

The dilemma of gender inequality in the delict of seduction: A Zimbabwean perspective and some lessons from South Africa

Priccilar Vengesai

LLB LLM LLD PDHTE

Lecturer, Herbert Chitepo Law School, Great Zimbabwe University

Sibongumuzi Zibusiso Mnkandhla

Cert Police Service, Dip in Law

5th year LLB student, Herbert Chitepo Law School, Great Zimbabwe University

SUMMARY

In Zimbabwe, the delict of seduction has two species, namely seduction under common law derived from Roman-Dutch law and seduction under customary law. The universal feature in these species is that they were both conceived in patriarchal societies marred with gender inequalities. These inequalities were exhibited, *inter alia*, in stiffer sexual mores being imposed on women. In these societies, men allotted property rights to themselves over the sexuality of women who were perpetually under their tutelage. Conceptually, it is argued that the delict of seduction is a legal incarnation of these gender inequality-stricken notions. This paper unmasks the plethora of prejudices, challenges and gender inequalities which are engineered by the delict of seduction during litigation and draws on hegemonic masculinity in patriarchal societies as a theoretical framework.

1 Introduction

The delict of seduction is saturated with connotations of morality. Under this delict, unmarried women are presented as morally upright and focused whilst men are regarded as potential threats who through seductive artifices may derail women from the path of virtue. This delict was originally conceived in patriarchal societies characterised by sexual double standards, which saw the imposition of steep sexual mores on women while men were allowed to explore their sexuality unabated. This societal setup became a breeding ground for hegemonic ideals of masculinity, which did not only ratify the subordination of women socially and economically but also set standards of the ideal man who is virile, stoic and tough. In these societies, men allotted to themselves proprietary rights over women and their sexuality. The delict of seduction was clearly designed to protect those proprietary interests,

among other things.¹ However, with time, those societies have changed, forcing the law to adapt to the ethos of equality of all persons. The dilemma which has emerged is that this delict which is a product of man-induced inequalities, must comply with the right to equality for its survival. The right to equality is recognised in the national laws of the countries under the study. Also, the right occupies a significant space in regional and international human rights law.

In this paper, the introduction is followed by section 2, which covers the theoretical framework that is hinged on hegemonic masculinity. In section 3, I will discuss the conceptual framework as well as the key elements of the delict of seduction. Section 4 contains an analysis of the objects of the delict of seduction. In section 5, I explore the feasibility of the objects of seduction in the contemporary cosmopolitan society, in light of the proliferation of women's sexual liberals. Section 6 discusses gender inequalities inherent in seduction law. Some lessons shall be drawn from South Africa, in recognition of the fact that South Africa has dealt with seduction under the law of delict and its constitutionality, in section 7. Conclusion and recommendations are provided in section 8.

2 Theoretical framework

Masculinity is a particular pattern of social behaviours or practices that is associated with ideals about how men should behave and their position within gender relations.² Katz, Kaufman and Kimmel all agree that masculinity is a social construction rather than a fixed state of being and is shaped within a social, political and economic context; that dominant constructs of masculinity are often harmful to both men and women; that men's concept of aggression is rooted in these constructs of masculinity; and that a fundamental shift in the social construction of masculinity is needed in order to end gender inequalities.³ Also, masculinity is regarded as a dichotomous concept, defined in opposition to femininity and expectations about how women should behave.⁴ One of the more common features of masculinity is the equation of manhood with dominance, toughness, and risk-taking. In this regard, masculinity means the qualities and characteristics that a society associates with manhood.

1 Nguyen "Roman Rape: An Overview of Roman Rape Laws from the Republican Period to Justinian's Reign" 2006 *MICH. J. Gender & Law* 75.

2 Ngoshi "Masculinities and Femininities in Zimbabwe Autobiographies of Political Struggle: The Case of Edgar Tekere and Fay Chung" 2013 <https://repository.up.ac.za> (last accessed 2022-03-24).

3 Minnings "How Men are Transforming Masculinities and Engaging Men and Boys to End Violence Against Women and Girls in Zimbabwe: A Case Study" 2014 https://ruor.uottawa.ca/bitstream/10393/31059/1/Minnings_Amber_2014_researchpaper.pdf (last accessed 2022-03-24).

4 Whitehead *Men and Masculinities: Key Themes and New Directions* (2002) 93-94.

Morrell calls for the placement of masculinity on the agenda in the study of law and gender relations. It is only when we understand how different masculinities are formed and how they change over time that we can effectively influence changes towards equal relations between men and women.⁵

The standards of masculinity in patriarchal societies have seen women being socially classified as perpetually subordinate to men. In addition, it has begotten unequal sexual standards on both men and women, which have seen men being liberalised to explore their sexuality uninhibited yet stiffer sexual mores were imposed on women. Against this background, the concept of the delict of seduction was conceived, ostensibly to ameliorate the fate of women in such a hegemonic societal setup. However, paradoxically, this very conceptual background has caused the delict of seduction to perpetrate gender inequalities to the disadvantage of women. Also, in a rather strange twist of events, men are suffering a different form of gender discrimination that has gone unnoticed, one targeted against their masculinity. As a result, men are hard-pressed to prove their innocence in cases of the delict of seduction.

