LAWS ON ADULTERY: COMPARING THE HISTORICAL DEVELOPMENT OF SOUTH AFRICAN COMMON-LAW PRINCIPLES WITH THOSE IN ENGLISH LAW

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> The history of humankind indicates that when it created the relationship of marriage, adultery was not far behind. A study of ancient laws will show that although we now treat the adulteress and the adulterer more humanely, our underlying feelings resemble those of ancient man.[1]

1 Introduction

Adultery is a universal human occurrence. It threatens the core of family life and the stability of the institution of marriage and potentially creates uncertainty about the paternity of the marital offspring.[2] It is not merely a moral issue, but one which, over the past two millennia, legal systems have used numerous avenues to address. The legal consequences of committing adultery have varied according to place, community values, the historical era and prevailing ideology.

Adultery is still legally relevant in South Africa. Although it is no longer a crime,[3] the Transvaal High Court (as it then was) confirmed in 2008 that the innocent spouse's claim for delictual damages against a third-party adulterer remains part of South African law.[4] In the Divorce Act, adultery combined with the inability to continue with the marriage, is still mentioned as one possible factor proving that the marriage has broken down

1 DE Murray "Ancient laws on adultery – A synopsis" (1961) 89 *J of Family Law* 89-104 at 89. Although the legal definition of adultery may change, at its core is intercourse with a person other than a spouse.

2 Johannes Voet *Commentarius ad Pandectas* (tr Percival Gane *The Selective Voet being the Commentary on the Pandects by Johannes Voet* vol 1, London, 1955) *ad* D 48 5 7 at 382 notes that a wife's pregnancy by her adulterer confuses the bloodlines; if the husband unwittingly acknowledges the adulterer's child as part of his family, the family resources are used to maintain a "foreign" child and the rightful heirs are cheated because their possible inheritance is diminished.

3 *Green v Fitzgerald* 1914 AD 88 at 102, 119.

4 *Wiese v Moolman* 2009 (3) SA 122 (T) at 3.

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irretrievably.[5] In addition, adultery may be indirectly relevant at the time of divorce as a factor to consider when determining post-divorce spousal maintenance, a claim for forfeiture of benefits and/or a redistribution order.[6]

In England, all references to adultery have been deleted from the law. It is no longer a crime; does not give rise to a third party claim for tort/delictual damages; and is no longer included in the divorce statutes.[7]

This article focuses on the history of the legal consequences of adultery: moving from a private self-help remedy of the *paterfamilias* and/or the husband against the adulterer and/or his married partner to the public criminal prosecution of the adulterers; and then moving away from adultery as a crime, towards a damages claim by the innocent spouse against the adulterer (and later also the adulteress) in terms of statute and later the law of delict or tort.

In addition, the article tracks the legal relevance of adultery in the divorce laws[8] and records the right of adulterers to marry each other eventually.

The above developments are traced chronologically, commencing with Roman law as it developed through canon and Roman-Dutch law and culminating in the existing South African legal system.[9] This progression is then compared with historical developments in English law, from observations by Julius Caesar in 54 BC up to current English law.

There are specific themes to the above developments, for example the private self-help or public criminal nature of the remedies; the original disparity between married and unmarried women; and the obvious gender differences:[10] the change from the protection of only the husband's rights to more gender-neutral consequences; the significance of adultery during divorce proceedings and its possible direct link with the divorce action; and a possible claim for damages.

2 The development of the South African law on divorce

In the next section, the development of the various legal systems that have influenced South African divorce law is briefly explained.

5 Section 4(2)(*b*) of the Divorce Act 70 of 1979.

6 See, respectively, s 7(2), s 9 and s 7(5) of the Divorce Act 70 of 1979 and the discussion *infra* at 2 3.

7 See discussion *infra* at 3 5.

8 The impact of adultery on the separation of spouses who do not divorce, and the consequences for a child born of such an adulterous liaison are ignored for purposes of this article.

9 Although South Africa is a multi-cultural society, the developments in African customary law and possible religious principles are not included here.

10 The gender similarities in the consequences of adultery are also noted.

2 1 Roman law

2 1 1 Introduction

According to early Roman tradition, attributed to Romulus and Remus,[11] women were not equal to men and legally disadvantaged,[12] being generally regarded as property.[13] Both Plutarch[14] and Dionysius of Halicarnassus[15] noted that under Romulus and Remus an unfaithful wife was judged privately by her family and her husband at a family council[16] and could be put to death by her husband or his or even her family.[17] This gave him and the families, not a criminal law action, but a unilateral self-help measure.[18] The alternative to death was for the wife to be sent back to her father.[19] Conversely, a wife could not act against her husband because of his adultery.[20]

In the fourth century BC, the *aediles* had the power to prosecute men for seducing married women,[21] and by the second century BC, adulterers were still treated harshly. Marcus Cato the Elder referred to a husband's right to kill his wife if she were caught committing adultery,[22] and Plautus explained that husbands were known to beat and castrate their wives' lovers.[23]

11 Legend places Romulus and Remus as the founders of Rome around 753 BC (A Borkowski & P du Plessis *Textbook on Roman Law* (Oxford, 2005) at 1).

12 Murray (n 1) at 96; VL Bullough "Medieval concepts of adultery" (Winter 1997) 7(4) *Arthuriana* 5-15 at 7; Borkowski & Du Plessis (n 11) at 104.

13 Bullough (n 12) at 6.

14 Plutarch *The Parallel Lives* ("The Life of Romulus") (tr B Thayer vol 1, Loeb Classical Library, 1914) 22 3 at 163, available at *http //penelope.uchicago.edu/Thayer/E/Roman/Texts/Plutarch/ Lives/ Romulus*.html* (accessed 19 May 2013).

15 *The Roman Antiquities of Dionysius of Halicarnassus* (tr B Thayer vol 1, Loeb Classical Library, 1937) 2 25 6 at 385, available at *http //penelope.uchicago.edu/Thayer/E/Roman/Texts/Dionysius_of_ Halicarnassus/ 2A*.html* (accessed 19 May 2013); L Betzig "Roman monogamy" (1992) 13 *Ethology and Socio-biology* 351-383 at 365; Bullough (n 12) at 7.

16 JPVD Balsdon *Roman Women Their History and Habits* (London, 1962) at 77.

17 Murray (n 1) at 96.

18 *Ibid*. Betzig, however, argues that the killing of wives and their lovers was "conspicuously absent in [early] Roman writing" (Betzig (n 15) at 365).

19 R Langlands *Sexual Morality in Ancient Rome* (Cambridge, 2006) at 20.

20 Murray (n 1) at 96.

21 Betzig (n 15) at 365. It should be noted that the Twelve Tables (450 BC) was silent on the issue of adultery.

22 This was noted in a speech by Marcus Cato the Elder, called "On the Dowry" (Aulus Gellius *Attic Nights* 10 23 (second century BC)).

23 Plautus *Mercator Syra* (254-184 BC) as quoted by A Tarwacka "*Vidua visas partem*. Threats of divorce in Plautus' comedies" (2011-2012) 10 *Diritto@Storia* at 5, available at *http //www. dirittoestoria. it/10/D&Innovazione/ Tarwacka/Plautus-divorce.htm* (accessed 12 May 2013).

As the empire expanded, the suppression of adultery weakened.[24] By the time of Augustus, "evidence points to a certain moral laxity and a casual approach to personal relationships"[25] with widespread free marriages and divorces by mere agreement.[26]

In 18 BC Augustus introduced the lex Julia de adulteriis.[27] Its aim was to keep Rome's morals clean by repressing non-marital sexual conduct.[28] It was revolutionary in the sense that it ran contrary to the then existing custom of dealing with adultery within the privacy of the family without state interference.[29] By bringing the family under the protection of the state, the aim was to address social problems in Rome, where marriage between the upper classes had become infrequent, with few legitimate offspring being born.[30]

The lex Julia remained "the cornerstone of Rome's matrimonial law for centuries – if erratically enforced".[31] It was amended in AD 9 by the lex Papia Poppaea, but after that largely fell into disuse.[32] It was revived upon its re-incorporation into the *Sententiae* of Julius Paulus Prudentissimus[33] and later the Corpus iuris civilis.[34]

It was not a uniformly popular law.[35] Both Martial[36] and Juvenal[37] made fun of it when it was revived by Domitian, mainly because he himself flouted it.[38]

24 Bullough (n 12) at 7.

25 Borkowski & Du Plessis (n 11) at 121.

26 *Idem* at 129.

27 A primary copy of the lex Julia did not survive and secondary sources are used to ascertain its contents, specifically the Digest (D 48 5, *Ad legem Iuliam de adulteriis coercendis*). All the references to Digest 48 5 in this article are from *The Digest of Justinian* T Mommsen, P Krueger & A Watson (eds) vol 4, Philadelphia, 1985).

28 TAJ McGinn *Prostitution, Sexuality and the Law in Ancient Rome* (New York, 1998) at 140.

29 Betzig (n 15) at 366-367; McGinn (n 28) at 141; "Legal status in the Roman world" in MR Lefkowitz & MB Fant *Women's Life in Greece and Rome* at para 120, available at *http //www.stoa.org/diotima/anthology/wlgr* (accessed 27 Jul 2012).

30 Lefkowitz & Fant (n 29) at 120.

31 Borkowski & Du Plessis (n 11) at 130.

32 Lefkowitz & Fant (n 29) at 120. St Jerome (AD 347-420) recorded a case of a wife who was married to her twenty-third husband, she being his twenty-first wife (JEG de Montmorency "Divorce Law in England" (Nov 1926) 75(1) *University of Pennsylvania LR and American Law Register* 36-39 at 36).

33 This document is generally referred to as the *Opinions of Julius Paulus Addressed to his Son* (hereunder referred to as Paulus *Sententiae*). He lived from the second to the third century AD. The references below are to Book 2 (tr SP Scott) *The Civil Law* (Cincinnati, 1932) available at *http // webu2.upmfgrenoble.fr/DroitRomain/ Anglica/Paul2-Scott.htm* (accessed 12 May 2013).

34 AD 529-534. See discussion *infra* at 2 1 4.

35 McGinn (n 28) at 245. Livy, Virgil and Horace supported the law, but Propertius, Tibullus and Ovid did not (A Keith "*Tandem venit amor* A Roman woman speaks of love" in JP Hallett & MB Skinner (eds) *Roman Sexualities* (Princeton, 1997) 295-310 at 295).

36 *Satires* 2 29-33.

37 *Epigrams* 6 2, 4, 7, 22, 40, 91.

