ARTICOLE

CIVIL-LAW ANTECEDENTS OF THE REGULATION OF POLYGYNY IN SOUTH AFRICAN LAW

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Abstract: *In South Africa, the preference for monogamy is founded on the South African legal system's civil-law tradition. Attitudes that potentially polygynous African customary and Muslim marriages were contra bonos mores and uncivilised should not merely be ascribed to colonial policies and political ideology, often based on Christian doctrine. The rejection of polygyny in Roman society was continued in Roman-Dutch law and reflected in the comments of the Roman-Dutch institutional writers. In this article I trace the historical antecedents of the rejection of polygyny in the civil-law foundations of South African law.*

Keywords: *Monogamy; polygamy; polygyny; polyandry; bigamy; praecepta iuris; honeste vivere; chastity; boni mores; equality of spouses; Roman law; Roman-Dutch law; African customary marriage; Muslim marriage.*

1. Introduction

In 1996, the South African Law Reform Commission identified the potentially polygynous nature of the African customary marriage as one of the crucial issues that had to be addressed in harmonising the South African common law (essentially Roman-Dutch law)[1] and African customary law of marriage. Central to this issue, was the fact that polygyny was perceived to be irreconcilable with the constitutional commitment to gender equality. Against the background of its colonial heritage, it should not surprise that South African law had always given preference to the so-called civil or Christian marriage "on the understanding that only a 'voluntary union for life of one man and one woman to the exclusion of all others' is a true marriage".[2]

Historically, African marriages were measured primarily not against the yardstick of gender equality,[3] but that of Christian values and the prevailing *boni mores*. On account of their polygynous nature and the institution of bridewealth or dowry (similar to the *dos* in Roman law), these marriages were found not worthy of official recognition. The upshot of this policy was that over the years "almost the entire Native population" had been "basterdised".[4] The Law Reform Commission's investigation in the 1990's eventually resulted in the legislative recognition of polygynous African customary marriages. Unfortunately, though, today almost two decades later, Muslim marriages, which are also potentially polygynous, have not yet been

afforded such blanket recognition.[5] For many years the South African Court of Appeal's decision in *Ismail v. Ismail*[6] ruled the roost for Muslim marriages. In this case it was held that such marriages were *contra bonos mores* and therefore void. In addition, the Court explicitly referred to the equality of the spouses as a reason for not recognising potentially polygynous Muslim marriages, stating that "in view of the growing trend in favour of the recognition of complete equality between marriage partners, the recognition of polygamous unions ... may even be regarded as a retrograde step". In 2003, though, the South African Law Reform Commission published a report on the recognition of Islamic marriages, including a draft Bill.[7] This Bill, which has yet to be passed into law, recognises polygynous Muslim marriages subject to certain conditions.

Polygyny is clearly irreconcilable with the ideals of equality entrenched in the international instruments such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Universal Declaration of Human Rights, including the Protocol on the Rights of Women in Africa and the International Covenant on Civil and Political Rights. Significantly, African customary marriages have been afforded legislative recognition only because the institution of polygyny is believed to be "so deeply rooted in the African consciousness that it would be impossible to enforce any prohibition". The attempt in the Recognition of Customary Marriages Act[8] to address the dichotomy of entrenching the inequality of husband and wife by the legislative recognition of polygyny on the one hand, and on the other hand, of protecting women's rights of dignity and equality in customary marriages, in line with the South African Constitution[9] and South Africa's international treaty obligations, has not been successful. South African judicial decisions bear out the fact that despite its official recognition, the status of polygynous African customary marriages remains uncertain. There are still numerous issues that cloud these marriages and that have led the courts to declare subsequent polygynous marriages void, with dire consequences for one of the wives and immense suffering for any children.[10]

Historically, colonial policies and political ideology have largely informed the attitude in South Africa that African customary law and especially institutions of polygyny and the custom of bridewealth were uncivilised. But the predilection for monogamy is in truth founded on the South African legal system's civil-law tradition and may be traced back to Roman and Roman-Dutch law. The rejection of polygyny in Roman society was continued in Roman-Dutch law and the abhorrence with which the institution was held is clearly reflected in the comments of Roman-Dutch institutional writers. In this article I will trace the historical antecedents of the rejection of polygamy in the civil-law foundation of South African law.

