Transforming *dignitas* into dignity? A case study of adultery in South African law

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1 Introduction

South African law recognises a delictual action for adultery: a plaintiff can sue a third party who has committed adultery with the plaintiff's spouse. The damages awarded are sometimes considerable.[1] South Africa also has a constitutional Bill of Rights which protects rights such as privacy and freedom of association.[2] The Constitution is the supreme law; no rule of statutory or common law may conflict with constitutional provisions.[3]

Intuitively, the action for adultery and the South African Bill of Rights seem rather 'strange bedfellows' – is it really constitutional for the law to prohibit private non-commercial sex between consenting adults? Some commentators think not, and have argued that the adultery action infringes several important constitutional rights, including the rights to privacy, dignity, equality, freedom of conscience, and freedom of association.[4]

In the leading case on the issue, *Wiese v Moolman*,[5] the court provided a surprising response to the constitutional challenges. Not only did the court rule that that the adultery action is not unconstitutional, but it held that the state has a positive constitutional obligation to protect marriage through the civil prohibition of adultery – failure to do so would infringe the dignity rights of aggrieved spouses.

In part, the *Wiese* judgment reached this conclusion by reinterpreting the nature of the legal harm caused to plaintiffs in adultery cases. In terms of South Africa's Roman-Dutch common law, the harm caused by adultery was identified as injury to the plaintiff's "*dignitas"* or "honour." The *Wiese* court reframed the harm, and identified the harm suffered as infringement of the plaintiff's inherent human dignity. This paper explores the shift from "*dignitas"* to "dignity," discusses the South African adultery action, and considers whether the reframed action for adultery is constitutionally compliant.

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[1] See for example, *Erasmus v Heine* (North Gauteng High Court, Pretoria case 39407/2010) where the plaintiff was awarded R75 000 in damages— a considerable award considering that the average South African household income was R119 542 *per annum* at the time (Statistics South Africa 2012 :12).
[2] Constitution of the Republic of South Africa, 1996. Chapter 2, ss 7-39.
[3] Constitution section 2.
[4] The most important example of constitutional challenge through the courts is *Wiese v Moolman* 2009 (3) SA 122 (T). For scholarly writings on this issue see Heaton, J (2010) *South African Family Law*, 3rd ed., LexisNexis, Durban: 45); Glover, GB (2013) Divorce' in Clarke, Brigitte (Ed.) *Family Law Service*, LexisNexis, Durban: §D6; and Church, J & Church, J (2006) Personal consequences of marriage' in Joubert, WA (Ed.) *Law of South Africa*, 2nd ed., LexisNexis, Durban: §59.
[5] *Wiese* (note 2).

2 The action for adultery in South African Law

In South Africa, the civil action for adultery is brought using the broader delictual remedy, the *actio iniuriarum*, which was received into South African law through Roman-Dutch law.[6]

The *actio iniuriarum* is a broad delictual remedy, used to claim non-patrimonial damages for the wrongful and intentional infringement of a wide range of personality rights. In Roman and Roman-Dutch Law, the 'triad' of rights protected were *corpus* (bodily integrity), *fama* (reputation) and *dignitas* (honour) and these personality interests remain at the core of the action.[7] In a suit under the *actio iniuriarum* that plaintiff must prove all the elements of the delict on a balance or probabilities. Specifically, the plaintiff must prove that the defendant has wrongfully and intentionally caused injury to his or her personality rights.[8]

Adultery itself is narrowly defined as "sexual intercourse by a lawfully married person with any person other than his or her spouse."[9] The action for adultery can be brought against the third party even if the aggrieved spouse chooses not to divorce the adulterous spouse, because forgiveness of the spouse does not imply condonation of the third party's actions.[10] In principle, the plaintiff can bring the suit even if the spouses were estranged or separated when the adultery was committed. However, it will be more difficult to prove actual harm under these circumstances.[11]

In the context of adultery, the plaintiff can satisfy the intention element of the *actio iniuriarum* by proving *dolus indirectus* or even *dolus eventualis* – all that is required is that the defendant knew that his or her sexual partner was married to someone else and that the partner's spouse might be harmed by the adultery.[12] The other two elements of the delict (wrongfulness, and harm in the form of injury to *dignitas*) require more in-depth examination and will be discussed in detail in the body of the paper.

3 Dignitas: the patriarchal roots of the action

In Roman-Dutch law, only husbands had a civil remedy against third parties who committed adultery with their spouses.[13] Wives had no suit against their husbands' adulterous partners.[14] This was because adultery was understood as an *iniuria* in the form of *contumelia* (insult)

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[6] The action for adultery is discussed by Grotius at III.35.9 [Grotius, Hugo (1619) *Indeiding tot de Hollandsche Rechtsgeertheyd*, translated as *The Jurisprudence of Holland* by RW Lee, Clarendon Press, Oxford].
[7] Visser, DP (2007) 'Compensation for harm to the personality – the *actio iniuriarum'*, in Du Bois, Francois (Ed.), *Wille's Principles of South African Law*, 9th ed., Juta, Cape Town at 1166). On the expansion of the action, see Zimmermann, Reinhard (1996) *The Law of Obligations: Roman Foundations of the Civilian Tradition*, Oxford University Press, Oxford: 1050-1094.
[8] Visser (note 7: 1166); Zimmermann (note 7: 1083).
[9] McKerron, RG (1971) *The Law of Delict*, 7th ed., Juta, Cape Town: 166.
[10] *Viviers v Kilian* 1927 AD 449 at 450.
[11] *Michael v Michael and McMahon* 1909 TH 292 at 293.
[12] Neethling, J (2005) *Law of Personality*, 2nd ed., LexisNexis, Durban: 211; Amerasinghe, C (1966) *Aspects of the Actio Iniuriarum in Roman-Dutch Law*, Lake House Investments Publishers, Colombo: 109.
[13] See for example Grotius (note 6: III.35.9) confirming that sexual intercourse with a married woman is an injury against her husband.
[14] See the discussion in *Rosenbaum v Margolis* 1944 WLD 147.