3 The delict of seduction

The word seduction is derived from the Latin word *seducere* meaning leading astray.⁶ In the legal context, seduction is the leading astray of an unmarried woman from the paths of virtue by enticing her to have consensual sexual intercourse.⁷ It is the consequence of a woman succumbing to the seductive devices of the seducer which underlines the delict of seduction.⁸ Notably, there is a slight difference in the elements of seduction in each respective seduction law in that the customary law delict of seduction does not require one to prove she was a virgin at the time of seduction.⁹ Conversely, under common law, according to Van den Heever, there are three conditions which define a delictual act of seduction under common law: (i) that there has been sexual intercourse, (ii) that the woman has been seduced into the act, and (iii) that the woman was a virgin up to the time of seduction.¹⁰ Under common law, once it is proven that sexual intercourse occurred, the other two requirements, namely that the woman was seduced into the act and that she was a virgin, are presumed to have been fulfilled and the onus automatically shifts to the defendant to refute them. It is noteworthy that

5 See, generally Morrell "The Times of Change: Men and Masculinity in South Africa" in Morrell (ed) *Changing Men in Southern Africa* (2001).

6 Hegazy and Al-Rukban "Hymen: Facts and Conceptions" 2012 *heHealth* 109.

7 *Pillai v Pillai* 1963 1 SA 542 (N) 554

8 *Bull v Taylor* 1965 4 SA 29 (A) 29.

9 *Machokoto v Mabika* 1991 2 ZLR 159 (HC) 163.

10 Van Den Heever *Breach of Promise and Seduction in South African Law* (1954) 45.

the successful litigation of this delict heavily leans on the ability to satisfy these presumptions.¹¹

3 1 Elements of the delict of seduction

3 1 1 *Sexual intercourse*

In layman's terms, sexual intercourse generally refers to an activity involving penile–vaginal penetration for sexual pleasure or sexual reproduction.¹² However, this perspective diverges slightly from the legal position which takes sexual intercourse as even the slightest degree of penile-vaginal penetration.¹³ In the case of *S v Sabawu*¹⁴ Chatikobo J (as he then was) indicated that it is not necessary to prove that the hymen was ruptured for one to claim that sexual intercourse has taken place. It is noteworthy however that there are no definitions of sexual intercourse tailored to seduction cases, probably owing to the fact that there has been no reason to proffer a different definition of sexual intercourse.

3 1 2 *Seduced into the act*

This element requires proof of actual seduction into the sexual act. In other words, the victim must have succumbed to the seductive artifices of the seducer. The import of this requirement is that, even though consent may be present, the victim acted under diminished autonomy as a result of the seductive wiles of the seducer.¹⁵ However, once the act of sexual intercourse is proven, the victim is presumed to have been seduced into the act.¹⁶ This means actual seduction is automatically imputed to the defendant, upon proof of copulation. Thus, the woman does not have to prove actual seduction, instead, the onus lies with the defendant to rebut it. It would seem the rationale for this presumption revolves around the complexities involved in proving actual seduction.

It is argued that this requirement positions the delict of seduction in the middle ground between the crime of rape and consensual sexual intercourse. It makes this delict appear like a 'soft rape' in the sense that although the impugned conduct cannot strictly be defined as 'rape' since the plaintiff consented to the act at the time, at the same time the conduct does not fall under consensual sexual intercourse since the consent was improperly obtained as a result of the defendant's seductive artifices and the plaintiff's sexual gullibility. Thus, this requirement affirms the contention that seduction is anchored in the presumed sexual gullibility of women.

11 *Bull v Taylor* 34.

12 Merriam Webster Dictionary <https://www.merriam-webster.com/dictionary/sexual%20intercourse> (last accessed 2021-07-03).

13 *S v Mhanje* 2000 2 ZLR 20 (H) 22.

14 *S v Sabawu* 1999 2 ZLR 314 (H) 316.

15 *Bull v Taylor* 35.

16 *Bull v Taylor* 30.

3.1.3 Virginité

The term virginité refers to the physical state of a person who has never had sex.¹⁷ However, this term is commonly associated with women who have never experienced penile-vaginal penetration.¹⁸ It has also been observed that the term “virgin” has connotations of women’s subservience to men as its Old French term “*virgine*” is derived from Latin by fusion of the words “*vir*” which means “man” and “*genere*” which means “created for”.¹⁹ In seduction litigation, virginité is a state of a woman who has never copulated. In common law seduction proceedings, upon proof of copulation, the woman is presumed to have been a virgin.²⁰ Since virginité is automatically imputed to the seduced woman in the common law delict of seduction, there is a real risk of erroneously sanctifying an otherwise sexually precocious person. The issue of virginité arises in court, after the virginité breaking event (i.e. the alleged seduction) thus the seducer may face an uphill battle to rebut it. Furthermore, a woman’s virginité is generally not easy to determine. In conservative societies, the state of virginité has been inferred from the presence of a hymen without a rupture, however, scientific knowledge has proven that this method of assessment is not accurate.²¹ There is also consensus in the medical field that the bleeding of the hymen does not always occur during a woman’s first experience of sexual intercourse.²² Besides sexual intercourse, hymenal rupture can also be caused by intense sporting activities and the use of tampons.²³ This means that virginité is in some instances beyond scientific detection. If virginité is difficult to prove even on a *bona fide* virgin, the difficulty of proving its absence, in court, after the act, is even twice as hard. Given the fact that the determination of the plaintiff’s virginité status is elusive, and virginité is treated as a foregone conclusion, proving that the unmarried woman was not a virgin becomes an uphill battle for the defendant.