38 McGinn (n 28) at 120.

2 1 2 Lex Julia de adulteriis coercendis

The lex Julia … was a remarkable piece of social engineering, designed to improve moral standards by making the adultery of the wife a criminal offence – triable by special adultery courts – with serious consequences.[39]

Under the lex Julia only the wife's infidelity[40] was a crime – one of the gravest offences a woman could commit.[41] The provision was based on the notion that a wife's child by a stranger would become part of the household of the unsuspecting husband.[42] Its influence was particularly wide because it was applicable to all marriages, not just Roman civil-law marriages.[43] Some women were excluded from the operation of the legislation,[44] including an unattached woman or another's concubine,[45] prostitutes, actresses, procuresses,[46] slaves,[47] convicted adulterers and *peregrini* not married to Roman citizens. A wife similarly had no right to sanction her husband for his adultery.[48]

39 Borkowski & Du Plessis (n 11) at 129.

40 The husband had a claim for adultery with an "irregular" wife (D 48 5 7, *Marcianus libro decimo institutionum*). The law applied to a betrothed woman (D 48 5 14(13) 3, *Ulpianus libro secundo de adulteriis)*. D 48 5 35(34) 1, *Modestinus libro primo regularum* mentions that adultery could be committed with a married woman, a widow, a virgin or a boy. Adultery also could be committed by a minor over the age of puberty (D 48 5 36, *Papinianus libro tertio quaestionum*). The relationship between adultery and incest is ignored for purposes of this article (Paulus *Sententiae* 2 26 15; D 48 5 39(38)-40(39), *Papinianus libro trigensimo sexto quaestionum*). See, also, n 43 *infra*.

41 C 9 9 1, *Ad legem Iuliam de adulteriis et de stupro* (Impp Severus et Antoninus AA Cassiae); M Nathan *The Common Law of South Africa* vol 3 (London, 1906) at 1624.

42 D 48 5 6 1, *Papinianus libro primo de adulteriis* (see, *supra*, n 2) and Voet (n 2) *ad* D 48 5 7 at 382-383. It is also referred to as the "scandalous mixing of seed" and the "implanting of bastard offspring in another's family"; the "violation of the couch of another" or the "defiling of the mother of another's household" (*ibid*).

43 Borkowski & Du Plessis (n 11) at 130. In Roman law it was not essential for the marriage to be valid according to the requirements of the Roman civil law (D 48 5 13 1, *Ulpianus libro secundo de adulteriis*; Nathan (n 41) at 1624). For a discussion of irregular unions, see Voet (n 2) *ad* D 48 5 1 at 366.

44 McGinn (n 28) at 144, 196ff.

45 D 48 5 13, *Ulpianus libro secundo de adulteriis*; Voet (n 2) *ad* D 48 5 9 at 386.

46 The terms "procuress" and "panderer" in this scenario refer to a person who directly promotes prostitution by providing women for sexual intercourse. *Cf* Langlands (n 19) at 21. A woman in charge of any business or shop could not commit adultery (Paulus *Sententiae* 2 26 11). See, in general, Voet (n 2) *ad* D 48 5 8 at 383-385.

47 The lex Julia was only applicable to free persons, although some references were made to female slaves in particular. *Inter alia*, adultery with a female slave did not constitute an injury unless it resulted in a deterioration of her value or "if an attempt was made against their mistress through them" (Paulus *Sententiae* 2 26 16). Detailed discussion of the position of slaves is excluded from this discussion. See, in general, D 48 5 6, *Papinianus libro primo de adulteriis.*

48 C 9 9 1, *Ad legem Iuliam de adulteriis et de stupro* (Impp Severus et Antoninus AA Cassiae).

A father[49] was given the right to kill his married daughter and the person with whom she committed adultery[50] if they were caught *in flagrante delicto* in his home, or in the husband's home.[51] The rank of the adulterer was irrelevant.[52]

The husband's rights were more restricted: he could not legally kill his wife.[53] He could only kill the person with whom his wife had committed adultery if he caught them *in flagrante delicto* in his own house,[54] and where the adulterer was of inferior status, such as a panderer, a mountebank, a stage singer or actor, a condemned man, a freedman of the family or a slave.[55] If a husband did take revenge and kill both the adulterers, it still resulted in a murder charge against him.[56] In such circumstances he would be punished more leniently than murderers usually were, since the act was regarded as "a result of great annoyance and just suffering",[57] resulting in a sentence of exile or hard labour.[58]

In addition, a husband was compelled to divorce and prosecute his adulterous wife.[59] He had to publicly declare within three days with which adulterer she had committed

49 In this context, the term "father" refers to the *paterfamilias* who could be a natural adoptive father (D 48 5 23(22), *Papinianus libro primo de adulteriis*) (Lefkowitz & Fant (n 29) at 123). He could only kill her if she was still under his parental power; a father himself under parental power was not allowed to kill his daughter, although Paulus argued that he should be permitted to do so (Paulus *Sententiae* 2 26 2; Lefkowitz & Fant (n 29) at 123).

50 See D 48 5 22 (21), *Ulpianus libro primo de adulteriis* and D 48 5 24(23), *Ulpianus libro primo de adulteriis*. The father was also entitled to detain his daughter's adulterer for twenty hours enabling him to call the neighbours as witnesses (Paulus *Sententiae* 2 26 3 3).

51 Paulus *Sententiae* 2 26 1; D 48 5 24(23) 2, *Ulpianus libro primo de adulteriis*; Bullough (n 12) at 7. The *paterfamilias* could only do so if he killed his daughter too. If he killed only one of the offenders, he could be charged with murder (McGinn (n 28) at 146; Borkowski & Du Plessis (n 11) at 115).

52 Paulus *Sententiae* 2 26 1. Where a slave was the adulterer, he too could be killed if caught in the act of adultery (Paulus *Sententiae* 2 26 23). Frier & McGinn note that this was an exception to the general property protection rule (BW Frier & TAJ McGinn *A Casebook on the Roman Law of Delict* (New York, 1989) at 105.

53 Paulus *Sententiae* 2 26 2 & 4; Bullough (n 12) at 7; Borkowski & Du Plessis (n 11) at 130; C Edwards "Unspeakable professions: public performance and prostitution in Ancient Rome" in Hallett & Skinner (n 35) 66-95 at 75.

54 Paulus *Sententiae* 2 26 7; D 48 5 25(24), *Macer libro primo publicorum*. Voet, however, disputes whether this was allowed (Voet (n 2) *ad* D 48 5 13 at 393). The husband had the right to hold the adulterer for a maximum period of twenty hours to obtain evidence of his crime without endangering his rights (Paulus *Sententiae* 2 26 3; D 48 5 26(25) *Ulpianus libro secundo ad legem Iuliam de adulteriis*). Slaves could be tortured to obtain evidence (C 9 9 3).

55 Paulus *Sententiae* 2 26 4; D 48 5 25(24), *Macer libro primo publicorum*; Borkowski & Du Plessis (n 11) at 130; Bullough (n 12) at 7; Frier & McGinn (n 52) at 112.

56 D 48 5 39(38) 8, *Papinianus libro trigensimo sexto quaestionum*; Betzig (n 15) at 367.

57 Paulus *Sententiae* 2 26 5.

58 C 9 9 4, *Ad legem Iuliam de adulteriis et de stupro* (Imp Alexander A Iuliano) and D 48 5 39(38) 8, *Papinianus libro trigensimo sexto quaestionum* respectively.

59 Paulus *Sententiae* 2 26 6; Borkowski & Du Plessis (n 11) at 129. This obligation was ridiculed as not being conducive to the aim of the lex Julia, namely to protect the institution of marriage (Borkowski & Du Plessis (n 11) at 130).

adultery and the place of the adultery.[60] The prosecution of his adulterous wife had to occur within sixty days after the divorce.[61]

If the husband failed to prosecute her, her *paterfamilias* could proceed with the prosecution and if he did not do so either, any member of the public could prosecute her within a period of four months.[62] The aim of this provision was publicity and the humiliation of the adulteress.[63] The husband apparently had no duty to prosecute his wife's adulterer.[64]

Where a husband refused to divorce his wife or to prosecute her despite having caught the adulterers in the act,[65] and the adulterer was still alive, the husband could be charged with pandering.[66]

A special permanent public criminal court or *quaestio*[67] was created to deal with adultery. The *praetor* presided over it.[68] The *aediles* prosecuted the offenders, thus bringing to an end to the use of family law tribunals.[69]

The penalties for adultery were severe.[70] Over time the possibility of legally killing adulterers gradually diminished,[71] and if death was avoided, exile, confiscation of property and loss of dignity were inevitable.[72] The adulterers were sent to different islands.[73] The male adulterer would be deprived of half of his property.[74] His *infamia* could include the lowering of his status, humiliation and emasculation.[75] For the adulterous (ex-)wife, a

60 Paulus *Sententiae* 2 26 6. Specific evidentiary rules applied not relevant here.

61 Borkowski & Du Plessis (n 11) at 129; Balsdon (n 16) at 78.

62 D 48 5 4, *Ulpianus libro octauo disputationum* 1; C 9 9 6, *Ad legem Iuliam de adulteriis et de stupro* (Imp Alexander A Sebastiano); Betzig (n 15) at 366; Borkowski & Du Plessis (n 11) at 129.

63 Betzig (n 15) at 366.

64 McGinn (n 28) at 178.

65 D 48 5 2 2, *Ulpianus libro octauo disputationum*.

66 Paulus *Sententiae* 2 26 8; D 48 5 30(29), *Ulpianus libro quarto de adulteriis* and D 48 5 2 2, Ulpianus *libro octauo disputationum*; C 9 9 2, *Ad legem Iuliam de adulteriis et de stupro* (Impp Alexander et Antoninus A A Cassiae); Bullough (n 12) at 7. Borkowski & Du Plessis (n 11) at 129 explain that the word *lenocinium* means that the husband would be accused of acting like a pimp. See, also, Frier & McGinn (n 52) at 116.

67 Balsdon (n 16) at 77, 218; Borkowski & Du Plessis (n 11) at 115.

68 Bullough (n 12) at 7. Bullough goes on to say that in Dio Cassius' first term of office as *praetor*, there were more than 2000 pending suits concerning adultery (*ibid*).

69 McGinn (n 28) at 141-142. Balsdon notes that on rare occasions the Senate or the Emperor could decide on a private investigation as against the usual public court hearing (Balsdon (n 16) at 219).