which injured the husband's *dignitas* (*'eer'* in Dutch.)[15] When a third party committed adultery with a man's wife, the third party impugned the husband's honour. Huber expresses the harm in this way: "Adultery is committed against the honour of the husband … because he usually becomes thereby an object of contempt, and is tauntingly addressed by the name of 'cuckold' and the like …"[16]

Injury to honour was deemed an extremely serious form of injury in the honour-based culture of the Roman-Dutch writers. The specific *form* of honour that mattered was linked to a person's position and rank, and the social roles and norms which the rank imposed.[17] The honour code based on this form of honour was a dominant value in European society from the 14th and to late 18th centuries.[18]

In honour-based cultures of this kind, community members are ranked "according to adherence to rigid conduct codes, requiring specific manifestations of pride, assertiveness, and independence of men, and sexual purity of women."[19] Not every man in an honour-based society possesses "honour" – it is possible to lose your honour (and hence your position in society) if you fail to respond appropriately when your honour is insulted or challenged.[20]

In European honour culture, there were many ways in which a man's honour could be impugned: among the most serious challenges to honour were accusations of cowardice or dishonesty, or questioning a man's sexual prowess[21] – and "no one was more dishonourable than a cuckold."[22] The honour code demanded that men defend their honour – if necessary, even risk their lives in the duel – to ensure that they received the respect due to them in terms of their position in society.[23]

Honour of this kind was primarily associated with men, and only men were expected to defend their honour. Women had "secondary honour" – that is, the reflected or shared honour of the men and family with whom they were associated.[24] A woman's own personal honour

[15] See for example Huber at VI.XI.1 explaining that adultery is 'tegens de eere van de man.'[Huber, Ulric (1637) *Heedensdaegse Rechtsgeleertheyt*, translated as *The Jurisprudence of My Time* by P Gane, Butterworths, Durban].
[16] Huber (note 15: VI.XI.1).
[17] Berger, Peter (1984) 'On the obsolescence of the concept of honor', in Sandel, Michael (Ed.), *Liberalism and Its Critics*, New York University Press, New York, pp. 172-182 : 176); Appiah, Kwame (2010) *The Honor Code: How Moral Revolutions Happen*, Norton, New York: 16, 64); Livingston, Alex (2007) 'From honor to dignity and back again', *Political Theory*, Vol. 35, No. 4, pp. 494-501: 496; LaVaque-Manty, Mika (2006) 'Dueling for equality: masculine honor and the modern politics of dignity', *Political Theory*, Vol. 34 No. 6, pp. 715-740: 715.
[18] See Appiah (note 17); Stewart, Frank (1994) *Honor*, University of Chicago Press, Chicago.
[19] Kamir, Orit (2006) 'Honor and dignity in the film "Unforgiven": Implications for sociolegal theory', *Law & Society Review*, Vol. 40, No. 1, pp. 193-233: 196.
[20] Stewart (note 18: 59, 64); Marston, Jerrilyn Greene (1973) 'Gentry honor and royalism in early Stuart England' (1973) *The Journal of British Studies*, Vol. 13, No 1, pp. 21-43: 23); Appiah (note 17: 32); Kamir note 19: 198).
[21] Appiah (note 17: 18; 28)
[22] Stewart *(*note 18*:* 108).
[23] Appiah (note 17: 19).
[24] Stewart (note 18: 107); Appiah (note 17: 104).

was restricted to the context of sexual virtue.[25] For women (but not men) any form of extra-marital sex was considered dishonourable. Unmarried woman were dishonoured by sexual relations with anyone;[26] married women were dishonoured by sexual relationships with anyone apart from their husband. However, women themselves were not expected to defend their honour. Defence of a woman's honour was the responsibility of the man under whose protection she fell.[27] It was not only the woman herself who was dishonoured by the extra marital sex. Through this conduct she brought shame upon her family and in particular on the man under whose protection she fell: in honour cultures, "a man's honor is frequently dependent on his control of his woman's sexuality ...."[28]

The *actio iniuriarum* received through Roman law responded to the context of the European honour code. The Roman-Dutch writers identified several examples of *contumelia* which were based on offence to honour, for example, suggesting that someone was a cuckold, or refusing someone their rightful place in a procession.[29] This was a "hierarchically structured society, intensely concerned with rank, form and ritual."[30] In this context, the *contumelia* aspects of adultery offend honour in a number of ways: the dishonouring of the woman whose honour a man was obliged to defend; and the dishonouring of the man himself by challenging his control of the woman in question. The dishonour was compounded by the implicit challenge to the cuckolded husband's sexual prowess.

Huber notes that adultery was considered a violation of the wife's honour, but that her dishonouring was not as bad as that of her husband because 'it is supposed to be a man's duty to prevent adultery being practised upon him.'[31] Thus for Huber, the party dishonoured by the wife's adultery was primarily the husband rather than the wife herself.

As late the early 20th century, the South African Appellate Division still interpreted adultery through the lens of the honour code. In the 1927 case *Viviers v Kilian*,[32] the court considered whether adultery was a *contumelia* and an infringement of the husband's honour. The appeal court, reluctantly, found in favour of the husband, but reduced the damages awarded to a nominal sum because the wife was a woman "of very low character, course-minded, immoral, and lost to all sense of decency."[33] The woman herself had no honour worth defending, and her husband's honour was already so compromised by his wife's dishonour that he had little left to sue for.

[25] Kamir (note 19 198); Pitt-Rivers, Julian (1966) "Honor and social status," in Peristiany, J.G. (Ed.), *Honor and Shame: the Values of Mediterranean Society*, University of Chicago Press, Chicago: 42.
[26] Appiah (note 17: 141).
[27] Stewart (note 18: 107); Appiah (note 17: 61); Pitt-Rivers (note 25: 44).
[28] Kamir (note 19: 198).
[29] Zimmermann (note 7: 1065-1066).
[30] Zimmermann (note 7: 1066).
[31] Huber (note 15: VI.XI.1).
[32] *Viviers* (note 10).
[33] *Id.* at 452.