2. Roman law

2.1 Polygamy in Roman society

In Roman society, marriage evolved under the influence of Christianity from a private family affair to a religious and juridical institution in the post-classical era.[11] Nevertheless, even in classical law there were various restrictions relating to age, fitness, and capacity that applied to the persons who wanted to marry each other. A perusal of the texts of the classical jurists as they appear in the Digest, show that Ulpian's foundational principle of *honeste vivere* played a

significant role in the development of the Roman law of marriage.[12] This principle impacted specifically on the regulation of the choice of marriage partners.[13] The lawful Roman marriage (*iustum matrimonium*) was described by Modestinus in D. 23.2.1 as "the union of a man and a woman, forming an association during their entire lives, and involving the common enjoyment of divine and human privileges". The *iustum matrimonium* had a dual objective, on the one hand to create equality of rank, condition and honour between the spouses; and on the other hand, the "propagation of the species".[14] The goal of attaining equality of the spouses is confirmed by the fact that Roman law forbade polygamy.[15] Polygamy includes both polygyny (the system that permits a man to be married to more than one wife, as prevails in African customary law) and polyandry (the system allowing a woman to have multiple husbands).[16] Yet it appears that literary sources and Roman texts tend to focus more on the polyandry of the wife and concomitantly on her chastity than on the husband's polygyny.[17] This does not really surprise. In the writings of the classical jurists in the context of marriage, the concept of *honestas* is closely linked to the notion of *materfamilias* which became the essence of female honourability.[18] The glossatorial exegesis of D. 1.1.10.1[19] confirms the centrality of the wife in the idea of *honestas* when it illustrates the precept of *honeste vivere* with reference to the wife who lives chastely, honouring her vows in accordance with the mores of the day.[20]

Although *de iure* Roman marriages were monogamous, extra-marital sexual relations were widely practised and condoned.[21] In reality, what has been dubbed as "serial monogamy" prevailed: because divorce was informal and effortless, men could have numerous wives in a row.[22] Constantine curbed this practice by restricting divorce, recognising only approved reasons for a divorce and attaching penalties (the forfeiture of property) where a divorce took place for trivial reasons.[23]

2.2 Roman law and polygamy

Until the classical period there was such a rudimentary assumption of monogamy that the existence of polygamy or bigamy (terms used interchangeably in Roman literature) simply did not feature in Roman law.[24] Because a second marriage during an existing marriage automatically dissolved the first, polygamy in the strict sense of the word was not possible.[25] While it was held to be unlawful to marry another while you were in an existing marriage, until the time of Diocletian, such a transgression was only visited with *infamia*; that is unless the second marriage amounted also to adultery, in which case both civil and criminal sanctions followed under the *lex Julia de adulteriis*.[26] The same applied to those who were engaged to two persons at the same time.[27]

Although during the classical period the *Edictum perpetuum* attached only *infamia* to polygamy, that does not mean that it was not seen in a serious light, as D. 3.2, which deals with "those who are branded with infamy," confirms.[28] In D. 3.2.1, Julian's redaction of the Edict classes this transgression together with other acts deserving of infamy.[29] These include being discharged from the army for disgraceful conduct; appearing on stage as actor or to recite on stage; keeping a brothel; being found guilty in a court of law of vexatious litigation or collusion, theft, robbery with violence, insult, fraud or trickery; being condemned in a case of partnership, tutelage,

mandate, or deposit; giving your daughter or someone in your power in marriage before the termination of the customary mourning period *tempus lugendi* (*annus luctus*); and knowingly marrying a woman before the mourning period had passed.[30]