70 Bullough (n 12) at 7.

71 Borkowski & Du Plessis (n 11) at 115.

72 Lefkowitz & Fant (n 29) at 120; Bullough (n 12) at 7.

73 Paulus *Sententiae* 2 26 14; McGinn (n 28) at 143. Ironically, Julia, the daughter of Augustus, was exiled after being convicted of adultery (Balsdon (n 16) at 84; Langlands (n 19) at 68).

74 Borkowski & Du Plessis (n 11) at 130.

75 D 48 5 23(22) 3, *Papinianus libro primo de adulteriis*: "A man who has the right to kill the adulterers has all the more right to inflict humiliation on him." Walters "Invading the Roman body: Manliness and impenetrability in Roman thought" in Hallett & Skinner (n 35) 29-43 at 39 interprets this to include beatings, rape and castration. The adulterer's lowered status could also entail hard labour (Borkowski & Du Plessis (n 11) at 130).

third of her separate estate and half the dowry could be confiscated.[76] She also lost part of her right to inherit.[77] *Infamia* for the convicted adulteress included loss of citizenship[78] and the lowering of her status to that of a prostitute, and the wearing of a toga.[79]

Initially wives registered themselves as prostitutes in order to be able to commit adultery legally, but this loophole was closed in AD 19, and numerous prosecutions ensued.[80]

Panderers and colluders were subjected to the same penalties as the adulterers.[81] Prosecution of the offences prescribed after five years.[82]

From the above it is clear that adultery was an automatic catalyst for divorce. Although Roman law did not require spouses to have specific grounds for divorce, certain negative consequences could follow if the divorce was groundless.[83] The wife's adultery was regarded as a just ground for divorce so that if she had committed adultery the husband could avoid these negative consequences.[84]

Since the adulterous wife was forbidden to re-marry, she could not marry her lover after her divorce.[85]

2 1 3 Early canon law and the Theodosian Code

As mentioned above, the law was not uniformly applied and fell into disuse. From the vantage point of the Christian religion adultery is regarded as a sin.[86] However, in the

76 Paulus *Sententiae* 2 26 14; C Dunn "Forfeiting the marriage portion: Punishing female adultery in secular courts of England and Italy" in M Korpiola (ed) *Regional Variations in Matrimonial Law and Custom in Europe, 1150-1600* (Leiden, 2011) 161-187 at 175; Borkowski & Du Plessis (n 11) at 129; McGinn (n 28) at 141-142.

77 McGinn (n 28) at 143.

78 Borkowski & Du Plessis (n 11) at 129.

79 McGinn (n 28) at 147, 156. The toga is worn as a symbol of shame (McGinn (n 28) at 143, 238-239).

80 Suetonius *Life of Augustus* 34; Tacitus *Annals* 2 85 1-3; Betzig (n 15) at 367; McGinn (n 28) at 217.

81 A third party who knowingly allowed his property to be used for adultery, or for the planning, advising or encouraging of adultery, or who benefitted financially from adultery was punished as an adulterer (D 48 5 9(8), *Marcianus*, *libro secundo de adulteriis*; and D 48 5 10(9), *Ulpianus libro quarto de adulteriis*). See, also, Borkowski & Du Plessis (n 11) at 130; McGinn (n 28) at 144.

82 D 48 5 30(29) 6, *Ulpianus libro quarto de adulteriis*. The five years was calculated as from the date of commission of the crime (D 48 5 30(29) 7, *Ulpianus libro quarto de adulteriis*; C 9 9 5, *Ad legem Iuliam de adulteriis et de stupro* (Imp Alexander A Vadanti)). See, also, D 48 5 32(31), *Paulus libro secundo de adulteriis*; McGinn (n 28) at 145.

83 Borkowski & Du Plessis (n 11) at 130. In general, the negative consequences would include the wife's loss of her dowry and her relegation to a nunnery (Borkowski & Du Plessis (n 11) at 130). For the husband, the negative consequences could include the loss of a third of his estate and relegation to a monastery (Borkowski & Du Plessis (n 11) at 130).

84 Borkowski & Du Plessis (n 11) at 130.

85 Balsdon (n 16) at 77; Borkowski & Du Plessis (n 11) at 125. Any remarriage would be void and the new husband would be guilty of collusion (McGinn (n 28) at 143; E Labuschagne "Die lotgevalle van die konkubinaatsverhouding in die Romeinse reg tot by Justinianus" (1989) 18(4) *TSAR* 649-662 at 660).

86 *Exodus* 20:14; *Deuteronomy* 5:18.

fourth and fifth centuries there was a renewed legal emphasis on adultery,[87] whether or not because of the Christian influence is controversial.[88] A major revision of the relevant laws formed part of the Theodosian Code,[89] which brought about significant changes. Divorce was no longer a private right of Roman citizens who could end a marriage if they wished to, but included a public element, namely that the state could impose a penalty for an offence against a marriage.[90]

In AD 326 Constantine started the reform by ordering that only a father, husband or other relatives of the husband (but not those of the wife), could bring a charge of adultery against a married woman.[91] However, women working in certain menial professions were exempted from possible charges of adultery.[92]

Constantine also reintroduced the death penalty for adultery in AD 331, making it possible for a husband to kill his wife.[93] Alternatively, the husband could divorce his wife for her adultery.[94] A wife could only divorce her husband in special (but limited) circumstances, but not merely because her husband was an adulterer.[95]

Constantine and his Christian successors thus took adultery seriously:[96] adultery, as a moral action, was always prosecuted as a criminal offence; it was not regarded as a civil

87 M Kuefler "The marriage revolution in late antiquity: The Theodosian Code and later Roman marriage law" (2007) 32(4) *J of Family History* 343-370 at 356, available at *http //www.scrollpublishing.com/store/Theodosian-ode.html* (accessed 12 May 2013). It should be reiterated that Roman law formed the basis of canon law (JC de Wet *Die Ou Skrywers in Perspektief* (Durban, 1988) at 66).

88 Kuefler (n 87) at 355, 362-363. This view is not unanimous.

89 The Theodosian Code was drawn up between AD 329 and 438 and was a compilation of the laws of the Roman emperors from Constantine (AD 306-337) to Theodosius (AD 408-450), with new laws added until the end of the fifth century (Kuefler (n 87) at 344).

90 Kuefler (n 87) at 355.

91 C Th 9 7 2 (Constantine, law of 326) (tr C Pharr *The Theodosian Code and Novels and the Sirmondian Constitutions*. *A Translation with Commentary, Glossary and Bibliography* (London, 1952). (All references in this article to the Theodosian Code relate to Pharr's translation.)

92 Although the wife of a tavern-keeper could be accused of adultery (but only by her husband), her maidservant or a woman who "gave service" in the tavern could not be accused (C Th 9 7 1 (Constantine, law of 326)). Kuefler (n 87) at 357 notes that "giving service" refers to the practice of prostitution in taverns. A married woman who had children with a slave and attempted to pass them off as her husband's children was condemned (C Th 9 9 1 (Constantine, law of 326 or 329)).

93 Burrough (n 12) at 7; Borkowski & Du Plessis (n 11) at 130; McGinn (n 28) at 143; Balsdon (n 16) at 219.

94 Kuefler (n 87) at 355.

95 *Ibid*. The interpretation of the term *muliercularius* is disputed and could mean either a frequenter of prostitutes or an adulterer with married women.

96 *Idem* at 357. The severity with which the crime of adultery was viewed can be seen from the fact that most prisoners were released from prisons to celebrate Easter, except those convicted of the most serious crimes such as treason, necromancy or magic, murder, poisoning, rape or adultery. This release occurred eight times between the reigns of Valentian 1 (364 AD) and Theodosius 1 (AD 395) and was also included in clauses 7-8 of the Sirmondian Constitution (Pharr (n 91) at 367-368, 380-381, 384-385, 388, 479-480)).

action.[97] It could not be disguised as a suit for the recovery of the dowry;[98] there was no right to appeal a conviction for adultery;[99] and persons previously acquitted of adultery could be retried at a later date.[100]

Under the Theodosian Code the death penalty was imposed in a particularly gruesome way, adulterers being sown into leather sacks and burnt alive.[101] The seriousness with which adultery was viewed is evident from the fact that Constantine's own wife, Fausta, was executed for adultery.[102] The death penalty was later converted to exile and included further punishments such as the loss of the dowry and betrothal gifts by the wife.[103]

Although opinions were divided on whether remarriage was allowed after a divorce based on adultery, St Augustine in AD 430 finally adopted the strict doctrine of the indissolubility of marriage,[104] making remarriage impossible.

This Code remained unpopular and was repealed twice by subsequent emperors, only to be reinstated soon afterwards.[105] Many of its sections were included in the Corpus iuris civilis in the sixth century and it was also consulted during the revival in Europe in the twelfth century.[106]

2 1 4 Corpus iuris civilis

As mentioned above, the lex Julia was incorporated in Justinian's Corpus iuris civilis, specifically Digesta 48 5, Codex 9 9 1 and Novellae 117 and 134. To summarise, a father, without fear of penalty, could kill his daughter and her adulterer if they were caught *in flagrante delicto*.[107] A husband could not, but if he did kill the adulterer found in his house, he would only suffer exile based on excusable diminished culpability.[108] The

97 C Th 3 13 1 (Constantius et Constans, law of 349). The charges were personal and ceased upon the death of the adulterer. There was no action against the heirs of the adulterers (Kuefler (n 87) at 357.

98 C Th 9 7 7 (Theodosius, Arcadius et Honorius, law of 392); Kuefler (n 87) at 357. It was permissible to torture household staff to obtain the required information (C Th 9 7 4 (Gratian, Valentinian & Theodosius, law of 385).

99 C Th 11 36 7 (Constantius et Constans, law of 344).

100 C Th 9 7 8 (Theodosius, Arcadius et Honorius, law of 393).

101 C Th 11 36 4 (Constantius et Constans, law of 339).

102 Kuefler (n 87) at 360.

103 In AD 459 the Novella Majoriani 9 1 (law of 459) determined that the offender should escape without losing his or her life, but still be severely punished (see Kuefler (n 87) at 357).

104 De Montmorency (n 32) at 36 refers to St Chrysostom (AD 407 who that held that adultery itself dissolved the marriage.

105 Kuefler (n 87) at 356.

106 *Idem* at 363.