4 The adultery action evolves in the twentieth century

In the years following the *Viviers* decision, the Provisional Divisions of the Supreme Court began to give contradictory judgments on the nature and ambit of the adultery suit.[34] Most of the Provincial Divisions refused to award damages to wives against their husbands' paramours on the grounds that the Roman-Dutch authorities provided no such action.[35] However, the Cape Provincial Division did indeed award damages to aggrieved wives in *Tutt v Tutt*[36] and *Gair v Gair*,[37] although it seems that both cases were decided on a misreading of the Roman-Dutch authorities.[38] A better decision was given by the Johannesburg court in the 1944 case *Rosenbaum v Margolis*.[39] The court correctly concluded that Roman-Dutch law did not provide an adultery remedy for aggrieved wives.[40] Despite this, the court went on to hold that it had the power to develop the common law and to develop a civil action for wives equivalent to that available to husbands. The reasons given for this development included considerations of public policy: the court held that the adultery action could be regarded as a general deterrent against adultery and that this end would be served if the action were available to wives as well as husbands.[41] Furthermore, the court noted that since the time of the Roman-Dutch writers, the position of women had been raised in terms of South African law. In view of the enhanced status of women in society, it would be inequitable to deny women a delictual claim for adultery.[42]

The conflicting provisional-level decisions were eventually settled by the Appellate Division in the 1950 case *Foulds v Smith*,[43] which concluded that the action for adultery should indeed be available to wives as well as husbands. This case is particularly interesting because the court examined the nature of the "*dignitas"* upon which the suit was historically based. The Appellate Division concluded that it would be a mistake to place too much emphasis on the apparent "insult to honour" committed through adultery.[44] The court was vague as to the precise nature of the harm suffered, but had little difficultly in concluding that in contemporary society wives would suffer the same kind of harm as a result of their husbands' adultery as husbands suffer when wives were adulterous. Consequently, regardless of whether or not the Roman-Dutch writers had provided a remedy for wives, in the modern age, both husbands and wives should have the remedy.[45]

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[34] See the detailed historical overview by Amerasinghe (note 12: 95-105)
[35] Examples include the decisions of the Eastern Districts Court which refused such damages to the wife in *Wait v Wait* 1913 EDL 519 and the Orange Free State Provincial Division which refused such damages to the wife in *De Bruyn v de Bruyn and Raynor* 1916 OPD 221 and *Thompson v Thompson and Stofberg* 1934 (2) P.H. B17 (OPD). See the discussion in *Rosenbaum* (note 14) at 150.
[36] 1929 CPD 51.
[37] 1932 CPD 38.
[38] Amerasinghe (note 12: 97).
[39] *Rosenbaum* (note 14).
[40] *Id.* at 155.
[41] *Id.* at 158.
[42] *Id.*
[43] *Foulds v Smith* 1950 (1) SA 1 AD.
[44] *Id.* at 11.
[45] *Id.* at 10

The *Foulds* case is often interpreted as authority for a remedy based on hurt feelings.[46] Indeed, Neethling is critical of cases decided in the pre-*Foulds* era, which, in his view *incorrectly* regarded the harm suffered as *contumelia* or insult to honour.[47] In Neethling's view, the harm suffered through adultery is hurt feelings or emotional pain.[48] In the post-*Foulds* era, some courts have cited Neethling in identifying emotional pain as the harm suffered in adultery cases.[49] However, because of the formulation of the action in the old Roman-Dutch texts, courts have also continued to refer to the *contumelia* or insult suffered through adultery, without specifically elaborating on why the act of adultery should be regarded as 'insulting' in contemporary times.[50]

5 The evolution of 'dignitas' into 'dignity'

The *dignitas* or reflexive honour that was valued and duelled over in terms of the European honour code began to decline in importance towards the end of the 18th century, and by the mid-19th century, had become virtually obsolete.[51] Instead, a new vision of "inherent human dignity" entered the popular consciousness, and became the dominant understanding of dignity after the Second World War.

It is this new understanding of dignity that is protected by the South African Constitution. The Constitutional Court has explained the dignity rights as follows: "Recognition of the right to dignity is an acknowledgment of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern."[52]

Appiah has described the evolution of dignity as follows:

> "One way to understand what has happened to the word "dignity" is to say that it has come to refer to a right to respect that people have simply in virtue of their humanity**.** Here are a few of the facts about people that we give proper weight to in acknowledging human dignity: that human beings have the capacity for creating lives of significance; that we can suffer, love, create; that we need food, shelter, and recognition by others. And these facts, which we might dub the grounds for dignity, make it appropriate to respond to people in ways that respect such fundamental human needs and capacities."[53]

This new understanding of dignity is very different from the *dignitas* historically protected by the *actio iniuriarum*: Honour is competitive, linked to rank, and must be jealously guarded, to the death if necessary. [54] Inherent human dignity is non-competitive, held by all, and can never be lost.[55] As summed up by Kamir:

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[46] See for example Amerasinghe (note 12: 101); Neethling (note 12: 209).
[47] Neethling (note 12: 208-209).
[48] *Id* at 209.
[49] These include *Wiese* (note 2); *Van der Westhuizen v Van der Westhuizen* 1996 (2) SA 850 (C).
[50] See for example *Godfrey v Campbell* 1997 (1) SA 570 (C); *Diemer v Solomon* 1982 (4) SA 13 (C); *Fraser v De Villiers* 1981 (1) SA 378 (D); *Chapman v Chapman* 1977 (4) SA 142 (E).
[51] Except perhaps in the military. See Appiah (note 17: 192-193); Stewart (note 18: 68-69); Berger (note 17: 172).
[52] *S v Makwanyane* 1995 (3) SA 391 (CC) para 144.
[53] Appiah (note 17: 129-130)
[54] Miller, William (1993) *Humiliation: And Other Essays on Honor, Social Discomfort and Violence*, Cornell University Press, Ithaca: 116; Pitt-Rivers (note 25: 4).
[55] Kamir (note 19: 202-203); Livingston (note 17: 497).

