account of the Natives of the Swaziland Protectorate* (1940) 87). However, it is noted that the chastity of a virgin is on the wane, owing to the influence of western morality and laws (Dlamini 1984 *THRHR* 28). This tendency has led to a trend where many seducers of unmarried women continue to perpetuate the delict of seduction with impunity. Nevertheless, the prevalent impunity does not take away the fact that the customary delict of seduction is still widely practised in South Africa. As a result, the authors conclude that it will not be easy for people to abandon cultural sanctions against the practice of seduction and impregnation of unmarried women. Given the current practice and widespread social acceptance of the delict of seduction in customary law, any attempt to abrogate it would amount to paper law that will be largely ignored by the very target community whose behaviour the lawmakers would be intending to change in the first place.

The social disapproval of pre-marital intercourse has numerous advantages. These social advantages include, *inter alia*, efforts to discourage the spread of HIV/AIDS, unplanned pregnancies, and early detection of child sexual abuse. It is an indisputable fact that HIV/AIDS can be transmitted through unprotected sexual intercourse and other sexual behaviours that involve an exchange of bodily fluids. Therefore, sexual activity among younger adults will continue to have devastating consequences for them, their families, and the government. Moreover, the early sexual activity of young people has led to unwanted teenage pregnancies, promiscuity, and immorality.

It is noted that in a traditional Zulu society a maiden who lost her virginity before marriage was ostracised by her age group or even ill-treated (Dlamini 1984 *THRHR* 19). This culturally embedded sanction shows beyond any doubt the value that society places on virginity.

In ensuring virginity before marriage the traditional Zulu society observed certain safeguards against seduction. Virgins (*amatshitshi* in Zulu) were under strict surveillance by their elder counterparts (*amaqhikiza*). In addition to this, the traditional communities permitted *ukusoma* (Van Tromp *Xhosa Law of Persons A Treatise on the Legal Principles of Family Relations Among the AmaXhosa* (1948) 18) as a cultural practice aimed at safeguarding the chastity of virginity and alleviating social and moral ills associated with premarital penetration. Be that as it may, for the purposes of this note the authors retain the meaning of *ukusoma* as a traditional practice of thigh sex. As indicated above, it was tolerated as a preferred option compared to pre-marital sexual intercourse which was regarded as a taboo. However, *ukusoma* is no longer widely practised in our modern society,

notwithstanding evidence that it allowed for safer sexual experimentation (Eppreett "Unnatural Rise in South Africa: The 1907 Commission of Enquiry" 2000 34 *The International Journal of African Historical Studies* 121–140). Moreover, *ukusoma* was used successfully to curb sexually transmitted diseases because it does not involve an exchange of bodily fluids (Price "Conserving (not preserving) Culture: Avoiding the Damage to Culture of Veiled Moralism in HIV Education" 2009 *The South African Journal of HIV Medicine* 14).

In safeguarding against seduction, the custom of virginity testing (*ukuhlolwa kobuntombi*) was used. However, this custom has tended to fall into disuse owing to the influence of western morality and individualism (Dlamini 1984 *THRHR* 19). In response to the escalating statistics of people dying as a result of HIV/AIDS, the late King Goodwill Zwelithini revived the reed dance ceremony in 1984. In the latter ceremony, virgin girls dance before the King himself who may at times exercise the prerogative to choose one of the virgin girls and make her one of his wives. It is noted that the revival of virginity testing gained more prominence in the early 1990s when some concerned women such as Nomagugu Ngobese (Patience Nomagugu Ngobese decided to revive the Nomkhubulwane festival when she was an honours student in Drama at the University of Natal in 1996. The idea had come to her in a dream, and she has now left the teaching profession and become a *sangoma* (traditional healer). As the maidens who participate in the festival must be virgins, according to ancient custom, the custom of virginity testing was also revived, as part of the festival) emphasised the importance of reviving virginity testing as a weapon against the escalating number of people dying as a result of AIDS-related illnesses (See generally Bennett, Mills and Munnick "The Anomalies of Seduction: A Statutory Crime or An Obsolete, Unconstitutional Delict?" 2010 2 *TSAR* 254). Virginity testing enjoys legal protection in South Africa and is regulated in terms of section 12 of the Children's Act (34 of 2005). The above-mentioned section of the Children's Act is aimed at ameliorating harmful effects that might be caused by the practice of virginity testing and stipulates:

- "12 (4) Virginity testing of children under the age of 16 is prohibited.
- (5) Virginity testing of children older than 16 may only be performed–
 - (a) if the child has given consent to the testing in the prescribed manner;
 - (b) after proper counseling of the child; and
 - (c) in the manner prescribed.
- (6) The results of the virginity test may not be disclosed without the consent of the child.
- (7) The body of the child who has undergone virginity testing may not be marked."