4 The objects of seduction

In Zimbabwe, owing to legal pluralism, the delict of seduction is contained in two legal systems being common law and customary law. For a coherent appreciation of the objects of seduction in each type of

17 Merriam Webster Dictionary <https://www.merriam-webster.com/dictionary/virgin> (last accessed 2021-08-10).

18 Castaneda “Virginité Unmasked: The Many Meanings of Virginité” 2015 *Sex Roles* 83.

19 O’Connor “Reconstructing the Hymen: Mutilation or Restoration?” 2008 *Journal of Law and Medicine* 161.

20 *Bull v Taylor* 34.

21 Hegazy and Al-Rukban 112.

22 Curtis and Lazaro “Appearance of the Hymen in Adolescents is not Well-documented” 1999 *BMJ* 605.

23 Goodyear-Smith and Laidlaw “Can Tampon Use Cause Hymen Changes in Girls Who Have Not Had Sexual Intercourse? A Review of the Literature” 1998 *Forensic Sci Int.* 147.

law, it is prudent to give a succinct description of the societies in which each ideal was conceived since the objects of seduction were designed to reinforce values and legal principles of each society.

4 1 Common law delict of seduction

Zimbabwean common law is derived from Roman-Dutch law, imported into the country during colonialism via the British High Commissioner's declaration.²⁴ This law had significant content of Roman-Dutch law fused with few English law principles. Roman-Dutch law is derived from Roman law which is deeply rooted in patriarchal principles. During the monarchical era of Rome, under the kingship of Romulus, men and women were not treated equally.²⁵ These inequalities were notable in the economic, cultural and social spheres of Roman life and were also reinforced by sexual double standards between men and women of the time. These sexual double standards can be gleaned in Balsdon's narrative in his book, where he wrote as follows:²⁶

In the surviving literature of antiquity, social criticism is a male preserve. Not that men were in any way disingenuous. They took for granted and frankly admitted that there was one standard of moral behaviour for wives and another for husbands ... unfaithfulness in a husband – as long as it took account of both law and of convention was in general a concern neither to his conscience nor to the law. That a man's virility might reasonably require greater outlet than his matronly wife could provide was a fact, men held which should be realistically appreciated, by no one more than his matronly wife.

Women were ostracised from beneficial economic activities and were relegated to household duties where they adopted a perpetual minority status under the tutelage of their *paterfamilias* who were invariably men.²⁷ In this set-up, these sexual double standards became a template for gender-determined standards of human dignity. These voiceless women were burdened with steep sexual mores, in terms of which they were to preserve their virginity at all costs, so that they could meet the expectations of sexual purity of their future husbands.²⁸ In the early Roman society, virginity was highly valorised as it carried a political and religious function as could be seen from the tradition of "Vestal Virgins".²⁹ These virgins were chosen at a young age and were required to endure celibacy up to the age of thirty-five while performing their priestess duties and their virginity was so important that any deviance

24 Greenbaum "History of South African Law" in Maisel and Greenbaum (ed) *Foundations of South African Law* (2002) 57. This declaration essentially grafted into the then Rhodesia the law which applied at the Cape of Good Hope as at 10 June 1890 and this law was a fusion of Roman-Dutch law and English law.

25 Tinkler *The Abuse of Patriarchal Power in Rome: The Rape Narratives of Ovid's Metamorphoses* (MA thesis 2018 Canterbury) 12.

26 Balsdon *Roman Women: Their History and Habits* (1962) 214-215.

27 Tinkler 14.

28 Bush and McHugh, "Patterns of Roman Marriage," 1975 *Ethnology* 27.

29 Staples *From Good Goddess to Vestal Virgins: Sex and Category in Roman Religion* (1998) 135.

was punishable by live burial.³⁰ The original Roman family system placed the most senior male member as the *paterfamilias* who controlled all the affairs of women including their sexual honour.³¹

Mernissi in her analysis on the concept of virginity concludes that in such societies “virginity is a matter between men, and women play the role of silent intermediaries”.³² Thus, an ideal woman in that society could only indulge in coital activity after her virginal wedding and not at the whim of her mental and physiological inclinations. Against this background, the idea of delict of seduction was conceived. However, owing to legal developments in Rome and also in the Netherlands, which weakened patriarchal authority, seduction under common law, conferred the *locus standi* to the seduced female who was to be compensated for the diminished prospects of marriage.³³ Upon its plantation to present-day Zimbabwe during colonisation, the delict of seduction under Roman-Dutch law was litigated at the instance of the seduced female.³⁴ Its objective is to compensate the plaintiff for the deterioration of her chances in the marriage market.³⁵ Also, all unmarried women regardless of age can claim for seduction as long as they can prove their cases.³⁶

4 2 Customary law delict of seduction

The grafting of common law into the Rhodesian society did not displace the law which was applied in the pre-colonial Rhodesia, namely customary law as practiced by the indigenous communities.³⁷ The Lancaster House Constitution permitted the co-existence of these two legal systems.³⁸ The pre-colonial customary law had its own delict of seduction. In similar fashion to early Roman society, African society also valorised the virginity of a woman, and this was a sexual custom which never applied to men.³⁹ The object of this delict was to compensate the guardians or the parents of the seduced woman for the diminution of *lobola* owing to the seduction act.⁴⁰

An attempt to liberate and empower women to be in charge of seduction delict under customary law was staged by Dumbutshena CJ (as

30 Staples (1998) 135.

31 Tinkler 18.

32 Mernissi “Virginity and Patriarchy” 1982 *Women’s Studies International Forum* 5.

33 Nguyen “Roman Rape: An Overview of Roman Rape Laws from the Republican Period to Justinian’s Reign” 2006 *MICH. J. Gender & Law* 75.