In D. 48.5.11(12).12 Papinian discussed an apparently true second-century case[31] in point. It concerned a woman who contracted a second marriage, having heard that her absent husband had died. Papinian held that had she been under the *bona fide* impression (determined by her behaviour) that her absent husband had died, she would not be held to have done anything deserving of punishment. However, should she have used the rumour of her husband's death as a mere excuse, she would have been guilty of adultery.[32] Another example Papinian discussed is that of the man who had lead a married woman astray, taking her as his wife and sending her husband a notice of repudiation. The punishment of this particular man was relegation for a period of three years.[33]

From the mid-third century, polygamy was regarded in an increasingly serious light and the punishment for perpetrators increased. In 258, emperors Valerian and Gallienus determined that a man who had married two wives would not only be branded with *infamia*, but if he had done so pretending that he was unmarried, he could also be punished for the crime of fornication (*stuprum*) and would forfeit the *dos*.[34] It appears then that it is the misrepresentation of his marital status that elevated the sexual intercourse with a second wife, which was not in itself a crime, to an offence.[35]

In post-classical times this changed and polygamy was visited with more severe punishments. During the reign of Diocletian, it was for the first time declared a crime for men to have two wives.[36] C. 5.5.2 determined that "[i]t is a matter of common notoriety that no one who is subject to the jurisdiction of the Roman Empire can have two wives at once; as, by the Edict of the Praetor, men of this description are branded with infamy, and a competent judge will not suffer a crime of this kind to go unpunished". The judge had a discretion regarding the appropriate penalty for the crime.[37]

During Constantine's reign, legislation was promulgated regulating second marriages where a husband had presumably died on a military campaign. According to C. 5.17.7, a wife who was unable to obtain tidings of the safety of her husband, could enter into a second marriage only after a period of four years had expired after his departure for military service and after she had notified the general under whose command he had served of her intention to remarry. Subject to these conditions, and not having entered into the second marriage clandestinely or rashly, she would not lose her dowry or be subject to capital punishment. However, had the second marriage been entered into secretly the proper punishment would be imposed.[38]

The increasing intolerance towards polygamy was witnessed by the fact that the Romans extended the prohibition also to the foreigners who practised it.[39] Blume notes in his comments on C. 5.5.2 that polygamy had been practiced in Thrace, Lybia, Armenia, Syria, and possibly in Palestine[40] and Egypt,[41] and that it continued to be practiced also under the Empire.

The regulation of Jewish marriages warrants special mention. It is generally accepted that polygyny was practiced by the Jews.[42] In 388, marriages between Jews and Christians were forbidden by law.[43] There are different opinions regarding the reason for the prohibition of

such mixed marriages. Among these are, the prevention of polygamy; to curtail conversion to the Jewish religion; because of the more liberal rules in Jewish law regarding the prohibited degrees of marriage; and to enhance religious and political unity through *concordia fides.*[44] Barely five years after the issue of this rescript, in 393, Theodosius declared that "no Jew shall follow the custom of his people in contracting marriage, nor enter wedlock according to Jewish law, nor enter into different marriages at the same time…".[45] Interestingly, though, there are academics who hold that despite the fact that Jewish society of that time – the Mishnaic and Talmudic periods – may be characterised as polygynous, in reality polygamy was not commonly practised in Roman Palestine and the Western Jewish communities. Some hold that this was as a result of the influence of the "monogamous structure of Christian European society".[46] By contrast, Roman legislative regulation of Jewish marriage practices and Theodosius's decree may be regarded rather as confirmation of the fact that the institution of polygyny was a well-known social phenomenon at the time.[47]

Justinian's attitude towards Jewish polygyny may be gleaned from C. 9.9 and Nov. 12 that deals with "unlawful and unnatural marriage[s], which the law calls incestuous, sinful and punishable".[48] In terms of Nov. 12.3, unlawful marriages had to be dissolved, children borne from such marriages were illegitimate, and a fourth of the property was forfeited. Justinian later granted some relief for Jews, determining that their marriages need not be dissolved and that their children could inherit, but he specifically limited this provision to those who lived in the region of Tyre.[49]

The concept of polygamy was extended to include also concubinage. During the fourth century, Constantine forbade a man to have a wife and concubine at the same time.[50] Justinian endorsed this law in C. 7.15.3.2, determining that "[m]en, however, who have wives, are not permitted, either by the ancient or the present laws, to have concubines, free or slave". According to Stocquart[51] concubines too were forbidden to have more than one partner simultaneously as that was regarded as polygamy and "contrary to Roman civilization". In this regard Ulpian in D. 25.7. 3 is pertinent where he observes that a woman living in concubinage with her patron acts improperly if she enters the same relationship with his son or grandson, "because a connection of this kind closely approaches one that is infamous, and therefore such scandalous conduct should be prohibited".