> "Honor is complemented by fear of shame and humiliation; dignity by empathy, solidarity, and humanistic obligation …. Honor implies 'live and let die,' whereas dignity implies 'live and let live.' In an honor culture, an offense to one's honor burdens him or her with the duty to remove the stain, purify the honor, avenge the offense, and humiliate the offender. Within the logic of dignity, an attack on a person's dignity is an attack on society and its fundamental values; it does not burden the offended party, but challenges the social order."[56]

It is clear that the concept "*dignitas"* that the Roman-Dutch writers considered to be injured by adultery is not the same thing as the modern constitutional value of inherent human dignity. According to the *Wiese* court, however, it is indeed the evolved human dignity right that is infringed in adultery cases. The court reaches this conclusion by relying on the link between marriage and inherent human dignity as developed by the Constitutional Court.

6 Dignity and marriage in the Constitutional Court

The modern understanding of inherent human dignity rests on the recognition that "everyone matters" – all people create lives of personal significance. In this regard, the Constitutional Court has recognised that many people regard their intimate relationships, particularly their family and marriage, as the most important, significant, and fulfilling part of their lives.

In the seminal case, *Dawood v Minister of Home Affairs,*[57] the court put it like this: "Entering into and sustaining a marriage is a matter of intense private significance to the parties to that marriage …. Such relationships are of profound significance to the individuals concerned."[58] The court went on describe marriages as relationships of "defining significance," as an important component of "personal fulfilment" and as "an aspect of life that is of central significance" to the people concerned.[59]

Dawood was the first Constitutional Court case examining marriage in detail, and it laid a very strong constitutional foundation for the importance of marriage. The court noted that "marriage and the family are social institutions of vital importance,"[60] an observation which has been cited extensively in decisions by other courts. The Constitutional Court's endorsement of marriage, its stress on the importance of the institution, and the link between marriage and human dignity, have coloured all marriage-related judgments since the *Dawood* decision.

The *Dawood* case concerned the constitutionality of immigration laws that prevented married couples from living together in South Africa. The court found the legislation unconstitutional on the grounds that it infringed the inherent human dignity of the couples concerned. The court reached this decision by endorsing the common law definition of the marital consortium (which includes a right and duty of cohabitation), linking the marital consortium to inherent human dignity, and holding that state interference with the marital consortium violated the dignity right.

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[56] Kamir (note 19: 203).
[57] *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC).
[58] *Id.* para 30.
[59] para 37.
[60] para 30.

The definition of the marital consortium provided by South Africa's highest court includes "reciprocal obligations of cohabitation, fidelity and sexual intercourse."[61] The identification of fidelity as part of a constitutionally-endorsed legal definition of marriage has obvious relevance for the adultery action. In *Dawood* the court was concerned with state interference in the consortium. In *Wiese* that court argues that the state also has a duty to protect the marital consortium from interference by private third parties by providing an action for adultery.

7 Arguments against the continued existence of the adultery action

Many jurisdictions have abolished the civil action for adultery.[62] Reasons for abolition include objections to the historical origins of the action, which in common law was based on the notion of wives as their husbands' chattel;[63] abuses of the action for the purposes of blackmail; and recognition that the action has failed to achieve its avowed objectives (the prevention of adultery and the preservation of marriage). [64]

Recent South African scholarship and court cases explore some of the arguments against the delictual action in the South African context. It is useful to group these arguments under the following headings: [1] the action is inherently unfair because it lies only against the third party – there is no remedy against the adulterous spouse; [2] the action is unconstitutional; and [3] the action is old-fashioned and does not conform to contemporary social mores.

7.1 The action is unfair because only the third party is liable

In terms of the Roman-Dutch common law, the adultery action was available only against the third party. The aggrieved spouse did not have a claim for delictual damages against their partner for reasons of "public policy."[65] Instead, the remedy against the adulterous spouse was divorce on the grounds of adultery. In terms of the fault-based divorce system the guilty spouse was potentially liable to significant economic penalties, because the divorce court could order forfeiture of the patrimonial benefits of the marriage.[66]

South Africa moved to a no-fault divorce system with the Divorce Act 70 of 1979. Almost immediately, scholarly commentators began to question the fairness of the adultery action.[67]

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[61] para 33.
[62] The civil action for adultery was abolished in England by statute in 1970 (Law Reform (Miscellaneous Provisions) Act 1970, sched. 5). At present, only eight states in the USA states retain the adultery. (Feinberg Jessica (2012) 'Exposing the traditional marriage agenda,' *Northwestern Journal of Law and Social Policy,* Vol.7, No. 2, pp. 301-351: 331.
[63] Cary, Jean and Scudder, Sharon (2012) 'Breaking up is hard to do: North Carolina refuses to end its relationship with heart balm torts' *Elon Law Review* Vol. 4, No. 1, pp. 1- 30: 14, citing *Hunt*, 309 N.W.2d at 821.
[64] Feinberg (note 62: 332).
[65] *Asinovsky v Asinovsky* 1943 CPD 131 at 131-132.
[66] Spouses married by antenuptial contract would forfeit any benefits bestowed in terms of the contract. Spouses married without an antenuptial contract were married in community of property and could lose their portion of the joint estate.
[67] See for example Church, Joan (1979) 'Consortium *omnius vitae', Tydskrif vir Hedendaagse Romeins-Hollands Reg,* Vol. 42, 376; Hahlo, HR (1985) *The South African Law of Husband and Wife*, 5th ed., Juta, Cape Town: 349.