However, some scholars, such as Mubangizi, are unhappy about the current regulation of virginity testing in South Africa. They maintain that virginity testing violates the equality provision and assails a maidens' sense of dignity (Mubangizi "A South African Perspective on the Clash between Culture and Human Rights, with Particular Reference to Gender Related Cultural Practices and Traditions" 2012 13(3) *Journal of International Women's*

Studies 39; see also Mswela “Cultural Practices and HIV in South Africa” 2009 12(4) *Potchefstroom Electronic Law Journal* 171–213).

5 Religious consequences

In cultural communities which place a high value on virginity, the loss of a maiden’s virginity has religious consequences. In such communities, there is a strong belief that the seduction of an unmarried woman constitutes an insult to the ancestral spirits. Because of the fear of ancestral spirits, it would not be easy for communities that still observe the delict of seduction to countenance its abolition.

Appeasement of Nomkhubulwane (Nomkhubulwane is the goddess of rain, nature and fertility. There is a belief among the Zulus that the goddess never married, and she never bore children, but she considers all Zulu virgin girls as her daughters. A festival in honour of the goddess was held annually over 200 years ago, but with the emergence of Christianity, the worship of the female aspects of the gods waned) is one of the factors that led Africans to value virginity and to do everything possible to safeguard virgin girls against seduction. Nomkhubulwane is an almost forgotten deity or goddess who was regarded as an immortal mother and the protector of Zulu girls. Nomkhubulwane does show herself to virgin girls and may be directly contacted through virgin girls only. Therefore, in ancient times, a group of Zulu virgin girls wearing *umutsha* or *izigege* (small, beaded aprons that cover the pubic area only) would depart to the mountain to request rain from Nomkhubulwane during times of drought. In doing so, they had to perform a ritual of sowing seeds in a garden that was specifically reserved for the deity as a form of appeasement (Mkhize *Umsamo African Institute* (2011) 36; Kriege “Girls, Puberty Songs and their Relation to Fertility, Health, Morality and Religion among the Zulu” 1968 *Africa* 175–198; Gluckman 1935 *Bantu Studies* 255–271). As mentioned earlier, only virgin girls can appease the Zulu goddess by performing necessary rituals and this necessitates the safeguarding of girls’ virginity. Therefore, to turn a blind eye to this reality might lead to paper law because the sacral element of a practice contributes a lot to its continuation and enforcement for fear of punishment by the ancestral spirits. The following section intends to discuss the connection between the delict of seduction in customary law and the custom of *lobolo*. It is argued that as long as *lobolo* exists it would be difficult to abolish this delict in the South African legal order.

6 Link between the delict of seduction in customary law and *lobolo*

It is appropriate to begin by clarifying that the practice of the custom of *lobolo* has a strong link with the delict of seduction in customary law. Any male person who impregnates a virgin or non-virgin out of wedlock is expected to pay seduction damages that normally comprise an *inquthu* beast (mother’ beast), an *imvimba* beast (beast paid for each subsequent pregnancy) and an *ingezamagceke* beast (the beast for the cleansing or purification of the homestead). Besides the *inquthu* and *ingezamagceke*

beasts, the *imvimba* beast is payable for each pregnancy thereafter. The father or guardian of the impregnated unmarried woman receives an *imvimba* beast because each child that is born out of wedlock is not only regarded as an abomination, but as diminishing the amount of *lobolo*. In light of this observation, the authors argue that the person who stands to be the legitimate beneficiary of compensation for the seduction delict is the father or guardian of the seduced woman for the prospective diminution of *lobolo*. Hence *lobolo* is still recognised and widely practised in the Southern African Development Community (SADC) in particular, and Africa, in general. This is so because it has been argued that Africans, in general, are unable to recognise a relationship as a valid marriage if there was no agreement that *lobolo* or part of it will be delivered (Dlamini *Juridical Analysis and Critical Evaluation of Ilobolo in a Changing Zulu Society* (doctoral thesis, University of Zululand) 1983; see also Dlamini "The Modern Legal Significance of *lobolo* in Zulu Society" 1984 *De Jure* 148–166). In addition to this, the manner in which the process of marriage is conducted makes it difficult to evade the payment of *lobolo* even if a person may want to. During marriage negotiations, it is usually not possible to determine whether a prospective marriage will be a civil or a customary marriage because the agreement to pay *lobolo* is a norm in negotiations of both civil and customary marriages (Dlamini 1984 *De Jure* 148–166).

7 Delict of seduction under customary law versus equality rights

For a start, it would be appropriate to analyse the equality provision which provides that every person is equal before the law and has a right to the same safeguard and benefit of the law (s 9 (equality clause) of the Constitution of the Republic of South Africa, 1996). The Constitution does not necessarily prohibit all forms of differentiation or discrimination. It prohibits only unfair discrimination. The question is whether or not the delict of seduction in customary law constitutes an infringement of the right of women to equality. It would infringe the right to equality if it unfairly discriminated against women.