2.3 Reasons for the prohibition of polygamy in Roman society

There are various possible reasons for the protection of monogamy in Roman law. Among these are the following: to ensure that inheritance is limited to specific legitimate heirs by one legitimate wife, and in affluent families also ensuring wealth by limiting the number of heirs;[52] to preserve the honourability of the marriage (*honeste vivere* and, linked to that, the notion of living chastely);[53] and the objective of the Roman *iustum matrimonium* to engender equality of the spouses.[54] In Nov. 12 that deals with unlawful marriages, the concept of chastity pertinently comes to the fore: the converse of the life of one who enters into an unlawful marriage is "to live chastely, and according to nature, and refrain from living licentiously, from seeking forbidden bounds and from violating laws dictated by nature."[55] The unwanted

consequences of entering into an unlawful marriage are listed as "spoiling the blood of the offspring", "insulting family" and "violating the laws of God and man".

But, in Roman society extra-marital sexual relations were not frowned upon until the time of Augustus. *De iure* monogamy prevailed, but in practice polygamy (especially with slaves) was at the order of the day, even though extra-marital sex was (in theory) punishable for women. For men it was punishable only if it also amounted to adultery.[56] Augustus' *lex Iulia de maritandis ordinibus* of 18 BC and *lex Papia Poppaea* of AD 9 were legislative measures aimed at intervening in the general moral degeneration in Rome and in declining population numbers. These laws put marriage under the auspices of the state and aimed among others, at curbing extra-marital sexual relations by subjecting adultery to public instead of private sanction.

Evans Grubbs, though, holds that the view that Roman society was generally morally depraved, is erroneous and should be attributed to the exaggerated writings of imperial satirists and moralists, such as Seneca and Juvenal, which dealt predominantly with the lives of the Roman aristocratic elite who formed a small percentage of Roman society.[57] She argues that "Romans had a 'sentimental ideal ... focused on a standard of companionate marriage and a delight in children ...'".[58] As appears from late-Republican funerary inscriptions, the attributes of a married woman were *pudicitia* (modesty, especially as regards sexual behaviour); *castitas* (chastity as manifested by complete sexual fidelity); marriage to one man, and conscientious execution of household duties[59] – all of which are consonant with the *praeceptum iuris* of *honeste vivere* and the glossatorial interpretation of this Ulpian precept.

Susan Treggiari[60] has a similar view. She notes that even though the reality of Roman social life contradicted the notion that an ethos of monogamy prevailed, the idea that only death could dissolve a marriage was nevertheless founded on Roman ideals. Further, literary evidence and epitaphs confirm that the eternal character of the marriage bond (lifelong monogamy) too is Roman in origin.[61] In his *Mostellaria*, Plautus revealed three important characteristic features of the ideal Roman marriage: faithfulness or fidelity to one husband; obedience to the husband; and the eternal nature of the marriage bond.[62] Of course, Augustus' legislation contradicted his ideal of reviving traditional morals – especially that of the *univira*, a term coined in Latin literature and Roman funerary inscriptions and referring to wives who had married only one husband.[63] The ideal of the *univira*, the woman who had one husband only,[64] is founded in Roman religion as certain religious rites were the prerogative of *univirae* only.[65]

3. Roman-Dutch law

The Roman texts mentioned above were also regarded as the foundation of the law relating to polygamy in Roman-Dutch law and, as may be expected, one finds ample reference to and discussion of these texts in the writings of the old Roman-Dutch law authorities. As will appear shortly in the cursory perusal of the Roman-Dutch texts on the topic, polygamy was regarded in a very serious light and the views of the institutional authors became increasingly more intolerant of this crime. Further, polyandry was also in Roman-Dutch law regarded as more serious than polygyny, because of the all-encompassing importance of the chastity of a wife.