34 Van den Heever *Breach of Promise and Seduction in South African Law* (1954) 45.

35 Van den Heever 49.

36 *Bull v Taylor* 31.

37 Greenbaum 57.

38 S 89 of the Constitution of Zimbabwe 1979.

39 Bhana “Virginity and Virtue: African Masculinities and Femininities in the Making of Teenage Sexual Cultures” 2016 *Sage Journals* 465. See also Muza v *Mburjwa* 1943 SRN 17.

40 *Nira v Marete and Ngando* 1954 SRN 467.

he then was) in the case of *Katekwe v Muchabaiwa*⁴¹ where he held that, pursuant to the Legal Age of Majority Act,⁴² women of full age could sue for seduction on their own. This judgment stripped the *locus standi* of the parents of the seduced daughter who had reached the age of majority.

However, the gains of the *Katekwe* judgment were watered down by the Supreme Court in *Magaya v Magaya*⁴³ which held *obiter* that the *Katekwe* Case erred by invoking common law concepts of minority and majority status which are alien to customary law.⁴⁴ The *Magaya* Court in its decision, also relied on the Lancaster House Constitution, which condoned the discrimination of women in the matters of customary law, to re-affirm the *locus standi* of the parents of the seduced daughter throughout her lifetime before marriage.⁴⁵ Another important take away, from the *Magaya* judgment is that it categorically conceded that the “compensation of the diminution of the *lobola* value” notion was the sole object of the customary law seduction.⁴⁶ Hence, to take away the *locus standi* of the parents and allot it to their seduced daughter would undermine the very root of this delict. This judgment, clearly sets the record straight that the delict of seduction under customary law had nothing to do with protecting the seduced female but rather, it was exclusively meant to cushion the monetary interests of her parents which were to mature for payment during *lobola*, a transaction which had nothing to do with her welfare or livelihood.

5 Assessing the feasibility of the objects of seduction in the contemporary society

Generally, Zimbabwe has taken significant steps in addressing the subjugation of women in the twenty-first century.⁴⁷ There is an increased involvement of women in the political⁴⁸ and economic spheres,⁴⁹ and women are proving that they can perform the same roles as men without any difficulties, a clear indication that the disenfranchisement of women was not based on any biologically-determined inadequacies. Hence, the presumption of the sexual docility of unmarried women of full age implied by the delict of seduction is susceptible to criticism. Certainly, a woman of full age, who is capable of performing duties in any high office cannot be said to be sexually gullible simply because she is not yet

41 *Katekwe v Muchabaiwa* 1984 2 ZLR 112 (SC).

42 S 15 of the General Law Amendment Act Chapter 8:07 of 1983.

43 *Magaya v Magaya* 1991 1 ZLR 100 (SC) 109.

44 *Katekwe v Muchabaiwa* 1984 2 ZLR 100 SC 102.

45 S 23(3)(a)(b) of Constitution of Zimbabwe 1979.

46 *Magaya v Magaya* 102.

47 Mungwini “Forward to the Past: Dilemmas of Rural Women Empowerment in Zimbabwe” 2007 *African Sociological Review* 11.

48 S 124(1)(b) Constitution of Zimbabwe Amendment (No.20) Act 2013 (Constitution of Zimbabwe) created a women’s quota in the National Assembly, which seeks to increase women participation in politics.

49 S 80(1) of the Constitution of Zimbabwe.

married. Moreover, in the contemporary society, generally, women are sexually liberal and enjoy pre-marital sex, a privilege which was a preserve of men in the olden days.⁵⁰ In addition, the improved availability of contraceptives has enabled unmarried females to guard against unplanned pregnancies. These have essentially handed women the right to make decisions concerning their sexual and reproductive needs.⁵¹ Thus, while the argument may be raised that the delict of seduction was instrumental in protecting women's sexual and reproductive rights, the growing popularity of contraceptives and their enhanced availability now serves as a convenient substitute.

Also worth noting is that in the contemporary society, cultural practices such as compulsory virginity testing have now been criminalised.⁵² Virginity testing of girls has attracted worldwide condemnation from human rights organisations.⁵³ Besides being unlawful, virginity testing is no longer considered as a pre-condition for the *lobola* negotiations in virtually all contemporary societies. If virginity is no longer a decisive component of marriage, the object of compensating the seduced female for the reduced chances of marriage is rendered nugatory. This proposition, equally applies to common law seduction.

Additionally, the emergence of hymen reconstruction surgery, which in medical terminology is known as hymenorrhaphy, unleashes another complication in deducing the virginity of a maiden.⁵⁴ It is an innovative medical procedure which revives the ability of the hymen to bleed during sexual intercourse on the wedding night.⁵⁵ This procedure is capable of concealing the lost virginity. Thus, some women may opt to circumvent seduction litigation and the stigma attached to it, and go for this unique medical procedure.