107 C 9 9 4, *Ad legem Iuliam de adulteriis et de stupro* (Imp Alexander A Iuliano).

108 *Ibid*; Nov 117 15. Where he remains married to his wife, he cannot be her accuser (C 9 9 11, *Ad legem Iuliam de adulteriis et de stupro* (Imp Alexander A Norbano)).

husband had to bring the claim within sixty days,[109] which prescribed after five years.[110] Wives on the other hand had no criminal claim against their adulterous husbands or their lovers.[111]

The penalties in Codex 9 9 35 and 36 determined that adulterers were to be flogged and their noses cut off "so that in that way they can carry about a permanent reproach for the crime perpetrated in the shape of a dishonourable wound and one which was plain to everybody".[112] Novella 134 10 softened these penalties and made provision for an adulterous wife to be sent to a convent for two years until the husband took her back.[113]

Certain exceptions were introduced, so that penalties did not apply in certain limited instances.[114] In addition, mitigating factors were taken into account, for example where there was merely attempted adultery.[115] The penalties were increased in certain circumstances; for example where deception was involved in adultery or it was incestuous.[116]

A husband was still compelled to divorce his adulterous wife,[117] but this rule was subsequently amended to allow him to remain married to her, although she could nonetheless be criminally charged – even though her husband forgave her. [118]

The adulterous (ex-)wife could not marry her lover after her divorce, although this ban was limited by Justinian to the lifetime of the aggrieved spouse.[119]

109 C 9 9 6, *Ad legem Iuliam de adulteriis et de stupro* (Imp Alexander A Sebastiano). If the claim was not brought within sixty days it was conceded to strangers (C 9 9 6, *Ad legem Iuliam de adulteriis et de stupro* (Imp Alexander A Sebastiano)).

110 C 9 9 5, *Ad legem Iuliam de adulteriis et de stupro* (Imp Alexander A Vadanti).

111 C 9 9 1, *Ad legem Iuliam de adulteriis et de stupro* (Impp Severus et Antoninus AA Cassiae).

112 Voet (n 2) *ad* D 48 5 10 at 389.

113 If the husband died before he could take her back, her head had to be shaven and her property divided: two-thirds to her children and a third to the convent (Nov 134 10).

114 Voet (n 2) *ad* D 48 5 16 at 395-396 mentions the following examples: (i) before conviction or pending an appeal; (ii) on reconciliation or (iii) where the innocent spouse did not sue; (iv) where there was a real mistake; (v) where the woman married again in the reasonable belief that her husband had died; or (vi) where irresistible force was used.

115 As where there was merely attempted adultery; where the offender thought that the woman was married when she was not; or where the offender thought that the married woman was unmarried (D 48 5 18(17), *Ulpianus libro secundo ad legem Iuliam de adulteriis*).

116 D 48 5 18(17) 6, *Ulpianus libro secundo ad legem Iuliam de adulteriis*. For a discussion of incestuous adultery, see D 48 5 39(38), *Papinian libro trigensimo sexto quaestionum*.

117 Where a husband refused to divorce his wife, he would be guilty of collusion and subject to the same penalties applicable to the adulterers (C 9 9 2, *Ad legem Iuliam de adulteriis et de stupro* (Impp Severus et Antoninus AA Cassiae) and C 9-10, *Ad legem Iuliam de adulteriis et de stupro* (Imp Alexander A Proculo et Demetriano). Slaves could be tortured to obtain evidence (C 9 9 3, *Ad legem Iuliam de adulteriis et de stupro* (Imp Antoninus A Iuliano)).

118 C 9 9 11, *Ad legem Iuliam de adulteriis et de stupro* (Imp Alexander A Norbano); Voet (n 2) *ad* D 48 5 21 at 403 with reference to Nov 117 ch 8 s 2.

119 Borkowski & Du Plessis (n 11) at 125.

2 1 5 Classical canon law

Although classical canon law on adultery closely resembled earlier canon law on the subject,[120] it differed from Roman law in two key respects. Firstly, in accordance with biblical interpretation, adultery was a sin for all married persons irrespective of gender, and the punishment was extended to all.[121] In addition, the crime could be committed by all women, not only married women, although adultery committed by a married woman was still distinguished from that committed by an unattached woman. Adultery by a married woman was regarded as a greater sin because a third party's child might be introduced into the marriage and was thus punished more severely.[122]

Secondly, the killing of an adulterous spouse was no longer permissible – even one caught *in flagrante delicto*.[123] Lesser punishments were imposed, including a fine and humiliation,[124] combined with monetary damages to the husband where the wife of another gave birth to his child.[125]

In terms of the Corpus iuris canonici:

> [A]lthough it is earnestly recommended that a spouse, moved by Christian charity and concerned for the good of the family, not refuse forgiveness to an adulterous partner and not disrupt conjugal life, nevertheless, if the spouse did not condone the other's fault expressly or tacitly, the spouse has the right to sever conjugal living unless the spouse consented to the adultery, caused it, or also committed adultery. [126]

Although marriages were regarded as indissoluble, adultery subsequently did become the only ground for divorce for the innocent spouse.[127]

Under canon law a man could not marry a woman whom he had defiled by adultery.[128] Canon law remained relevant whilst marriage as an institution fell within the realm of the church, but as it became more secularised, these principles were amended by national statutes.

2 2 Roman-Dutch law

The Corpus iuris civilis was included in the revival of Roman law in Europe in the twelfth century[129] and, as mentioned above, was further influenced by canon law as well as the

120 The era after the Decretals of Pope Gregory IX (ca 1140) is regarded as the classical canon law period.

121 Bullough (n 12) at 10; P Nicolas "The lavender letter: Applying the law of adultery to same sex couples and same sex conduct" (2011) 63(1) *Florida LR* 96-127 at 107.

122 Bullough (n 12) at 10.

123 *Ibid*.

124 *Idem* at 11.

125 *Idem* at 9.

126 4 1 7 11 2 (*canon* 1152 §1). The Code also prescribed its own processes and trial procedures for the ecclesiastical courts and remained applicable until 1917, when it was replaced by the Codex iuris canonici, available at *http //www.vatican.va/archive/ENG1104/_INDEX.HTM* (accessed 2 Jun 2013).

127 Bullough (n 12) at 11.

128 RH Helmholz *Marriage Litigation in Medieval England* (London, 1974) at 94.

129 Kuefler (n 87) at 363.

local law.[130] For our purposes, the fusion of Roman, canon and Dutch laws resulted in the legal protection of the marriage relationship,[131] with the criminality of adultery extended to both genders.[132] Prosecution under Dutch law was secular and was instituted by the civil authorities, not the family.[133] The prosecution of adulterers (and panderers) still prescribed after five years,[134] and an adulteress had to be prosecuted within six months from the date of the dissolution of her marriage.[135]

Criminal penalties in Holland depended on whether it was aggravated adultery (a married man with a married woman) or ordinary adultery (a married man with an unmarried woman).[136] Penalties ranged from death[137] and banishment for up to fifty years to flogging or confinement to a nunnery or monastery;[138] stripping of any rank and office, a fine of up to two hundred Caroline florins; or imprisonment for fourteen days on a diet of bread and water.[139]

Apart from the above penalties, it became possible for a husband to claim damages.[140] Adultery was regarded as an injury to the husband and he could recover damages for the loss of his wife's *consortium* as well as any patrimonial loss he had suffered.[141] The basis of the injury has been described as the defilement of a married woman; the violation of another man's bed; or the corruption of another man's spouse.[142] The civil action also

130 D Kleyn & F Viljoen *Beginner's Guide for Law Students* 4 ed (Claremont, 2010) at 29.

131 In terms of Roman-Dutch law the marriage had to be valid for adultery to be possible (Nathan (n 41) at 1624), mainly because the distinction between marriages known in Roman times had become obsolete. See, in general, Simon van Leeuwen *Het Roomsch-Hollands recht* (tr JG Kotze rev and ed with notes by CW Dekker *Commentaries on Roman Dutch Law* vol 1 London, 1921) 1 4 14 1.

132 Voet (n 2) *ad* D 48 5 7 at 383.

133 Voet (n 2) *ad* D 48 5 21 at 405; Simon van Groenewegen van der Made *Tractatus de legibus abrogatis et inusitalis in Hollandia vicinisque regionibus* (tr B Beinart *Abrogated Laws* Johannesburg, 1975). See C 9 9 1, *Ad legem Iuliam de adulteriis et de stupro* (Impp Severus et Antoninus AA Cassiae).

134 For incestuous and violent adultery, the prescription period was twenty years (Voet (n 2) *ad* D 48 5 22 at 406).

135 Voet (n 2) *ad* D 48 5 22 at 405; D 48 5 30(29) 5-7 *Ulpianus libro quarto de adulteriis*.

136 Adultery by a married woman was particularly frowned upon. See Simon van Leeuwen *Censura Forensis* (tr M Hewett *Censura forensis* Pretoria, 1991) 1 5 24 1; Leeuwen (n 131) 1 4 14 1; Nathan (n 41) at 1624; Ph J Thomas "Prenuptial *stuprum*" (2001) 64(3) *THRHR* 423-429 at 426.

137 Hugo de Groot *Inleydinghe tot de Hollandsche rechts-geleerdheyt* (tr RW Lee with brief notes & a commentary *The Jurisprudence of Holland* vol 1 Oxford, 1926) 3 33 at 481. This is refuted by Voet ((n 2) *ad* D 48 5 13) who contends that neither the husband nor the father could kill the daughter or the adulterer under Dutch law.

138 De Groot (n 137) 4 18 4; C 9 9 29(30) 1, *Ad legem Iuliam de adulteriis et de stupro* (Imp Constantinus A Africano); Nov 134 10.

139 The Political Ordinance of Zeeland, 1583 was almost identical (Leeuwen (n 131) 1 4 14 9). Although the Diocese of Utrecht and Friesland punished adulterers much more lightly (up to twenty Caroline florins), the punishment in Utrecht and Friesland increased in 1584 (*Rubric 33*) and 1601 (*Placaat* of 14 Feb 1601) respectively (Leeuwen (n 131) 1 4 14 10). See, also, Nathan (n 41) at 1624. The monetary fines were later quadrupled (Voet (n 2) *ad* D 48 5 10 at 390).