In the case of *Prinsloo v Van der Linde* (1997 (3) SA 1012 (CC)) the Constitutional Court held that discrimination in South Africa means "treating people differently in a way which impairs their fundamental dignity as human beings" (*Prinsloo v Van der Linde supra* par 31). The delict of seduction in customary law constitutes a differentiation on a specified ground of discrimination (that is discrimination based on sex and gender) because the delict of seduction is only males and not from females. This is so even if they practised consensual sex. Males are the ones who incur all the blame for making unmarried females pregnant. This raises the question of whether South African equality jurisprudence is based on the liberal perception of equality that is based on sameness and similar treatment. In departing from that view, in the case of the *President of the RSA v Hugo* (1997 (6) BCLR 708 (CC)) Goldstone J indicated that "although a society which affords each human being equal treatment based on equal worth and freedom is our goal; we cannot achieve that goal by insisting on identical treatment in all circumstances before the goal is achieved" (*President of the RSA v Hugo*

supra par 729). The court held that there must be an examination of an impact of an alleged infringement of the right to equality concerning the prevailing economic, cultural, and social circumstances in the country (1996 (6) BCLR 752 (CC) par 768 ; see also *President of the RSA v Hugo supra* par 729).

As already mentioned earlier, the delict of seduction in customary law constitutes a differentiation on one of the specified grounds of discrimination. This means that discrimination has been established (*Prinsloo v Van der Linde supra* par 31). However, it is submitted that this form of discrimination is not unfair because it does not infringe the right of women to equality and dignity. The case of *Harksen v Lane* (1997 (11) BCLR 1489 (CC) par 50–51) provided some guidelines for assessing what constitutes unfair discrimination. It was held that the impact of discrimination on the complainant or the victim is a determining factor. Goldstone J held that in assessing the impact of the discrimination on the complainant, the following factors must be considered:

- 1) The position of the complainant in the society and whether they have suffered from past patterns of discrimination;
- 2) The nature of the provision or power and purpose sought to be achieved by it. An important consideration would be whether the primary purpose is to achieve a worthy and important societal goal and an attendant consequence of that was an infringement of the applicant's rights; and
- 3) The context to which the rights of the complainant have been impaired and whether there has been an impairment of his or her fundamental dignity (*Harksen v Lane supra* par 50–51).

It has been argued that the delict of seduction in customary law does not violate the right of women to equality and human dignity- on the contrary; it compensates a woman together with her family for the loss of dignity. This is because in a traditional society a virgin was regarded as a full maiden and that earned her the respect and dignity of other maidens in her age group and the community at large.

The importance of human dignity in the South African equality jurisprudence also appears in the words of the former Chief Justice of the Constitutional Court, Chaskalson. When delivering the third Bram Fischer Memorial Lecture, he indicated:

“As an abstract value, common to the core values of our Constitution, dignity informs the content of all the concrete rights and plays a role in the balancing process necessary to bring different rights and values into harmony. It too, however, must find its place in the constitutional order. Nowhere is this apparent than in the application of the social and economic rights entrenched in the Constitution. These rights are rooted in respect for human dignity, for how can there be dignity in a life lived without access to housing, health care, food, water or in the case of person unable to support themselves, without appropriate assistance. In the light of our history the recognition and realization of the evolving demands of human dignity in our society – a society under transformation – is of particular importance for the type of society we have in the future.” (Chaskalson “Human Dignity as a Foundational Value of Our Constitutional Order” 2000 16 *SAJHR* 193)

The above quotation supports the equality jurisprudence of the Constitutional Court which views equality as a value that does not stand independently. If equality stands alone, it is not easy to explain exactly what it is that we seek to protect or achieve (Cowen "Can 'Dignity' Guide South Africa's Equality Jurisprudence?" 2001 *SAJHR* 40). The Constitutional Court responds that we seek to protect human dignity. So far, nothing is proving that the delict of seduction in customary constitutes an affront to a woman's right to dignity.

8 Conclusion

This note concludes by arguing that it is not yet ripe for South Africa to abolish the delict of seduction in customary law because that has the possibility of creating paper law that would be largely ignored by the cultural communities practising it. First, seduction has both cultural and religious relevance. As already argued above, there is a general belief among those practising the delict of seduction that if it is not paid for a female that was impregnated out of wedlock, that would attract the anger of the ancestral spirits. There is still a widespread belief in ancestral spirits in South Africa amongst the traditionalists, westernised and semi-westernised black South Africans. Therefore, many Africans are not likely to abandon the recognition of the delict of seduction even if the legislature may attempt to abolish it.

Secondly, in a traditional societal setting, it appears that a full maiden or a female who does not get pregnant out of wedlock enjoys respect and dignity by the maidens in her age group and the community at large. It is a disgrace for a female to be impregnated out of wedlock and that reduces her chances of getting married. Therefore, if the legal system allows seduction with impunity, that would be an affront to the seduced's dignity and that of their families.

Lastly, the customary delict of seduction has a strong link with the custom of *lobolo*. In customary law each pregnancy that occurs outside marriage is punishable and a male is expected to pay some damages in the form of a beast. As long as the custom of *lobolo* exists in South Africa, it would be difficult to get rid of the delict of seduction in customary law. It is submitted in this note that the abolition would be a mere paper law.

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