6 Gender inequalities in seduction

Equality on the ground of sex in contemporary Zimbabwe has been laid down as a founding value of the Constitution and as a stand-alone right in Sections 3 and 56 respectively.⁵⁶ Zimbabwe has an obligation under

50 Sinclair "Seduction and the Myth of the Ideal Woman" 1987 *Minnesota Journal of Law & Inequality* 5.

51 S 52(b) of the Constitution of Zimbabwe.

52 S 3(1)(l)(i) of the Domestic violence Act Chapter 5:16 of 2006.

53 World Health Organisation "United Nations agencies call for ban on virginity testing" <https://www.who.int/news/item/17-10-2018-united-nations-agencies-call-for-ban-on-virginity-> (last accessed 2021-06-16).

54 Usta "Hymenorrhaphy: What Happens Behind the Gynecologist's Closed Door?" 2000 *Journal of Medical Ethics* 26.

55 Kamm "Dimensions of Honour in Kremo Kartli, Georgia: The Importance of Virginity in the Name of Honour" in Voell and Kaliszewska (eds) *State and Legal Practice in the Caucasus: Anthropological Perspectives on Law and Politics* (2016) 83-94.

56 S 3(g) of the Constitution of Zimbabwe makes gender equality a founding value and in S 56 provides the equality clause.

international law to observe equality.⁵⁷ The tone to observe and uphold equality was set in Article 7 of the Universal Declaration of Human Rights which enjoins the state parties to accord to its citizens equal protection before the law without any discrimination.⁵⁸ Furthermore the International Covenant on Civil and Political Rights to which Zimbabwe is a member state,⁵⁹ in article 26 provides that:⁶⁰

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

When it comes to equality that concerns women, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) becomes binding to Zimbabwe as well.⁶¹ CEDAW is a critical tool in the struggle to improve women's rights around the world. Zimbabwe is one of the members that ratified this treaty.⁶² Although in the past Zimbabwe turned a blind eye to the provisions of this treaty on the adjudication of women's rights issues, as can be noted in the case of *Magaya v Magaya*,⁶³ its commitment to observe international law is clearly stated in section 46 of the Constitution.⁶⁴ CEDAW condemns gender inequality and it enjoins member states to observe equality between men and women.⁶⁵ Regionally the Protocol to the African Charter on Human and People's Rights of Women in Africa requires the state parties to combat all forms of discrimination against women through appropriate legislative, institutional and other measures.⁶⁶ The SADC Protocol on Gender and Development brings the obligation to eliminate discrimination against women closer home by denouncing traditional norms and cultural practices that exacerbate gender inequalities and gender based

57 S 46(c) of the Constitution of Zimbabwe provides that, when interpreting the Bill of Rights, a court, tribunal, forum or body must take into account international law and all treaties and conventions to which Zimbabwe is a member state.

58 Universal Declaration of Human Rights 1948.

59 Zimbabwe signed the International Covenant on Civil and Political Rights in 1999.

60 International Covenant on Civil and Political Rights adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976.

61 Convention on the Elimination of All Forms of Discrimination against Women, opened for signature Mar. 1, 1980, 1249 U.N.T.S. 13 entered into force Sept. 3, 1981 [hereinafter CEDAW].

62 Zimbabwe ratified CEDAW in 1999.

63 *Magaya v Magaya* 109.

64 Bond "CEDAW in Sub-Saharan Africa: Lessons in Implementation" 2014 *Mich St L. Rev* 241.

65 Article 15 of CEDAW.

66 Article 2 of the Protocol to the African Charter on Human and People's Rights of Women in Africa adopted by the 2nd Ordinary Session of the Assembly of the Union Maputo, Mozambique 11th July 2003 Entry into Force 25th November 2005.

violence.⁶⁷ The delict of seduction, fails to meet not only formal but substantive equality envisaged by the Constitution of Zimbabwe, regional human rights instruments and international human rights treaties. In exposing gender inequalities couched within the delict of seduction a divide is made between the unfair discrimination suffered by women and men.

6 1 Unfair discrimination against women

The presumption that the female was seduced into a sexual act has the effect of tagging women as inherently and continually immature when it comes to their sexuality. This presumption, to the extent that it is applied at the instance of a woman of full age, implies that unmarried women are sexually gullible. It conceptually classifies women as helplessly docile and as requiring specialised care from the law. Put differently, whenever the spinster participates in sexual intercourse, this presumption procreates a supposition that she was unduly influenced owing to the blandishments of the male partner. Consequently, this presumption portrays unmarried women as irrational beings when it comes to their sexuality. Thus, the delict of seduction is patently a *persona non grata* in an egalitarian society since it denigrates the inherent dignity of women.

Another red flag relates to the uncapped age limit at which women are entitled to claim for seduction. This presents a conflict between the Constitution of Zimbabwe and the delict of seduction regarding the sexual independence of women of full age. On the one hand, the Constitution of Zimbabwe recognises the sexual maturity of females upon attaining the age of majority;⁶⁸ on the other hand, the delict of seduction holds that all women, regardless of age, as long as they are not yet married, are perpetually susceptible to seduction and therefore sexually docile. In *Mudzuru v Minister of Justice*,⁶⁹ the Court interpreted the constitutional provisions on the age of majority to mean that eighteen years of age is the minimum threshold at which a person can enter into a marriage. It follows, therefore, that when one is legally qualified to enter into marriage she is mature enough to make rational decisions concerning her sexuality. Consequently, the delict of seduction purports to take away the constitutionally-recognised sexual maturity of women of full age and for that reason, it is a threat to equality since men are not treated in a similar manner.