As indicated earlier, the main component of the South-African common law is Roman-Dutch law. Despite the hybrid nature of the law, the civilian tradition remains dominant and is generally regarded as the essential core of South African law. Academics and the South African courts today still rely both on Roman law (also as an independent original source) and Roman-Dutch law as primary sources of law.[66] This is evidenced especially in the law of marriage. Thus, in 2004 in its decision in *Fourie and Another v. Minister of Home Affairs and Another*,[67] the South African Supreme Court of Appeal noted that the foundation of the common law definition of marriage may be attributed to Modestinus, in D. 23.2.1 and Justinian's Institutes 1.9.1., and then continued that "[t]hese definitions have been quoted over and over again down the centuries". The Court further specifically referred to the continued relevance of the work of the seventeenth-century author on the law of Holland, Henricus Brouwer.

With regard to the monogamous nature of marriage, a number of the old authors on Roman-Dutch law are referred to regularly.[68] The most important of these are Hugo de Groot, Henricus Brouwer, Johannes Christenius, Simon van Leeuwen, Johannes Voet and Johannes van der Linden. In what follows I will look briefly at the writings of a selection of these authors.

3.1 The seventeenth century

3.1.1 Hugo de Groot (Grotius)[69]

Grotius was the pioneer of Roman-Dutch law and features prominently in the development of South African law. His *Inleiding tot de hollandsche rechts-geleertheid* was an authoritative source of the law in the nineteenth century independent states of the *Zuid-Afrikaansche Republiek*[70] and the Orange Free State[71] and continued to exert great influence in South African law. Grotius's observations in his *Inleiding* about polygamy are sparse. Unlike most of the other Roman-Dutch authorities, he does not refer to any Roman law texts since his work was written while he was imprisoned and consequently lacked any references.[72] In his *Inleiding* 1.5.1, Grotius pertinently mentions that marriage is a union of one man and one wife. He continues then, in 1.5.2, broadly relying on Christian doctrine, that one man may be married to only one wife and one wife only, to one man. Should a married person, marry another, or promise to marry another, he or she would be severely punished, and the second marriage would be regarded as void. Interestingly, more than 150 years later, Dionysius van der Keessel, Professor at the University of Leiden, who based his lectures on Roman-Dutch law on the *Inleiding*, pointed out that Grotius merely refers to the fact that an engagement to another by someone who is already married is severely punished, without actually calling it bigamy.[73] Fockema Andreae & Van Apeldoorn's[74] comments on Grotius's texts indicate that where the second marriage was not consummated, the punishment was much less severe. The second marriage could be validated if the first spouse decided to relinquish his or her marriage. Further, children could be legitimised. The disapprobation of polygamy during this time is evident from the severity of the penalties. In fact, the death penalty was sometimes given in aggravating cases, such as where a man had several wives.[75]

3.1.2 Henricus Brouwer[76]

Brouwer was a professor at the University of Leiden during the seventeenth century and was famous for his monumental work on the law of marriage, *De jure connubiorum apud Batavos recepto* … .[77] Unlike Grotius's *Inleiding*, this seminal work is inundated with references. *De jure connubiorum* is in South Africa still today regarded as an important source of the common law regarding marriage. In fact, the South African Supreme Court of Appeal in the *Fourie* case mentioned earlier, noted with regard to the formalities of a marriage and the appointment of clerics as State officials as legislated in the Marriage Act 25 of 1961, that "[i]ndeed it is instructive to note that this way of seeing the matter is set forth by Henricus Brouwer (1625-1683), a leading Roman Dutch writer, in his work *De Jure Connubiorium*, which was first published in 1665 … This analysis is clearly correct and as applicable today as it was in 1665 when it was first published."[78]