140 Political Ordinance of Holland (1580) art 15-17; Leeuwen (n 136) 1 4 14 8.

141 De Groot (n 137) 3 35 9; Nathan (n 41) at 1624.

142 *Ibid*.

entailed the loss of dowry or *donatio propter nuptias*[143] and whatever else had accrued to the adulterer by agreement or joint matrimonial property.[144] Adultery remained a recognised ground for divorce.[145] The law of Holland reintroduced an earlier Roman-law prohibition in that the adulterer and the adulteress could never marry one another.[146]

2 3 South African law[147]

South African law adopted these Roman-Dutch common-law principles in the seventeenth century: adultery was a crime and could result in a delictual damages claim by the husband, but not by the wife.[148] The husband lost his claim for damages (and divorce) where he condoned her adulterous actions, where there was connivance between the spouses,[149] or where he himself committed adultery.[150] The amount of damages was affected by the husband's treatment of his wife prior to the adultery: where he had failed to treat her with kindness and consideration, it was a key element in the estimation of the damages.[151]

Adultery was a ground for divorce, but it was uncertain in earlier years whether a divorce was a prerequisite for a claim for damages by the husband[152] although the action could be brought either together with the divorce, or in a simultaneous separate action.[153]

143 Leeuwen (n 131) 1 4 14 11.

144 Voet (n 2) *ad* D 48 5 11 at 390; Leeuwen (n 131) 1 4 14 12 with reference to Nov 117 8 2; C 5 17 8 2, *De repudiis et iudicio de moribus sublato* (Impp Theodosius et Valentinianus AA Hormisdae); the Political Ordinance of Holland (1580) art 18.

145 De Groot (n 137) 1 5 18.

146 JW Wessels *History of the Roman-Dutch Law* (Grahamstown, 1908) at 448-449 with reference to the Special Ordinance of 1674 (*Groot Placaetboek* vol 3 at 507); Nathan (n 41) at 1624.

147 See, in general, M Carnelley "One hundred years of adultery – re-assessment required?" in SV Hoctor & M Kidd (eds) *Stella Iuris Celebrating 100 Years of Teaching Law in Pietermaritzburg* (Claremont, 2010) 183-204.

148 Nathan (n 41) at 1671 with reference to A Matthaeus Secundus *De criminibus, ad libros XLVII et XLVIII Digestorum commentarius* (Utrecht, 1644) 48 5 8. See, also, *Farmer v Farmer* (1850-1852) 1 Searle 227; *Richter v Wagenaar* (1828-1849) 1 Menz 262; and *Barker v Barker* (1828-1849) 1 Menz 265 respectively. The death of either the adulterer or adulteress ended the husband's right to an action (Nathan (n 41) at 1631).

149 Nathan (n 41) at 1628 with reference to the Supreme Court of Friesland case of *Van Horien v Van der Lyt* as discussed by J van Sande *Decisiones Frisicae* (Groningen, 1683) 2 6 2. See, also, Leeuwen (n 131) 1 5 14 15.

150 Nathan (n 41) at 1630; *Wiezel v Wiezel* (1877) 7 Buch 92; *Heathershaw v Heathershaw* (1864-1867) 5 Searle 35 where the divorce orders were refused because the plaintiff had also committed adultery.

151 AFS Maasdorp *The Institutes of Cape Law Book I The Law of Persons* (Cape Town, 1903) at 89.

152 There were two opposing decisions: In *Nanto v Malgass* (1887-1888) 5 SC 108 the court argued *obiter* that it was a prerequisite; whilst in *Biccard v Biccard and Fryer* (1891-1892) 9 SC 476 the court came to the opposite conclusion. See, in general, Nathan (n 41) at 1675.

153 Maasdorp (n 151) at 89. Maasdorp *The Institutes of Cape Law Book III The Law of Obligations* (Cape Town, 1909) at 127; *Biccard v Biccard and Fryer* (n 152) at 477. The possible loss of dowry or any financial benefit arising from an agreement or the joint matrimonial property system were issues for the divorce and not relevant to the civil claim against the third-party adulterer.

It was uncertain whether the rule that adulterers were not allowed to marry each other became part of South African law.[154]

In the twentieth century the courts amended the common-law principles radically. The crime of adultery was abolished in 1914 by the Appellate Division (as it then was) in the case of *Green v Fitzgerald*.[155]

Adultery is defined as voluntary sexual intercourse between a married person and someone other than the spouse,[156] and as from 2006 could be committed by same-sex and other couples who had entered into a civil partnership in terms of the Civil Union Act.[157]

The right of adulterers to marry each other (after the dissolution of the relevant marriages) was confirmed by the same court in 1919 in *Estate Heinamann v Heinamann*.[158]

With regard to the claim for damages against the third-party adulterer, the courts in 1927 noted that a divorce was not a prerequisite for such a claim and thus separated the two actions.[159]

The damages claim became gender-neutral in 1950 when the Appellate Division (as it then was) found that either spouse, irrespective of gender, could bring an action for damages based on the adultery of the other spouse.[160]

The basis for this claim by the innocent spouse remained personal injury or *contumelia* suffered and loss of comfort, society, and services.[161] In recent cases, the courts have extended the grounds for the claim to include, together with the infringement of feelings, feelings of piety.[162]

154 VC Malherbe "Born into bastardy: the out-of-wedlock child in early Victorian Cape Town" (2007) 32(1) *J of Family History* 21-44 at 23; Wessels (n 146) at 448-449 with reference to the Special Ordinance of 1674 (Groot Placaetboek vol 3 at 507); Nathan (n 41) at 1624. Wessels argues that this law has never been repealed, and thus theoretically forms part of the common law of South Africa (Wessels (n 146) at 449). See, also, Maasdorp vol 1 (n 151) at 18 with reference to *Daniel v Daniel* 3 Juta 231. However, Beyers argues that Wessels is wrong in this regard and that, as a result of inconsistency in various areas in the Dutch provinces, this rule was not generally accepted and was thus never part of South African law (LJED Beyers *Die Echtreglement en die Suid-Afrikaanse Reg* (Leiden, 1953) at 23-25).

155 (n 3) at 102, 119.

156 Carnelley (n 147) at 186 fn 29. In terms of s 13 of the Civil Union Act 17 of 2006 all the consequences of a marriage are also applicable to civil partnerships or civil unions, which include the claim for damages based on adultery.

157 Act 17 of 2006. In terms of s 13 of the Act, all the common-law consequences of a marriage are applicable to civil partnerships.

158 1919 AD 99.

159 *Viviers v Killian* 1927 AD 449.

160 *Foulds v Smith* 1950 (1) SA 1 (A).

161 *Viviers v Killian* (n 159) at 455.

162 *Seroot v Pieterse* 2005 Juta Daily Law Reports 0821 (T) in par [10]; *Wiese v Moolman* (n 4) at 3.

Whether the claim for damages is unconstitutional remains unclear.[163] The court in *Wiese v Moolman*[164] confirmed that in the light of the special protection offered to the institution of marriage,[165] the action is not in conflict with the Bill of Rights.[166] The court evaluated the community convictions through the lens of the spirit, purport, and objects of the Bill of Rights and concluded that the *boni mores* of society have not changed so much that adultery could objectively be regarded as reasonable; and thus it remains unlawful.[167] Although numerous academics have argued for the abolition of the claim, the courts continue to make damages awards based on adultery.[168]

Before 1979, adultery also played a significant role in the South African divorce laws, because it was one of only three grounds for a divorce.[169] The divorce system was fault-based at the time, and divorce could result in financial penalties for the adulterous spouse at the time of divorce, in accordance with the principle that "a spouse should not be allowed to benefit financially from a marriage which has been wrecked through

163 Although Cronjé & Heaton argued in 2004 that the claim might be unconstitutional in that it violated the constitutional right to freedom of association of the third party and the adulterous spouse, Heaton later added a caveat that the claim might be a justifiable limitation on the right to freedom of association in light of the purpose of the claim, namely to protect the sanctity of marriage. See, in this regard, DSP Cronjé & J Heaton *South African Family Law* (2004) at 166; J Heaton "Family law and the Bill of Rights" in Y Mokgoro & P Tlakula (consulting eds) *Bill of Rights Compendium* vol 1 (Durban, 1998-) Loose-Leaf Service at 21 & 3C19 respectively.

164 2009 (3) SA 122 (T). See, in general, the discussion by J Neethling "Owerspel as onregmatige daad – die Suid-Afrikaanse reg in lynregte teenstelling met die Nederlandse reg" (2010) 73 *THRHR* 343-346 at 346; Carnelley (n 147) at 196-201.

165 *Wiese v Moolman* (n 4) at 4, with reference to *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) & *Volks v Robinson* 2005 (5) BCLR 446 (CC) in par 52. The court in *Wiese* focused on the voluntary nature of the spouses' commitment to exclusivity and held that a legal outlet should be retained so that aggrieved people did not resort to self-help (*Wiese v Moolman* (n 4) at 4, 6).

166 The Constitutional sections discussed were mainly ss 9 (equality), 10 (dignity) & 18 (freedom of association). In short, the court noted that the damages claim did not conflict with the right to equality, as the distinction between married and unmarried person has been approved by the Constitutional Court in *Volks v Robinson* (n 165) in par 54 (*Wiese v Moolman* (n 4) at 8). It also does not infringe the right to dignity of the adulteress, as the third party cannot lay claim to the fact that his or her dignity is not respected where he or she interfered openly with the private relationship of others (*idem* at 11). There is also no unjustifiable impact on the freedom of association of the adulterers, as the guilty spouse voluntarily limited his right by getting married and the third party was aware of that (at 11).

167 *Wiese v Moolman* (n 4) at 7.

168 See, *inter alia*, J Church "*Consortium omnis vitae*" (1979) 42 *THRHR* 376-394 at 380; JMT Labuschagne "'Deïnjuriëring' van owerspel" (1986) 49 *THRHR* 336-341 at 341; V Goldberg "The legal ramifications of adultery – I: Infidelity, AID and divorce" (1991) 1 *Businessman's Law* 227-230 at 227; Carnelley (n 147) at 202. The contrary view is held by J Neethling, JM Potgieter & PJ Visser *Law of Delict* (Durban, 2006) at 326; J Neethling, JM Potgieter & PJ Visser *Neethling's Law of Personality* (Durban, 2005) at 208; J Neethling "Owerspel, die vervreemding van gevoelens en die erkenning van die reg op gevoelslewe as persoonlikheids- en mensereg" (2006) 69 *THRHR* 342-347 at 344; Neethling (n 164) at 163.

169 The grounds were based on Roman-Dutch law (adultery and malicious desertion) as amended by s 1 of the Divorce Law Amendment Act 32 of 1935 which added the further grounds of incurable insanity and habitual criminality. See HR Hahlo *The South African Law of Husband and Wife* 5 ed (Cape Town, 1985) at 330.

his matrimonial delinquency".[170] After 1979 a "no-fault"-system was introduced, and in terms of the Divorce Act 70 of 1979 adultery is no longer a ground for a divorce. It is merely one of the guidelines that may be used to prove that the marriage has broken down irretrievably.[171] In this respect, adultery may indirectly be relevant as a factor to be considered when determining post-divorce spousal maintenance, a claim for forfeiture of benefits and/or a redistribution order.[172]

From the above it is clear that the legal provisions on adultery have undergone substantial changes. Adultery is no longer a crime, and vis-à-vis the divorce law and delictual damages claims became gender-neutral more than sixty years ago.