It seemed illogical and unfair to render the third party liable to delictual damages when in terms of the new divorce law the adulterous spouse was not liable to any legal penalty.[68] It seems particularly unfair to single out the third party for civil liability when *prima facie* the adulterous spouse seems more blameworthy: an adulterous spouse breaches their marital commitments and promises whereas the third party is under no obligation of fidelity. Furthermore, if the modern action for adultery really is about emotional pain rather than insult, it would seem that the betrayal of trust by the adulterous spouse is the more proximate cause of the emotional pain.[69]

7.2 The action is unconstitutional

South African family law has been significantly transformed over the past twenty years as the result of constitutional challenges to pre-constitutional common law or statutory rules.

Opponents of the adultery action have argued that the action infringes several constitutional rights and therefore has no place in constitutional South Africa. In the *Wiese* case, the court rejected these arguments. Instead, the court held that there is a positive constitutional obligation to preserve the adultery remedy. The following sections of the paper examine the constitutional arguments in more detail.

7.2.1 Freedom of association

Perhaps the most compelling constitutional argument raised in *Wiese* was the claim that prohibition of the adulterous relationship interfered with the couple's right to freedom of association.

There is no South African case law exploring the right to freedom of intimate association, and South Africa's leading constitutional law texts rely on American constitutional jurisprudence to define the ambit of the right.[70] Woolman, for example, uses *Roberts v United States Jaycees*[71] to identify the "intimate associations" which presumptively qualify for constitutional protection.[72] In *Roberts*, the court defined protectable intimate associations as relationships of a highly personal nature such as those which "attend the creation and sustenance of a family" and

> "which involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life. Among other things, therefore, they are distinguished

[68] Theoretically, the divorce court retains discretion to consider "substantial misconduct" for forfeiture claims under Divorce Act, section 9(1), and it may also consider misconduct when deciding alimony awards. However, the courts have held that they will adopt a "conservative approach" when considering misconduct to avoid undermining the objectives of the no-fault divorce system (*Beaumont v Beaumont* 1987 (1) SA 967 (A) 994-995*)*.
[69] Cary and Scudder (note 63: 20) and the sources quoted there.
[70] Woolman Stuart (2013) 'Association', in Currie, Iain and De Waal, Johan (Eds.) *The Bill of Rights Handbook*, 6th ed., Juta, Cape Town, pp. 396-419: 407); Woolman, Stuart (2008) *Constitutional Law of South Africa*, Juta, Cape Town: §44.3.
[71] *Roberts v United States Jaycees* 468 U.S. 609 (1984).
[72] Woolman (2013 note 70: 407).

> by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship."[73]

Woolman notes that "intimate associations usually receive the strong constitutional protections that flow from privacy rights or human dignity rights."[74] Thus the right to freedom of intimate association is closely intertwined with the rights to privacy and dignity. In practice, assertion of the intimate association right takes the form of the right to conduct intimate relationships without legal interference – it is asserted as a privacy right. The intimate association right is based on the notions of autonomy and dignity – on the understanding that people's closest and most intimate relationships are of profound personal significance to the people involved.

While there is a dearth of South African case law specifically on the right to freedom of intimate association, the right to privacy in intimate and sexual relationships has been considered by the Constitutional Court on several occasions. In *Bernstein v Bester NO,*[75] the court held that the right to privacy is limited to "to those aspects in regard to which a legitimate expectation of privacy can be harboured."[76] In this regard, Ackermann J held that "only the inner sanctum of a person, such as his/her family life, sexual preference and home environment" could be considered inviolably private.[77] Thus "privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly."[78] The *Bernstein* case links the privacy right to personal autonomy, holding that the right to privacy is based on a notion of "what is necessary to have one's own autonomous identity."[79]

In *National Coalition for Gay and Lesbian Equality v Minister of Justice* the Constitutional Court ruled that the criminalisation of homosexual sexual activity was unconstitutional. The court examined the relationship between privacy and autonomy and held that

> "Privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which we give expression to our sexuality is at the core of this area of private intimacy. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy." In this regard, the court warned against "improper invasion of the intimate sphere of human life to which protection is given by the Constitution in section 14."[80]

The issues were examined again in *S v Jordan,*[81] where the Constitutional Court concluded that criminalization of commercial sex work did not infringe the right to privacy. The court argued that commercial sexual activity lies at the periphery and not at the core of the privacy right, because it is primary a commercial transaction:

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[73] *Roberts* (note 71) at 619-620. See also Cohen, Andrew (2011) 'How the Establishment Clause can influence substantive due process: adultery bans after *Lawrence*,' *Fordham Law Review,* Vol. 79, No. 2, pp. 605-647: 624.
[74] Woolman (2013 note 70: 407).
[75] *Bernstein v Bester NO* 1996 (2) SA 751 (CC).
[76] *Id* para 75.
[77] para 67.
[78] *Id.* 67.
[79] para 65, quoting Rainer Forst.
[80] *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) para 32.
[81] *S v Jordan* 2002 (6) SA 642 (CC).

> "central to the character of prostitution is that it is indiscriminate and loveless….. By making her sexual services available for hire to strangers in the marketplace, the sex worker empties the sex act of much of its private and intimate character. She is not nurturing relationships or taking life-affirming decisions about birth, marriage or family; she is making money."[82]

The quoted passages from the *Bernstein, National Coalition* and *Jordan* cases make it clear that the "inner core" of constitutionally-protected privacy is linked to autonomy and dignity rights, in particular, within the context of "establishing and nurturing human relationships."[83]

Would an adulterous sexual relationship fall within the ambit of the constitutional privacy right? Adulterous sex is often private and intimate and might be practiced within the context of '"nurturing a human relationship." The statement from the *National Coalition* case that: "Privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community," might appear at first glance to be broad enough to include adulterous affairs. However, the court immediately reigns in the ambit of this protected sphere of privacy by adding: "If … we act consensually and without harming one another." It is this qualification that might exclude adulterous sex from the privacy protection: unlike sodomy (the issue before the court), adultery often does cause harm to someone – most obviously the betrayed spouse, but potentially also the children of the married couple if the adultery leads to anguish within the family.[84] In addition, adultery poses a threat to the marriage relationship itself – an institution which the Constitutional Court holds in very high regard.