Brouwer discusses polygamy extensively, relying on Roman law texts. He, too, starts with the standard introduction that a marriage is a union of one man and one woman, relying on Inst. 1.10.[79] He then states that the reason for using the singular is to exclude polygamy: *viri & mulieris in singulari numero dicimus, ut polygamiam excludamus*.[80] Like Grotius, he invokes Christian doctrine to condemn polygamy, stating that "together with the rest of the Christians, we, Dutch apply this Roman law that is consonant with the law of nature and Divine law and accordingly we do not allow anyone in addition to a wife to have a concubine or to contract two marriages".[81]

It is evident in his discussion of the possible punishments and his interpretation of Roman law that Brouwer regarded polygamy in a very serious light. In less severe cases he does not explicitly state that polygamy is a crime, but when he discusses aggravated polygamy, he expressly refers to it as a crime and to the perpetrators as bigamists.[82] He mentions *infamia* in accordance with D. 3.2. for someone who has contracted two engagements or who has married another but where the second marriage had not been consummated. But where the second marriage was in actual fact consummated, referring to C. 9.9.18 and D.48.5.11(12).12, both parties are bigamists; the man in addition being guilty of immorality or unchastity (*stuprum*) and the woman of adultery.[83] Brouwer states that imperial law and Roman law are the guidelines regarding punishment for serious offences and that polygamy should be regarded as a serious crime; in aggravating circumstances it should be punished with the death penalty in accordance with C. 5.17.7 and D. 47.11.1.2.[84]

3.1.3 Antonius Matthaeus II [85]

Matthaeus II was also a seventeenth century jurist. He was of German decent, but became a professor of law at the University of Utrecht. Although he was not from the province of Holland, his work on criminal law, *De criminibus ad. lib. XLVII et XLVIII digesti commentarius* published in Amsterdam in 1644, is still consulted in South Africa today.[86]

Matthaeus makes ample use of Roman law. He discusses polygamy in 48.3.1.13, noting that someone married to two wives simultaneously should in accordance with C. 9.9.18 and C. 5.5.2 be guilty of *stuprum* and not adultery. Interestingly, one of his arguments is that while

the prohibition of adultery was universal (including in Israel), the prohibition of polygamy was not: "Indians, Persians, Ethiopians, and the peoples of almost all Asia and Africa had flocks of wives … and Almighty God tolerated polygamy even among the people of Israel" which He would not have done, had polygamy been regarded as adultery.[87] In his writings the differentiating standards of morality for men and women clearly come to the fore. He opines that a woman who commits polyandry should be guilty of adultery, in accordance with C. 5.17.7 and C. 117.11. He justifies this distinction between men and women because "a greater reason for virtue ought to exist in the case of a wife than in the case of a husband".[88] Matthaeus concludes that polygamy is a serious form of *stuprum* and should receive the ultimate punishment.[89]

3.2 The eighteenth century

3.2.1 Dionysius van der Keessel[90]

Van der Keessel was a well-known Dutch jurist at the end of the eighteenth century. He was a professor at Groningen and later at Leiden. His most important published work, *Theses selectae juris hollandici et zeelandici …*[91], presumably evolved from his lectures on Grotius's *Inleiding* which he used as the basis of his teaching on Roman-Dutch law. Van der Keessel's actual lectures were not published during his life time, but several manuscripts of the lectures have been published and translated during the twentieth century. A collection of them on criminal law, published and translated in five volumes in 1969-1978, is entitled *Praelectiones in libros XLVII et XLVIII digestorum exhibentes jurisprudentiam criminalem …*[92]. Both these works of Van der Keessel deal extensively with the phenomenon of dual marriages and, in addition to Grotius, he relies on Brouwer's *De connubiorum*. In his *Praelectiones ad ius criminales* 48.5.6, where he comments on various texts in the *Corpus iuris civilis*, it becomes clear that Van der Keessel draws no distinction between polygamy and bigamy: he uses the terms interchangeably.