Nevertheless, adultery remains relevant and two aspects have practical significance: controversially, a delictual claim based on adultery is still available in South Africa[173] and adultery could indirectly have an impact on the financial distribution at the time of the divorce.

The above differs from legal developments in England, as is shown in the paragraphs below.

3 The development of English law

3 1 Early English law

In 54 BC, Julius Caesar said the following about the Britons:[174]

170 HR Hahlo *The South African Law of Husband and Wife* 3 ed (Cape Town, 1969) at 424ff.

171 Section 4(2)(*b*) of the Divorce Act.

172 See, respectively, ss 7(2), 9 & 7(5) of the Divorce Act, 70 of 1979. In terms of s 9(1) the court may take into consideration any substantial misconduct on the part of either spouse when considering a forfeiture of benefits order. See *Wijker v Wijker* 1993 (4) SA 720 (A). Similarly, when considering a redistribution order, misconduct can be considered under the wide terms of "any other factor" in s 7(5)(*d*). However, the Supreme Court of Appeal in *Buttner v Buttner* 2006 (3) SA 23 (SCA) noted that it would only consider misconduct if it would have an impact on fairness or where there was an imbalance in the parties' conduct. J Heaton *South African Family Law* (Durban, 2010) at 141.

173 Although the constitutional issues were superficially raised in *Wiese v Moolman* (n 4), the author has previously submitted that the courts have not been given a full opportunity to consider arguments for the abolition of the claim in view of the constitutional framework (Carnelley (n 147) at 204). Among the reasons for the abolition of the claim previously set out by the writer were that: (1) the action provides an opportunity for blackmail to induce a favourable settlement in order to keep the adultery private; (2) the calculation of the damages is speculative since no reasonable standard for assessment has been set; (3) the action is based upon "psychological assumptions that are contrary to fact"; (4) the action has little or no deterrent effect; (5) it is conflict with existing no-fault divorce-law principles; (6) the claim is archaic and reminiscent of the view of a wife as property; (7) the claim should be abolished, since the law should not regulate morality; and (8) the social harm arising from such actions outweighs the social benefits accruing from attempts to protect family relations by means of delictual claims (*idem* at 203).

174 *Commentarii de Bello Gallico* (tr WA McDevitte & WS Bohm *Commentaries of the Gallic Wars* New York, 1869) 5 14, available at *http //www. forumromanum.org/literature/caesar/gallico_e5.html-14* (accessed 20 Mar 2013).

> Ten and even twelve have wives common to them, and particularly brothers among brothers, and parents among their children; but if there be any issue by these wives, they are reputed to be the children of those by whom respectively each was first spoused when a virgin.

Caesar did not refer to any prohibition on adultery and argued: "communal access would seem to eliminate philandering".[175] By the seventh century this had changed.

3 2 Early English kings

In one of the earliest English-language laws King Aethelbert I[176] passed legislation incorporating sexual offences as a substitute for the self-help blood-feud measures of previous customs.[177] These laws provided for the payment of damages of differing amounts, depending on the status of the adulterous wife and whether she was a "maiden belonging to a king", a "grinding slave" or a "nobleman's serving maid", "a commoner's serving maid" or the "woman of a servant".[178] In addition, the adulterer, at his own cost, had to provide a second wife for the husband.[179] The substitution of another for the wife is in line with the theory that the adultery damaged the husband's property and that his property rights had to be reinstated.[180]

The laws of Alfred the Great[181] were "a curious blending of tort and crime".[182] Depending on the status of the husband, the amount of damages was fixed on a sliding scale according to the husband's[183] *wergeld.*[184] However, if the adulterers were caught by the father, husband, or son *in flagrante delicto,* the person who caught them might kill the adulterer without becoming subject to a vendetta.[185] The wife did not have a similar claim.

175 Murray (n 1) at 97.

176 Aethelbert I reigned from AD 597 to 617.

177 Murray (n 1) at 97.

178 *Ibid*.

179 *Idem* at 97-98 with reference to Law 31 of King Aethelbert I; LO Pike *History of Crime in England* vol 1 (London, 1873) at 446.

180 Murray (n 1) at 98; Pike (n 179) at 446; Bullough (n 12) at 5.

181 AD 871-900.

182 Murray (n 1) at 98.

183 Murray (n 1) at 98 with reference to Law 10 of King Alfred: if the husband's *wergeld* was 1200 shillings, the compensation due to him for the adultery with his wife was 120 shillings; if his *wergeld* was 600 shillings, the compensation was 100 shillings; and a commoner was paid forty shillings.

184 *Wergeld* was the value placed on a person based on his rank and the amount paid as compensation for his death to the family or lord to prevent a blood feud (*sv* "*wergeld*" in Merriam-*Webster Dictionary*, available at *http //www.merriam-webster.com/dictionary/wergild* (accessed 2 Jun 2013).

185 Murray (n 1) at 98 with reference to Law 42 of King Alfred.

King Edmund I[186] added that adulterers were not worthy of a consecrated burial grave[187] and King Canute (Cnut)[188] confirmed the husband's claim for damages for the adultery and loss of property, but also decreed that in addition to the penalty the noses and ears of adulterers might be cut off.[189]

The laws of William the Conqueror (William I)[190] were similar to the lex Julia of Roman law in providing that if a father caught his daughter (or a son his mother) and her adulterer in the act in his house or that of his son-in-law, he might kill both the adulterers.[191] This provision was an exception to the laws of the time, which did not allow the infliction of death for a crime.[192] Although William the Conqueror forbade capital punishment for any offence, he ordered that the adulterous offender's "eyes shall be put out and he shall suffer castration".[193] In later reform the adulterer's hands and feet might be cut off as an alternative to castration "so that the trunk remains alive as a sign of his treachery and wickedness;" in addition to forfeiture of his *wergeld*.[194] The damages were not paid to the husband, but to the state.[195] Thus a person who committed adultery with a married woman suffered both a loss of property and physical punishment.[196]

These ancient laws were truly cruel and harsh. But one must remember that during those periods of time that the courts as we now know and have become to depend on were non-existent. Self-help and self-retaliation were almost the only means to redress open to a wronged person. It should be remembered also that women were not regarded as equals and were considered more in the nature of a property right.[197]

Adultery was not always prosecuted as adultery *per se*. Dunn explored "abductions prosecuted in England's secular courts during the late thirteenth and fourteenth centuries, and ... emphasised that authorities were primarily concerned with the offence of adultery rather than forcible kidnapping".[198] The second statute of Westminster of 1285 allowed husbands to approach the secular courts about both the abduction of their wives and adultery by their wives.[199] Dunn translated chapter 34 of Westminster II as follows:[200]

186 AD 922-946.

187 The Laws of King Alfred, Law 4, available at *http //www.fordham.edu/halsall/source/560-975dooms.asp#* (accessed 2 Jun 2013).

188 AD 990-1035.

189 MC Ross "Concubinage in Anglo-Saxon England" (Aug 1985) *Past & Present* 3-34 at 10.

190 AD 1028-1087.

191 In terms of s 35 of the Laws of William I, cited by Murray (n 1) at 100.

192 *Ibid*.

193 Section 10 of the Ten Articles of William I (EF Henderson *Select Historical Documents of the Middle Ages* (Honolulu, 1896), available at *http //avalon.law.yale.edu/medieval/lawwil.asp* (accessed 22 Mar 2013). See, also, Murray (n 1) at 99.

194 Section 18 of the Laws of William I as cited by Murray (n 1) at 99.

195 *Ibid*.

196 *Ibid*.

197 *Idem* at 104.

198 Dunn (n 76) at 164, 176.

199 *Idem* at 165.

200 *Idem* at 166.

> And of women carried away with the goods of their husbands, the king shall have suit for the goods so taken away.
>
> And if a wife willingly leave her husband and go away and live with her adulterer, she shall be barred forever of the action to demand her dower that she ought to have of her husband's lands if she be convicted thereupon, except that her husband willingly, and without the coercion of the church, reconcile her and suffer her to cohabit with him; in which case she shall be restored her action.
>
> He that carrieth a nun from her house, although she consent, shall be punished by three years' imprisonment, and shall make suitable satisfaction to the house from whence she was taken, and nevertheless shall make fine at the king's will.

The aim of the statute was to punish those who threatened marriages, the adulterers, as well as those who interfered with the husband's property; and because abduction and the adultery of wives were linked, the civil lawsuits that followed were mostly brought by aggrieved husbands.[201] The wife's consent was not a defence.[202] Through the suit the adulterer was punished, the husband was awarded damages, and the wife's adultery that affected the dower after his death was publicised.[203] The legislation prohibited adulterous wives from receiving their traditional marriage portions (dower).[204] The husband's whole inheritance was thus secured for his children by "preventing his remarrying wife and her new husband from controlling her one-third life interest in his patrimony".[205]

The use of this statute for prosecutions decreased significantly in the late fourteenth century, but it is uncertain why.[206] The exception with regard to the forfeiture of the dower remained part of English law until 1925, when the dower itself was abolished.[207]

3 3 Canon law and the influence of the church

For the sake of the completeness of this exposition, it should be noted that canon law also influenced English law during the pre-middle ages and was enforced in both civil and ecclesiastical courts. Although it was discussed *supra*, it is useful to note that adultery was regarded as a sin by the Christian church and that punishment for it no longer included the possibility of death, although monetary damages were paid to the husband whose

201 *Idem* at 167. English law prohibited a husband from prosecuting his wife and had no means to bar dower (*ibid*).

202 *Idem* at 166.

203 *Idem* at 167, 174; Seabourne argues that the statute at this time was interpreted in a "widow-friendly fashion" with reference to the 1307 matter of *Lyndeseye and Isabel his wife v Ralpoh son of William* (G Seabourne "Coke, the statute, wives and lovers: Routes to a harsher interpretation of the Statute of Westminster II c 34 on dower and adultery" (2013) 33 *Legal Studies* 1-20 at 2).