Comparative constitutional jurisprudence from the United States reveals that courts have been reluctant to include adultery within the parameters of the constitutional privacy right for precisely these reasons. In *Oliverson v West Valley City,*[85] for example, the United States District Court for the District of Utah considered the constitutionality of laws criminalising adultery. It held that "The decisions of the Supreme Court and other courts on privacy are narrowly drawn to protect fundamental or historical interest[s] of personal privacy. Extramarital sexual relationships are not within the penumbra of the various constitutional provisions or the articulated privacy interest[s] protected by the Constitution."[86] The court found that the State of Utah had a legitimate interest in preventing adultery, because adultery often results in the breakup of the marriage concerned,[87] and the state has an interest in protecting and preserving marriages and families because they have "enormous societal value."[88]

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[82] *Jordan* (note 81) para 83 *per* O'Regan and Sachs JJ [for the minority]. A similar point is made by the majority para 29.
[83] *National Coalition* (note 80) para 32.
[84] Cohen (note 73: 633).
[85] *Oliverson v West Valley City,* 875 F. Supp. 1465 (1995).
[86] *Id.* at 1480
[87] at 1484.
[88] at 1484. Other American cases have also held that the constitutional right to privacy does not extend to adulterous relationships. See *Suddarth v. Slane*, 539 F.Supp. 612, 617-18 (W.D. Va. 1982); Johnson v. San Jacinto Jr. College, 498 F. Supp. 555, 576 (S.D. Tex. 1980).

American courts have also held that adulterous relationships are not protected by the constitutional right to freedom of association. In *Marcum v. McWhorter*,[89] for example, the court held the adulterous relationship in question appeared to conform to the objective criteria for "intimate association" as established in *Roberts.*[90] However, because of the adulterous nature of the relationship, it was not protected by the constitutional right to freedom of association.[91]

In the *Wiese* case, the court acknowledged that the adultery action might indeed be a limitation on the right to freedom of association, both for the adulterous spouse and for the third party. However, the court held that the right to freedom of association could legitimately be limited in the context of adultery. The court argued that the adulterous spouse had voluntarily curtailed her rights to freedom of intimate association outside of the marriage when she married the defendant.[92]

It seems that both in the United States and in South Africa, constitutional protection for relationships often depends on the "worthiness" of the relationship. This worthiness tends to be assessed in two ways. Most obviously, a relationship is deemed worthy if it has "societal value." Both in the United States and in South Africa, marriages have been identified as relationships of immense social importance. Thus marriages have constitutional protection because of their value to society.

Marriages and other committed intimate relationships also qualify for protection on the grounds of inherent human dignity, because of the intense personal significance of the relationship to the people involved.[93] It seems that human dignity also informs the privacy right extended to intimate relationships – relationships will be protected because "we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships."[94] Sexual relationships will qualify for this kind of privacy protection when sex is part of "nurturing relationships or taking life-affirming decisions about birth, marriage or family."[95] Indeed, examination of South African and the American privacy cases reveals that the privacy right is extended to those relationships through which people exercise their most closely-held autonomy rights.

On the face of it, it might appear that marriages and extramarital dalliances are fundamentally different, and that marriages deserve protection from adultery. However, adulterous relationships are not necessarily inherently different, or inherently less significant to the people involved in them. People in adulterous relationships might also be nurturing their relationship or taking life-affirming decisions about family life. The relationship might be of "intense personal significance" to the people involved. It is worth remembering that many

[89] *Marcum v McWhorter*, 308 F.3d 635, (6th Cir.2002).
[90] *Id.* at 640.
[91] *Id.*
[92] *Wiese* (note 2) at 129.
[93] This was the reasoning in *Dawood* (note 57).
[94] *National Coalition* (note 80).
[95] *Jordan* (note 81) para 83.

people who begin their relationships as extramarital affairs go on to marry their partners and build new families within successful second marriages.[96]

In his minority judgment in *Marcum*, Judge Clay opined that the adulterous nature of a relationship should not be decisive to the question of whether or not it qualified for constitutional protection.[97] He provided the example of unmarried couples who live together for many years and have children together even though they have not legally terminated existing marriages to other people.[98] In *Hollenbaugh v Carnegie Free Library*[99] the US Supreme Court considered the circumstances of an adulterous couple who had moved in together and were raising their mutual child; one of them was still married to someone else. The court observed that the partners' right to take decisions about their relationship "closely resemble the other aspects of personal privacy to which we have extended constitutional protection. That petitioners' arrangement was unconventional or socially disapproved does not negate the resemblance."[100]

South Africa's no-fault divorce recognises that in many cases adultery is a symptom of a broken-down marriage relationship rather than the cause of the breakdown. If one spouse feels unfulfilled in the marriage and begins a meaningful relationship with someone new, it is not at all obvious that the dignity rights of the aggrieved spouse should be deemed important enough to trump the dignity and privacy rights of the couple who are building a new life together. It seems that if the law is to uphold the dignity rights of everyone to create meaningful lives of personal significance, then relationships cannot be deemed undeserving of constitutional protection merely because of their adulterous nature or origins.

7.2.2 Equality

In *Wiese* the defendant argued that the adultery action was unconstitutional on the grounds of equality because the action is available only to married people. The court was quick to dismiss this argument on the grounds that adultery specifically infringes a marriage, and that "people who choose to live together in other kinds of relationships make choices for themselves and they cannot complain if the consequences of marriage (which they themselves chose not to commit to) do not apply to them."[101]

The court's reasoning is precisely in line with that of the Constitutional Court in the domestic partnership case *Volks NO v Robinson*,[102] which denied financial benefits to a long-term domestic partner on the grounds that maintenance benefits were available only to those who had married. The court held that privileging the marriage relationship is not unfair or unconstitutional in the context of invariable economic consequences of marriage, and the court's reasoning would apply equally to personal aspects of the marital consortium such as mutual fidelity.