67 Article 21 of the SADC Protocol on Gender and Development signed on 17 August 2008 in Johannesburg, South Africa and entered into force on 22 February 2013.

68 S 78(1) of the Constitution of Zimbabwe bestows the right to found a family on every person who has attained eighteen years of age.

69 *Mudzuru v Ministry of Justice, Legal & Parliamentary Affairs* 2016 ZWCC 12 (CCZ) 42.

A further analysis of the litigation process for seduction damages, using a constitutional lens, shows that it perpetrates an undue intrusion into women's right to privacy.⁷⁰ This is because the sexual choices of the woman in question become the decisive component of the legal proceedings. Her virginity status is openly attacked by the defendant in front of the court gallery. Yet the virginity of a man is at no stage in this claim questioned. Although the whole process is meant to enable the victim to vindicate her claim, there is an element of overreaching, at the expense of the woman's right to privacy. Furthermore, another issue with the 'diminution of *lobola* value' notion in relation to the customary law delict of seduction, is that the computation of damages is purely conjectural. It is common cause that one cannot be delictually liable without causing damage. Damages refer to the diminution in the utility or quality of a patrimonial or personality interest in satisfying the legally recognised needs of the person involved as a result of damage-causing event.⁷¹ The "diminution of *lobola* value" notion, which symbolically appends a *lobola* price tag on women, arguably classifies the damages as pecuniary ones yet such monetary valuation is purely speculative. On the other hand, men are not perceived in the same manner. In addition, this notion is inextricably connected to the view that all women are homogeneously destined to traditional patriarchal oriented family set ups.

It can be gleaned from the foregoing discussion that the customary law of seduction seeks to prohibit sex before marriage for women whilst leaving men to enjoy this right freely. The "diminution of *lobola* value" notion seeks to designate sexual intercourse as a purely marital privilege, of which failure by the seducer to respect this invites punishment in the form of financial reparations proportionate to the perceived *lobola* value of a maiden before the seduction act. This notion makes this delict a moral guardian of the sex life of individuals. In Zimbabwe, the scope and form of all laws is now determined by their fairness, reasonableness, necessity and justifiability in a democratic society based on openness, justice, human dignity, equality and freedom.⁷² Paul Sieghart⁷³ as cited in *S v Makwanyane* described a democratic society as follows:⁷⁴

The hallmarks of a democratic society are pluralism, tolerance and broad-mindedness. Although individual interests must on occasion be subordinated to those of a group, democracy does not mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.

It is submitted that in contemporary democratic society, the sexual lives of individuals are evolving. Casual sex for gratification is becoming more

70 S 57 of the Constitution of Zimbabwe.

71 Neethling, Potgieter and Visser *Law of Delict* (1996) 210.

72 S 86(2) of the Constitution of Zimbabwe S 86 (2).

73 Sieghart *The International Law of Human Rights* (1983) 93.

74 *S v Makwanyane* 1995 3 SA 391 (CC).

common. The delict of seduction is apparently arm-twisting sexually empowered women to get married, failure of which the male will pay the reduced *lobola* value as damages. By so doing, not only does seduction force a certain standardised sex life upon society, but it has the indirect effect of violating marriage rights in the Constitution, which proscribe compelling one into marriage.⁷⁵ In addition to these red flags, the delict in question betrays the disharmony in the laws which are designed to protect minor females from unlawful sexual conduct. In the absence of harmonised laws, the effective protection of women from unlawful sexual activities will remain a utopian notion. The Zimbabwean legislature has indirectly criminalised the seduction of girls below the age of sixteen years as follows:⁷⁶

Sexual intercourse or performing indecent acts with young persons

- (1) Subject to subsection (2), any person who –
- a has extra-marital sexual intercourse with a young person; or
 - b commits upon a young person any act involving physical contact that would be regarded by a reasonable person to be an indecent act; or
 - c solicits or entices a young person to have extra-marital sexual intercourse with him or her or to commit any act with him or her involving physical contact that would be regarded by a reasonable person to be an indecent act shall be guilty of an offence.

The impugned conduct in the above mentioned offences, especially the first one, are clearly related to the delict of seduction. These offences constitute the act of leading a girl astray from the paths of virtue. In light of the Civil Evidence Act, it therefore follows that a conviction on the aforesaid offence is *prima facie* evidence for seduction in a civil court.⁷⁷ Looking at the entire body of law, Zimbabwean criminal law states that the female is sexually mature at sixteen whereas the common law delict of seduction states that she is perpetually immature till the event of marriage. More so, the Constitution, by declaring eighteen years as the minimum threshold for marriage, is acknowledging that a woman reaches sexual maturity at eighteen. These staggered maturity levels among these sources of law will only undermine the legal endeavour to protect women.