204 Dunn (n 76) at 164; Seabourne (n 203) at 1.

205 Dunn (n 76) at 175.

206 *Idem* at 185. Dunn argues that because there seems to have been a shift towards adjudication by the ecclesiastical courts; and also that in the light of the 1382 Statutes of Rapes, which allowed for the forfeiture of the dower during the lifetime of the husband, the wives may have been reluctant to depart from the household (*idem* at 186). This matter is not pursued further in this article.

207 Seaborne (n 203) at 20.

adulterous wife bore the adulterer's child.[208] "It was not until the twelfth century that the doctrine of strict indissolubility of marriage was enforced in England by canon law in the Courts of the Bishop",[209] and by the thirteenth century adulterers were not allowed to remarry.[210] The only possibilities were an annulment or a divorce *a mensa et thoro*.[211]

The ecclesiastical courts that operated from the sixteenth century had wide jurisdiction and could hear charges relating to the crime of adultery.[212] In those courts, punishment for adultery included public penance in a penitential white sheet before the parish congregation.[213] Some regarded the punishment for adultery as insufficient:[214]

> One can trace a long line of failed parliamentary Bills attempting to impose stiffer punishments for adultery: attempts were made in 1543, 1549, 1576, 1601, 1604, 1614, 1621, 1626, 1628 and 1629 to bring in such measures. The stream of moral reform strengthened in the 1640s, with Bills against adultery … surfaced in 1641, 1644, 1647, 1648 and 1649. The ending of the corrective powers of the ecclesiastical courts and the failure to put anything in their place gave added cogency to such pleas.[215]

The aim of the Adultery Act of 1650, which applied until the Restoration, was to suppress the detestable sins of *inter alia* adultery and was enacted "for the suppressing of the abominable and crying sins of … Adultery … wherewith this Land is much defiled, and Almighty God highly displeased".[216] Conviction led to the death penalty, although certain exceptions were noted, namely where the man did not know that the woman was married; where the woman's husband had been absent for three years or was reputed to be dead.[217] It is uncertain how strictly this statute was enforced.

In England, by the beginning of the sixteenth century, a flaw could be found in almost any marriage, resulting in an annulment, which made it possible for adulterous spouses

208 See discussion *supra* at 2 1 3 and 2 1 4.

209 De Montmorency (n 32) at 37.

210 Helmholz (n 128) at 94. Helmholz refers to the case of *Stuard v Wald* (1372) York CPE 111 where the divorce application was denied even though the husband was living in an adulterous relationship with another woman (at 288).

211 De Montmorency (n 32) at 37.

212 M Ingram *Church Courts, Sex and Marriage in England 1570-1640* (Cambridge, 1987) at 2-3; RB Outhwaite *The Rise and Fall of English Ecclesiastical Courts 1500-1860* (Cambridge, 2006) at 59, 81.

213 Ingram (n 212) at 4; J Panek "Punishing adultery in *A Woman Killed with Kindness*" (1994) 34 *Studies in English* 357-378 at 357.

214 Ingram (n 212) at 4.

215 RB Outhwaite *Clandestine Marriages in England 1500-1850* (Ohio, 1995) at 11.

216 S Pugh "Cleanly-Wantonnesse and Puritan legislation" (2006) 21 *The Seventeenth Century* 249-269 at 252.

217 Outhwaite (n 215) at 11.

to remarry.[218] This came to an end when in 1563 the Council of Trent reformed the Canonical Divorce Law and the Marriage Act of 1540 and confirmed the indissolubility of a consummated marriage between lawful persons.[219]

Between 1660 and 1857 it was not possible to obtain a divorce through the civil courts, since these courts refused to invade the jurisdiction of the church.[220] In addition, the ecclesiastical courts had no power to dissolve a marriage.[221] The only way to obtain a divorce was through an Act of Parliament[222] and adultery was the sole ground for it.[223] This made divorce rare and expensive, cumbersome and intricate;[224] and originally possible only for the aristocracy and the wealthy.[225] To obtain such an Act of Parliament, there were two prerequisites: a divorce order *a mensa et thoro* from the ecclesiastical court

218 De Montmorency (n 32) at 37.

219 *Ibid*.

220 AS Holmes "The double standard in English divorce laws, 1857-1923" (1995) 20 *Law and Social Inquiry* 601-620 at 604. This was unlike the situation in Holland where these matters were brought before a civil court. See discussion *supra.*

221 GOW Mueller "Inquiry into the state of a divorceless society" (1956-1957) 3 *University of Pittsburgh LR* 545-578 at 564; Holmes (n 220) at 604; B Hale *et al The Family, Law and Society* (Oxford, 2009) at 146; S Wolfram "Divorce in England 1700-1857" (Summer 1985) *Oxford J of Legal Studies* 155-186 at 157.

222 See Wolfram (n 221) at 155; De Montmorency (n 32) at 38; Hale *et al* (n 221) at 146; Holmes (n 220) at 604. This was in line with the Protestants' rejection, at the time of the Reformation, of the Pope's tenet that marriage was a sacrament and indissoluble (T Mackenzie *Studies in Roman Law with Comparative Views of the Laws of France, England and Scotland* (London, 1870) at 122). The statistics of the number of divorces through Acts of Parliament were (Wolfram (n 221) at 157): for the fifty years between 1700 and 1749 there were fourteen divorces; between 1750 and 1799 (fifty years), 117 divorces; and, between 1800 and 1857 (fifty-eight years), 193 divorces. After the 1857 Act, the divorce rate increased dramatically. By 1860, the divorce rate was up to more than one hundred annually and by the 1970s to more than 100 000 annually. The steep upward trend has been attributed to a combination of easier divorce laws combined with the emancipation of women (Wolfram (n 221) at 179-180). A discussion of this aspects falls outside the scope of this article.

223 D James "Parliamentary Divorce, 1700-1857" (2012) 31 *Parliamentary History* 169-189 at 169.

224 Divorces were granted mainly to men and to only four women; of the latter divorces, two were based on adultery combined with bigamy and two on adultery combined with incest (with the wife's sister who at the time fell within the prohibited degrees of relationship) (Wolfram (n 221) at 162, 174-175; Holmes (n 220) at 604; Hale *et al* (n 221) at 147). For an overview of the procedure followed to obtain a parliamentary divorce, see Mueller (n 221) at 551; Wolfram (n 221) at 168.

225 *Idem* at 159 with reference to the Royal Commission of 1853. Wolfram & James both argue that it was not merely the aristocracy who followed this procedure, but with time "the lower echelons of society" who could raise the necessary funds did so too (Wolfram (n 221) at 162-165; James (n 223) at 189). Wolfram (n 221) at 166 notes that the cost of a parliamentary divorce was about £700 in 1853, and a divorce *a mensa et thoro* between £120 and £140.

and a successful claim for damages: a third party "trespass" suit against the adulterer for criminal conversation.[226] This requirement did not apply to any female petitioners.[227]

Before 1680, at common law the husband had a claim for injury and assault of his wife and the loss of her help and companionship – loss of her as an economic asset.[228] Alternatively, he could informally demand compensation under threat of adverse publicity.[229] A third option was formal prosecution for assault and battery.[230] By the eighteenth century, the term "criminal conversation" defined this type of "trespass".[231] This claim (tort) was originally only available to a wronged husband, not a wronged wife.[232]

Between 1680 and 1740, only twenty-three cases of criminal conversation were brought to trial.[233] Although private in nature, they were high profile through reporting by the press and the printing of pamphlets.[234] The claim was based on assault and the loss of help and companionship. Contributing factors were rank, flagrant cheating, the state of the marriage and the wife's conduct.[235] Of the 784 cases brought between 1700 and 1857, only twenty were by women, of which only eight were successful.[236]

Although criminal conversation was a private action for financial compensation for personal insult, it was part of a public campaign to regulate vice, linked to the human

226 Wolfram (n 221) at 159; James (n 223) at 170. The last requirement was not absolute until the 1798 Standing Orders in Parliament (Wolfram (n 221) at 159-160). Before 1750 the Divorce Acts did not mention any criminal conversation verdicts, but in Copley's Act of 1750 this changed, with Copley being awarded £3 000 (Wolfram (n 221) at 160). For detailed statistics of these criminal conversation actions between 1750 and 1789, see *ibid*. The average damages awarded to a husband were £1 450, ranging from nominal damages to £20 000 (Wolfram (n 221) at 168-169). For the details of the amount of damages awarded in the reported cases, see Wolfram (n 221) at 167-168. She noted that after about 1830, the amount of awarded damages decreased, but the reason for this change was unknown and seemingly not related to social status (Wolfram (n 221) at 169, 171-172). The cases increased to seventy-three in the 1790s (DM Turner *Fashioning Adultery. Gender, Sex and Civility in England, 1660-1740* (Cambridge, 2002) at 172). In addition, before 1780, clauses were included in the Acts to bastardise the children of an adulterous union (Wolfram (n 221) at 161). She notes that the bastardising applied to any children born a year or more after the husband had last had access to his wife).

227 Wolfram (n 221) at 159-160.

228 Turner (n 226) at 174.

229 *Ibid*. This was an informal type of bartering.

230 *Idem* at 175. This legal fiction was used to bring the action within the jurisdiction of the courts, and the wife was assigned a passive role.

231 *Ibid*.

232 Nicolas (n 121) at 113.

233 Turner (n 226) at 172; DT Andrew "'Adultery à-la-Mode': Privilege, the law and attitudes of adultery 1770-1809" (1997) 82 *The Historical Association* 5-23 at 9.

234 Turner (n 226) at 174; Andrew (n 233) at 9.

235 Turner (n 226) at 188-190. For a discussion of the pamphlets and newspaper comments as well as the public debating society meetings as an attack on the fashionable nature of adultery, see Andrew (n 233) at 9-11.

236 James (n 223) at 177. The first woman to obtain such a divorce was Jane Campbell (Mrs Addison) in 1801 through 41 Geo 3 c 102 (Wolfram (n 221) at 174).

appetite for scandals.[237] In the debates prompted by the sensational evidence in the trials, there was discussion of the public nature of these debates, the gender roles or blameworthiness of the parties as well as what options should be available to redress the damages.[238] In addition, the interpretation of the loss of the dower in terms of the Statute of Westminster II of 1285 changed and in the nineteenth century it became "purposive, more moralising and much more 'widow-unfriendly'".[239] Although there was some discussion about change,[240] this only happened in 1857 when the Matrimonial Causes Act was promulgated.[241]

3 4 Matrimonial Causes Act, 1857

This 1857 Act for the first time made possible secular divorces (by court order).[242] Ecclesiastical jurisdiction over matrimonial matters was abolished and effectively transferred to the Court for Divorce and Matrimonial Causes.[243] The Act introduced a double standard between the sexes, explained on the basis that adultery by a wife is more serious than that of a husband, because it confuses paternity.[244] Attempts to use adultery *simpliciter* for wives too were resisted by the government as going beyond the main object of the Bill.[245]

For a man to obtain a divorce, adultery by his wife was sufficient reason, but section 27 determined that if a wife wanted to obtain a divorce, she had to prove, in addition to adultery by her husband, an additional factor.[246] The additional factor could be aggravating conduct such as incest, bigamy, cruelty, desertion, sodomy or bestiality.[247] Nor could a divorce be obtained if the petitioner was an accessory to the adultery or condoned it.[248]

237 Turner (n 226) at 178. The commercialisation as a public strategy was part of the larger class struggle to expose the lives of the aristocracy. See, in general, Turner (n 226) at 179-193.