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[96] See the discussion in Cohen (note 73: 625, 637).
[97] *Marcum* (note 89) at 644.
[98] *Id.*
[99] *Hollenbaugh v. Carnegie Free Library*, 439 U.S. 1052 (1978).
[100] *Id.* at 1055.
[101] *Wiese* (note 2) at 129. Of course, many people in long-term partnerships do not actively choose not to be married – they would prefer to marry, but their partner refuses to do.
[102] *Volks NO v Robinson* 2005 (5) BCLR 446 (CC).

7.2.3 Freedom of conscience, religion, thought, belief and opinion

The third constitutional objection raised in *Wiese* was that the action for adultery infringes the right to freedom of conscience and religion. As the court correctly pointed out, couples who marry agree to remain faithful to each other. This is an invariable consequence of marriage and a core aspect of the marital consortium. The rules of civil marriage, including the prohibition on adultery, have historical roots in Catholic Canon law. However, these rules were incorporated into the civil law centuries ago, and they apply to all who conclude a civil marriage regardless of their religious beliefs.

7.3 The action is old-fashioned and does not conform to contemporary social mores

In *Wiese v Moolman*, the defendant argued that the convictions of the community had changed and that the action for adultery was no longer appropriate in the twenty-first century.[103]

In this regard, the key consideration is whether the community believes that adultery is legally wrongful. All delictual actions require proof that the defendant's actions were wrongful in terms of the law. The law does not provide a remedy for damages in all situations were one person's intentional act causes harm to another, [104] and the concept of wrongfulness is used to decide whether or not the harm should be grounds for a damages suit.[105]

When deciding whether the plaintiff's harm should give rise to a claim for damages, the court must consider the *boni mores*, understood as "the legal convictions of the community."[106] Do the legal convictions of the community require that damages be awarded for the harm incurred? Because delictual remedies are linked to contemporary *boni mores*, the remedies are inherently flexible and responsive to changing social norms and values. In the constitutional era the courts have held that "public policy and the *boni mores* are now deeply rooted in the Constitution and its underlying values."[107]

Legal "wrongfulness" is not necessarily the same thing as moral wrongfulness. Many people find adultery reprehensible because of the breach of trust involved and the emotional anguish it causes. Many people regard adultery as morally wrongful, or even sinful in the context of their religious beliefs.[108] However, this does not necessarily imply that people believe that there should be a legal action for adultery resulting in the payment of damages.

In the *Wiese* case, the court approached this issue by asking whether people nowadays regard adultery as reasonable behaviour.[109] In answering this question, the court was not particularly

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[103] *Wiese* (note 2) at 124.
[104] For example, there will not be a claim when a person suffers financial loss due to the lawful business practice of a competitor (Boberg PQR (1989) *The Law of Delict*, Rev. ed., Juta, Cape Town: 30).
[105] Boberg (note 104: 32)
[106] *Minister van Polisie v Ewels* 1975 (3) SA 590 (A).
[107] *Bredenkamp v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA) para 39.
[108] See for example Herold, Jennifer (2005) 'A breach of vows but not criminal: does *Lawrence v Texas* invalidate Utah's statute criminalizing adultery?' *Journal of Law and Family Studies* Vol. 7, pp. 253-261: 253) reporting that the majority of Americans deem adultery morally wrong.
[109] *Wiese* (note 2) at 127.

interested in public opinion (although in passing, the court remarked that it did not believe that the general public approved of adultery). Instead, the court correctly sought the *boni mores* in our constitutional values.[110] The court noted that the Constitutional Court has linked the marital consortium to human dignity – an important constitutional right and value.[111] In *Dawood*, the court had concluded that state interference with the marital consortium is an infringement of the dignity right. The *Dawood* judgment defined the marital consortium, and noted that it includes sexual fidelity. From the above, the *Wiese* court concluded: "It follows that the convictions of the community are that the exclusive sexual relationship within the bounds of marriage must be respected and that it is wrongful to interfere with this."[112] The court argued that it was necessary to provide a delictual remedy against third parties in order to protect the marital consortium,[113] and went on to argue that public policy favoured retention of the adultery action because "the law should send a message that adultery is wrongful."[114]

With respect, the court's conclusions do not seem to be sufficiently well supported by the reasoning presented. The court reached the conclusion that the community regards interference with the exclusive sexual relationship of marriage as "wrongful," thus implying that the community favours a delictual suit for damages. However, the court did not interrogate the "damages question" in reaching this conclusion – all that had been established though the court's reasoning was that the *boni mores* (as articulated by the Constitutional Court) recognise that the marital consortium requires sexual fidelity. This does not necessarily imply that the *boni mores* support a delictual adultery claim.

The court also appears overly reliant on the *Dawood* case with regard to the issue of interference in the marital consortium. In *Dawood* the court was considering direct interference in a marriage through the exercise of state power: immigration laws made it impossible for married couples to live together. This direct state inference with the consortium was held to be an infringement of the right to human dignity. In this regard, the court mentioned the violation of dignity rights during the apartheid era when the power of the state was used to prevent married couples from living together,[115] and to prohibit marriages between people classified into different "racial groups" in terms of apartheid legislation.[116]

In *Wiese* the court was concerned with interference by a private third party. Unquestionably, the state has an obligation to protect constitutional rights from infringement by private parties.[117] However, there would appear to be an enormous and material difference between direct state violation of human dignity and an adulterous affair. This difference becomes particularly significant in the case of apparently conflicting or competing constitutional