6 2 Unfair discrimination against men

According to Peta and Moyo, the Constitution insulates the actions taken by the State to protect vulnerable groups even though such actions may be *prima facie* devoid of formal equality.⁷⁸ However, such affirmative action must serve a legitimate governmental purpose in a manner which

75 S 78(2) of the Constitution of Zimbabwe.

76 S 70 of the Criminal Law (Codification and Reform Act) Chapter 9:23 of 2007.

77 S 31(2) of the Civil Evidence Act Chapter 8:01 of 2001.

78 Peta and Moyo “The Rights of Persons with Disabilities in Zimbabwe” in Moyo *Selected Aspects of the 2013 Zimbabwean Constitution and the Declaration of Rights* (2019) 97.

is fair to the simultaneously discriminated persons.⁷⁹ This means, the protection of women of full age by this delict, must not be unreasonably prejudicial towards men.⁸⁰ It is submitted that no legitimate governmental purpose is served by this delict on females of full age, since as a result of their maturity, they are constitutionally ordained to enter into marriages which basically involve sexual activities. Thus, the delict of seduction on females who would have reached the majority status is unduly prejudicial to men who are required to own up to their sexual conduct yet the woman is treated as a victim.

This delict also defies the right to gender equality by sidelining boys and men from claiming seduction damages both under common and customary law.⁸¹ The right to equality bestows equal protection of the law on all persons regardless of gender, among other things.⁸² Yet, interestingly, in the eyes of the delict of seduction, men are sexual predators even in a scenario where the male partner succumbs to the erotic persuasion of the female, even one who is older than him. Thus, to the extent that the delict of seduction is gender oriented in favour of women, despite the fact that younger men are equally susceptible to be deluded from the paths of virtue at the hands of older women, it discriminates against men in terms of the equal protection of the law.

Also, in the domain of the law of delict, seduction does not embrace a recognised defence of *volenti non fit injuria*.⁸³ The delict disregards any defence based on the assumption that where there is consent there is no injury or wrong in the eyes of the law.⁸⁴ It is common cause that seduction is claimed by the female who consented to sexual intercourse. According to Matthews, the nullification of the *volenti non fit injuria* defence under seduction can be traced back to Roman-Dutch law in the Netherlands when women were regarded as perpetual minors and were therefore deemed devoid of the ability to give consent.⁸⁵ It is submitted that a woman who has reached eighteen years and attained majority status in terms of the General Law Amendment Act must, under the defence of *volenti non fit injuria*, be estopped from being awarded any seduction damages.⁸⁶ This is because, she is no longer a docile victim but a *pari dilecto* in the delictually impugned conduct. Thus, seduction clearly finds exceptions within the domain of the law of delict where men are

79 *Harksen v Lane* 1997 11 BCLR 1489 CC. The South African Constitutional Court explained the equality provision in the South African Constitution which is an equivalent to the one in the Constitution of Zimbabwe.

80 S 56(5) of the Constitution of Zimbabwe.

81 Amoah *Constructing Equality: Developing an Intersectionality Analysis to Achieve Equality for the Girl Child Subject to South African Customary Law* (PhD Thesis 2016 UCT).

82 S 5 (1) of the Constitution of Zimbabwe.

83 Matthews "Seduction in Native Law" 1981 <http://hdl.handle.net/10500/6673> (last accessed on 2022-03-24).

84 Reynolds *An Introduction to Law* (1983) 57.

85 Matthews 1981.

86 S 15 of the General Law Amendment Act.

prejudicially deprived of seeking refuge in the defence of *volenti non fit injuria*.

Moreover, the fact that once sexual intercourse is not disputed, the plaintiff (who is normally a woman), is basically a preset winner of the proceedings bearing in mind the difficulties attendant in rebutting those presumptions in her favour, makes this delict prone to abuse. There is a real danger that a jilted woman may use it as a bargaining tool to blackmail her erstwhile lover. It is noteworthy that when the State of Florida abolished the delict of seduction in 1945 it was moved by these concerns and it noted them in a Preamble to the bill which was finally passed into law as follows:⁸⁷

Heart balm actions have been subjected to grave abuses, causing extreme annoyance, embarrassment, humiliation and pecuniary damage to many persons wholly innocent and free of any wrongdoing, who were merely victims of circumstances, and such remedies having been exercised by unscrupulous persons for their unjust enrichment.

The term “heart balm actions” was explained in the bill to encompass the tort of seduction, among other three torts. This means that this delict may, contrary to its intended purpose, be manipulated by a jilted woman who may use it to settle scores against an otherwise innocent erstwhile lover.

7 Lessons from South Africa

A glance into the South African law of delict can immensely contribute to the jurisprudence of the evolving delict of seduction in Zimbabwe. A delict in the South African context forms part of the law of obligation which falls under private law.⁸⁸ It is trite under the South African law that private law does not exist in isolation from the fundamental rights contained in the Constitution.⁸⁹ Subjecting every delict to constitutional scrutiny serves as a fundamental lesson for Zimbabwe from South Africa. In these two jurisdictions constitutional supremacy is equally endowed.⁹⁰

As is the case in Zimbabwe, in South African law, the delict of seduction has its foundation in Roman-Dutch law.⁹¹ Hence, its general principles of liability are the product of the historical development of the original concepts of Roman law. In the same fashion, the delict of seduction had its object premised on the interests of the *paterfamilia* so

87 Sinclair “Seduction and the Myth of the Ideal Woman” 1987 *Minnesota Journal of Law & Inequality* 5. This article analysed the preamble to the Florida law (1945 Fla.1342, 1342) which outlawed the tort of seduction at length.

88 Van Der Walt and Midgley *The Principles of Delict* (2004) 15.

89 *Brisley v Drotosky* 2002 4 SA 1 (SCA).