238 *Idem* at 172-173. Publicity took the form of countless pamphlets, plays, laments and speeches (James (n 223) at 189).

239 Seabourne (n 203) at 2 with reference to *Woodward v Dowse* (1861) 10 Common Bench Reports (NS) 722.

240 In 1850, the Campbell Royal Commission on Divorce favoured the transformation of the divorce laws (with one dissension), leading to Parliamentary debates in 1854, 1856 and 1857 culminating in the 1857 Act (Wolfram (n 221) at 157).

241 20 & 21 Vict c 85. See, in general, Holmes (n 220) at 602; Mackenzie (n 222) at 122.

242 Section 31 of the Matrimonial Causes Act, 1857; Hale *et al* (n 221) at 147; Holmes (n 220) at 601. This Act was the result of the Report of the Divorce Law Commission, 1853 (CEP Davies "Matrimonial relief in English law" in RH Graveson & FR Crane (eds) *A Century of Family Law 1857-1957* (London, 1957) 311-351 at 316).

243 De Montmorency (n 32) at 38; EL Johnson *Family Law* (London, 1965) at 10; Davies (n 242) at 316. This court sat mostly in London (De Montmorency (n 32) at 38).

244 C Langhamer "Adultery in post-war England" (2006) 62 *History Workshop J* 86-115 at 93; Wolfram (n 221) at 157; Holmes (n 220) at 605. In 1857, the vote approving the distinction was 71:20, but in 1923 it was 95:8 (House of Lords) and 257:26 (House of Commons) (Holmes (n 220) at 602).

245 Davies (n 242) at 317.

246 De Montmorency (n 32) at 39.

247 Holmes (n 220) at 602; Hale *et al* (n 221) at 147; Davies (n 242) at 316.

248 Mackenzie (n 222) at 123; De Montmorency (n 32) at 39.

In addition to the above, section 33 determined that since a wife's adultery caused injury to the husband, it entitled him to claim compensation from the adulterer.[249] The wife did not have a similar claim.[250] The claim was no longer termed criminal conversation and the damages were paid to the court, not the practitioner.[251] The procedure remained the same as that in previous actions for criminal conversation, so that adultery continued to resemble the civil wrong of trespass, and retained the impression that the wife was the property of the husband.[252]

There were two main criteria that determined the amount of damages that "have always been compensatory only, and not exemplary or punitive. The grounds on which damages are given are: (1) the actual value of the wife lost; (2) injury to the husband's feelings, the blow to his honour and hurt to his family-life abilities".[253]

The value of the wife depended on her pecuniary worth, her assistance in the family business and her abilities as a housekeeper. The consortium aspects depended on her "purity, moral character and affection, and her general qualities as a wife and a mother".[254]

Although adulterers had been able since 1770 to marry each other eventually, the House of Lords attempted on numerous occasions to introduce a measure prohibiting a divorced (adulterous) woman from marrying her lover, but this was in vain, since the clauses were subsequently struck out in Committee.[255] Marriages between adulterers were widespread[256] and section 57 of the 1857 Act made provision for the remarriage of the parties after divorce as if the marriage had been dissolved by death.[257]

3 5 The twentieth century

In 1909, the Second Royal Commission on Divorce, the Gorell Commission, proposed that the double standards should be dropped and that the law should treat divorcing men and women equally.[258] The same proposal was made in 1912 by the Report of the Royal Commission on the basis that there was no adequate reason for the dual standard.[259] Equality between the genders was only realised in 1923 when the Matrimonial Causes

249 Section 33 of the Matrimonial Causes Act, 1857; De Montmorency (n 32) at 40.

250 Holmes (n 220) at 617.

251 *Idem* at 606.

252 *Ibid*. De Montmorency ((n 32) at 40) notes that various amendments were made to the statute with regard to procedure, practice and the power of the courts, notably in 1860, 1866, 1868, 1873 and 1884. None of these amendments is relevant to this discussion.

253 Holmes (n 220) at 617-618 with reference to *Wilson v Wilson* 18 *Law J Rep* 17-18 (1920) at 18.

254 Holmes (n 220) at 618; *Wilson v Wilson* (n 253) at 18.

255 Wolfram (n 221) at 161. The only exception was where the marriage would have been between persons related to each other within the prohibited degrees.

256 *Ibid*.

257 De Montmorency (n 32) at 40; Mackenzie (n 222) at 123. No clergyman could be compelled to solemnise the remarriage (De Montmorency (n 32) at 40).

258 *Idem* at 44; Hale *et al* (n 221) at 147; Holmes (n 220) at 602.

259 Davies (n 242) at 319.

Act, 1923 made adultery *simpliciter* available to both spouses instead of only the husband.[260]

In 1925 the third-party action was separated from the divorce action.[261] These enactments were consolidated and reincorporated in the Matrimonial Causes Act, 1950 and 1965.[262] It was only in 1970 that article 4 of the Law Reform (Miscellaneous Provisions) Act of 1970 finally abolished the third-party damages claim in tort altogether.

Adultery remained a ground for divorce.[263] The problem remained that for a divorce action to succeed, one of the spouses had to be regarded as the guilty party[264] and the other as innocent, and that no divorce order could be obtained if the parties were seen to be conniving, pandering or acquiescing to adultery to obtain a divorce.[265] Guilt, and thus often adultery, influenced possible post-divorce maintenance orders, since only the innocent spouse was entitled to a maintenance order.[266]

Numerous attempts were made to amend the law, namely in 1950, 1955 and 1968.[267] It was only after the Law Commission Report of1966[268] that the Divorce Reform Act of 1969 was passed, introducing the no-fault divorce concept of "irretrievable breakdown" of the marriage as an independent ground for divorce.[269]

The Matrimonial Causes Act of 1973 still included adultery as possible evidence that a marriage had broken down irretrievably,[270] but this remnant was deleted from the Family Law Act, 1996,[271] focusing on the agreement between the parties. All references to adultery were finally deleted from the legislation.

260 13 & 14 Geo V c 19; Wolfram (n 221) at 157; Holmes (n 220) at 602, 618; De Montmorency (n 32) at 44-45.

261 Section 189(1) of the Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo 5 c 49); Holmes (n 220) at 620 n 63.

262 E Phillips "Damages for adultery" (1981) 54 *Hong Kong LJ* 54-60 at 54.

263 Johnson (n 243) at 157-159. This was changed in 1937 when cruelty, desertion and incurable insanity were added as grounds for a divorce. See MA Fine & DR Fine "An examination and evaluation of recent changes in divorce laws in five Western countries: The critical role of values" (May 1994) *J of Marriage and the Family* 249-263 at 251. In 1946, the divorce jurisdiction extended further.

264 The petitioner's adultery was a discretionary bar to a divorce (Johnson (n 243) at 176).

265 De Montmorency (n 32) at 39; PM Bromley *Family Law* (London, 1976) at 216, 229.

266 Johnson (n 243) at 132, 143, 149; GD Nokes "Evidence" in Graveson & Crane at 156-157; Law Commission Consultation Paper No 208 *Matrimonial Property, Needs and Agreements. A Supplementary Consultation Paper* (2012) at 20.

267 J Levin "The Divorce Reform Act 1969" (1970) 33 *The Modern LR* 632-648 at 632. See, also, O Khan-Freund "Divorce law reform?" (1956) 19 *The Modern LR* 578-600.

268 Fine & Fine (n 263) at 251.

269 Wolfram (n 221) at 158. The introduction of the 1857 Act caused the divorce rate to increase from 3.3 pa to about 150 pa; in 1980, there were about 150 000 divorces pa (Wolfram (n 221) at 158). In 1965, both spouses were placed on an equal footing *vis-à-vis* condonation (Bromley (n 265) at 221).

270 Section 1(2)(*a*) of the Matrimonial Causes Act, 1973. See, also, Fine & Fine (n 263) at 252.

271 Section 5 of the Family Law Act, 1996.

4 Conclusion

Over the past two millennia, the legal consequences of adultery have changed drastically. These changes include a three-stage development: from private self-help measures to public criminal prosecutions, and later to a private claim for damages. In addition, while the law on adultery used to treat women particularly harshly, it is now gender-neutral.

In particular, it should be noted that adultery is no longer a crime in South Africa or England. In addition, adulterers are free to marry once they are no longer married. In addition, in South Africa the relevance of adultery in a divorce action has been whittled down to a mere guideline that proves that the marriage has irretrievably broken down. In England, there are no longer any references to adultery in divorce legislation.

The difference in the two jurisdictions lies in the third-party delict or tort, although the remnants that there are in South Africa are gender-neutral. Although it has been abolished in England,[272] the damages claim is still available in South Africa law. As mentioned *supra,* the question whether the third-party adultery claim should be abolished remains controversial, and calls for its abolishment have fallen on deaf ears.

Abstract

The article sets out the historical development of the legal consequences of adultery in South African and English law. Changes to the legal approach towards adultery took the form of a three-stage process: private self-help measures gave way to public criminal prosecutions, which in turn made way for a private claim for damages. In addition, the developments moved from being particularly harsh towards women, especially married women, to being completely gender-neutral. The article also tracks the legal relevance of adultery to the divorce laws. The direct links between the adultery and the divorce action as well as the prosecution and later the damages claim are noted. The article also records the ability of adulterers to eventually marry each other. The developments in the jurisprudence are explained chronologically, commencing with the development of Roman law through canon and Roman-Dutch law, and culminating in the existing South African legal system. This progression is compared to relevant historical developments in English law, commencing with observations made by Julius Caesar in 54 BC, and going up to current English law.

272 The claim has also been abolished in the Netherlands, Scotland, Canada, Australia and most states of the United States of America (Carnelley (n 147) at 201).