[110] *Id*.
[111] *Dawood* (note 57) and *Volks* (note 102).
[112] *Wiese* (note 2) at 127 (all translations of the judgment are by author)
[113] *Id.*
[114] *Id.* at 128.
[115] The so-called 'pass-laws' which prevented wives from joining their migrant-labourer husbands (eg Abolition of Passes and Co-ordination of Documents Act 67 of 1952).
[116] Prohibition of Mixed Marriages Act 55 of 1949. *Dawood* (note 57) para 28.
[117] Constitution, section 7(2).

rights. As discussed above, interference with an adulterous love affair could be considered an infringement of this couple's rights to privacy and freedom of intimate association. Some might argue that limitation of the constitutional rights of adulterous couples is justified if necessary to protect the dignity rights of the aggrieved spouse. However, this apparent "balancing of rights" is not proportional: it proposes that important constitutional rights of adulterous couples be infringed by direct state action. In the case of aggrieved spouses, the rights are directly infringed only by private third parties.

Of course, the "pro-remedy" response to this is that the state infringes the dignity rights of the aggrieved spouse if the law fails to provide a remedy. This line of reasoning has received a favourable response from the Constitutional Court in the context of domestic violence.[118] It is incontrovertible that the *boni mores* favour a damages action for violent spousal abuse. Failure to provide a remedy would effectively immunize the violent spouse, and imply that the abused spouse was not worthy of the law's protection.[119]

Adultery is clearly not the same. The law has already "immunized" the adulterous spouse – there is no delictual action against the adulterous spouse, for reasons of public policy. Furthermore, adultery is no longer grounds for divorce, and the courts have consistently expressed reluctance to apportion blame when deciding ancillary financial matters.[120] The logic behind the new divorce laws is that "no-one is to blame" – married people sometimes grow apart and fall in love with new people. The abandoned spouse might be heartbroken, but divorce law provides no patrimonial remedy for heartbreak. Public policy and the *boni mores* support the no-fault divorce, and there is no suggestion that the constitutional rights of the abandoned spouse have been infringed or that the law regards her as unworthy of legal protection. It thus appears rather disproportionate to suggest that the constitutional rights of third parties must be limited in the context of adultery actions so that the law does not infringe the dignity rights of the aggrieved spouse by failing to provide a remedy against the third party. The pro-remedy argument also fails to consider the autonomy rights of the adulterous spouse.[121] The Constitution provides protection for an intact consortium, where both parties choose to nurture and sustain their relationship. Constitutional Court jurisprudence providing protection for intimate relationships—including marriage—is based on human dignity. The jurisprudence respects everyone's freedom to make their own choices about profoundly personal matters such as whom they love and who they choose to build a life with.[122] If one of the parties decides to leave the marriage and begin a relationship with someone else, the Constitution cannot be invoked to prevent this. This would be a serious infringement of the adulterous spouse's right to human dignity—to make her own decisions

[118] *Van der Merwe v Road Accident Fund* 2006 (4) SA 230 (CC).
[119] *Id.* para 65.
[120] *Beaumont* (note 68); *Buttner v Buttner* 2006 (3) SA 23 (SCA); *Wijker v Wijker* 1993 (4) SA 720 (A).
[121] For a more in-depth discussion of the constitutional issues see Amanda Barratt 'Strange bedfellows? The action for adultery and the South African Bill of Rights' (2014) 7 *International Journal of Private Law* 310–327.
[122] This is evident for example in *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) para 32. Respect and protection for personal choice about profoundly intimate matters is also evident in *Minister of Home Affairs v Fourie* 2006(1) SA 524 (CC). In *Dawood supra* note 56, the court contrasts the constitutional approach with the restriction of choices in terms of the Prohibition of Mixed Marriages Act during the apartheid era.

about intensely personal matters, to move on with her life and nurture a meaningful relationship with someone new.[123]

The *Wiese* court's conclusion that it is necessary to provide a delictual remedy against third parties in order to "protect the marital consortium"[124] is also somewhat troubling, because it seems unlikely that the action is a deterrent in practice.[125] The court's finding that that public policy favours retention of the adultery action because "the law should send a message that adultery is unlawful,"[126] is insufficiently substantiated for the reasons explored above – the question of whether or not adultery should be unlawful will depend on whether the action infringes constitutional rights. The law can demonstrate its respect for marriage and provide more meaningful protection in other ways – ways which do not involve potential limitation of anyone's constitutional rights.

8 Conclusion

There do not appear to be any easy answers to the question of whether or not the action for adultery has a place in modern-day constitutional South Africa. In the years since *Wiese*, courts have not returned to *Wiese's* sophisticated constitutional analysis when deciding adultery cases. It is business-as-usual in adultery actions: plaintiffs sue on the grounds of *iniuria* to their old-fashioned *dignitas*.[127]

The *Wiese* court attempted to place the adultery action on a constitutional foundation by arguing that adultery is a violation of inherent human dignity. As discussed in this paper, the court's reasoning was not altogether convincing, and the action for adultery could potentially infringe the rights to privacy and freedom of association of the adulterous couple. The claim that the action is necessary to protect the dignity rights of aggrieved spouses seems disingenuous in the light of our permissive no-fault divorce laws. It seems that the adultery action and the Bill of Rights do not fit comfortably together; they are indeed rather 'strange bedfellows.'

[123] As expressed in *Dawood v Minister of Home Affairs supra* note 56, the right to inherent human dignity protects those 'who wish to enter into and sustain permanent intimate relationships' para 36. Of course Family law already acknowledges this right. In the no-fault divorce era, the straying spouse is able to sue for divorce and to marry her lover. See for example *Schwartz v Schwartz* 1984 (4) SA 467 (A).
[124] *Wiese* (note 2) at 127.
[125] Cary & Scudder (note 63: 21).
[126] *Wiese* (note 2) at 128.
[127] *Erasmus v Heine* (note 1)*; M v M and Another* (2011/12734) [2011] ZAGPJHC 176 (23 November 2011).