90 S 2 of the Constitution of Zimbabwe and S 2 of the Constitution of the Republic of South Africa, 1996.

91 Van Der Walt and Midgley (2004) 16.

that they redress monetary value for their daughters from the person who would have violated their virginity. In the case of *Ex parte Minister of Native Affairs: In re Yako v Boyi* the court held that seduction or defloration of a virgin, is regarded as a wrongful act arising from customary law.⁹² The extent of the customary law of seduction in South Africa before the constitutional era was such that the guardian of the female can claim seduction damages from the family head of the perpetrator.⁹³ In the same context as the Zimbabwean position, its object is to redress the violation of any rights representing material value, capable of being acquired by a family head.⁹⁴ This accessory liability of the family head only covers the unemancipated members of the family. The role of the family head in seduction delicts goes beyond the relationship between the perpetrator and the family head. In *Malie v Shiba* the court correctly noted that “it should be mentioned that in Native Law a father is not liable for his son’s delicts because of his relationship but on the ground of kraal head responsibility”.⁹⁵ A family head under the South African law can be either a male or a female.⁹⁶ This is another lesson that Zimbabwe can learn from South African customary law of delict, that women are now capable of being heads of families and can perform the duties of a family head. Confining family headship to male figure promotes female subordination and violates equality.

Masiya v Director of Public prosecution is a case about the constitutional validity of the common law definition of rape to the extent that it excludes anal penetration and is gender specific.⁹⁷ In this case, the majority judgment developed the common law definition of rape to include anal sex to females.⁹⁸ In a dissenting judgment by Langa CJ, it was stated that the development of common law rape must include anal rape of men.⁹⁹ Although this case was dealing with rape, Zimbabwe can learn from this and readapt common law and the delict of seduction to cover a case where one has been seduced into having anal sex. In as far as it is welcome under customary law that virginity is not a requirement for the delict of seduction, Zimbabwe has to embrace the fact that the penetration can occur anally and if it is done through seduction it thus amounts to an *injuria* claimable under law of delict. This lesson would assist in taking care of males who may be seduced by other man.

92 *Ex parte Minister of Native Affairs: In re Yako v Boyi* 1948 1 SA 388 (A).

93 Knoetze “Fathers Responsible for the Sins of their Children? Notes on the Accessory Liability of a Family Head in the Customary Law of Delict” <https://www.coursehero.com/file/125629041/Fathers-Responsibility-for-the-sins-of-their-sons-TORTpdf/> (last accessed 2022-03-22).

94 Knoetze “Fathers Responsible for the Sins of their Children? Notes on the Accessory Liability of a Family Head in the Customary Law of Delict” <https://www.coursehero.com/file/125629041/Fathers-Responsibility-for-the-sins-of-their-sons-TORTpdf/> (last accessed 2022-03-22).

95 *Malie v Shiba* 1963 NAH 34 (S) 36.

96 *Fanti v Boto* 2008 5 SA 405 (C) para 21.

97 *Masiya v Director of Public Prosecutions Pretoria (The State)* 2007 5 SA 30 (CC).

98 *Masiya v Director of Public Prosecutor* para 74.

99 *Masiya v Director of Public Prosecutor* para 93.

8 Conclusion

Seduction is a delict conceived in patriarchal societies characterised by double sexual standards applied differentially to men and women. These societies were plagued with artificial gender inequalities. Despite its good intentions to inoculate women from the adverse effects of masculinity, this delict has generated a plethora of prejudices and inequalities. Also, the uncapped age limit of women who may claim for seduction has the effect of conceptually branding them as perpetually sexually gullible, even at a time when they are legally entitled to get married. The fact that the presumption of sexual docility is finally doused by the event of marriage rather than mental maturity renders its legal soundness questionable. The underlying voice behind this presumption, is the archaic cultural mantra which says women are perpetual minors.

In light of the abundance of challenges and inequalities engineered by the delict of seduction, it can be noted that it is now living on borrowed time. All these challenges and inequalities point to the fact that it is a product of man-made inequalities, hence, it is destined to spawn more inequalities. In other jurisdictions, it was outlawed in the 1930s already.¹⁰⁰ At best, it is nothing more than a relic which reminds people of the past inequalities. It is fixated at preserving the archaic double sexual standards of patriarchal society, by solely aiming to preserve the virginity of all unmarried women, regardless of age. In Zimbabwe, cultural obligatory virginity testing has now been criminalised and it is no longer a decisive component of *lobola* negotiations in virtually all communities.

As a way forward, there is a need for a legislative reconstruction of this delict into a new *genus* of official customary law.¹⁰¹ The new delict must be purely tailored to protect all victims of sexual offences, who are below the age of consent,¹⁰² in addition to criminal prosecution of offenders. Its object will be to impose compensatory and punitive damages on the offenders for sexually exploiting minors to the detriment of their constitutionally enshrined best interests.¹⁰³

100 Sinclair 1987 *Minnesota Journal of Law & Inequality* 5.

101 Bekker and Rautenbach "Nature and Sphere of Application of African Customary Law in South Africa" in Rautenbach, Bekker and Goolam (ed) *Introduction to Legal Pluralism in South Africa* (2010) 31.

102 S 61 & 70 of the Criminal Law (Codification and Reform Act).

103 S 81(2) of the Constitution of Zimbabwe.