He notes that there are three requirements for this offence: there must be an existing spouse;[93] sexual intercourse must have taken place (if not, the perpetrator is followed with *infamia* only: D. 3.2.1; D. 3.2.13.3);[94] and there must have been wrongful intent.[95] Thus, a woman who believes her husband had died and marries again will not be guilty of bigamy (referring to D. 48.5.12(11); C. 5.5.7).[96] "Nowadays in our regions" he states, "polygamy can hardly exist without an act of falsity."

Just how serious polygamy or bigamy was regarded is illustrated by Van der Keessel's discussion of the punishment for the crime.[97] He drew the distinction between male and female bigamists: a male bigamist would be guilty of *stuprum* (C. 9.9.18; C. 5.5.2.) and a female bigamist of adultery. A man would accordingly be visited with *infamia* as well as the ordinary punishment for *stuprum*. There appeared to be some conflict of opinion whether the punishment should be death, but van der Keessel concluded, referring to D. 48.5.11(12).1 and 48.5.39(38).1, that if the *stuprum* was accompanied also by incest, death was the appropriate sentence.

In accordance with Nov. 117.11, a woman who is guilty of polyandry must be held liable for adultery.[98] He points out that in view of the fact that from the time of Constantine the punishment for adultery was death (C. 5.17.7), it should be an appropriate sentence. If it is

uncertain whether there was intent or negligence (in accordance with D. 48.5.12(11)12) there may be a discretion as to the punishment. Van der Keessel nevertheless observes that "under the very late law" adultery was no longer a capital crime for a woman as Charles V changed this by art. 121 of his *Constitutio criminalis coroli V*, and therefore it should follow that bigamy should no longer be punished with the death sentence.[99] He nonetheless states that bigamy is a far more serious crime than adultery: *bigamiae crimen scilicet multo gravius est adulterio.*[100]

3.2.2 Johannes van der Linden[101]

Van der Linden, too, played an import role in South African legal history. The 1858 Constitution of the independent state of the *Zuid-Afrikaansche Republiek* determined that his *Regtsgeleerd, practicaal, en koopmans handboek ...*[102] would be its basic law.[103] This work was regarded as an important source of law also in the other independent state, the Orange Free State.[104] It continued to be used as a source of law also in later years in the Union of South Africa, as is apparent, among others, from judicial decisions. Sir Henry Juta, who translated and annotated this work,[105] describes it as follows on the title page: "This book contains all of the Institutes that can be of any use to Students. There are copious notes bringing the law up to date ...." Interestingly, it appears from this work that at the time (1920) a distinction was still not drawn between polygamy and bigamy[106] and Van der Linden's *Koopman's handboek* 2.7.3 still constituted the existing law on the subject.[107]

Van der Linden regards marriage as monogamous.[108] He states that persons completely incapable of marrying are those who are already married, because *veelmannery* en *veelwyjverij* (that is, polyandry and polygyny) "are not allowed among us".[109] He evidently regards a dual marriage as a serious crime. Polygamy, together with adultery, rape, prostitution, sodomy and incest, are classified in the *Koopmans handboek*[110] under crimes originating in unchastity (immorality, fornication, lust). He draws no distinction between polygamy and bigamy and uses the terms interchangeably: Referring to Van der Keessel's *Theses* (th. 62) he states that "[w]hen a person during marriage wilfully enters into a marriage with another person and the second marriage is consummated, this crime is called polygamy or bigamy". The punishment for polygamy is flogging and banishment, or public exhibition on a scaffold and banishment.

4 Conclusion

Attitudes towards polygamy have not change fundamentally through history. Roman law became increasingly averse to the phenomenon and eventually criminalised it. Yet polygamy was tolerated to a very limited extent among those communities where the institution was a cultural attribute. The concept of *honeste vivere* in marriage finds expression, among others, in chastity set as benchmark for the wife. It is not unusual then that chastity and monogamy were frequently linked in the Roman texts and that the chastity of the wife forms a golden thread through the writings on this subject.

Also in Roman-Dutch law the notion of *honeste vivere* came to the fore in relation to marriage. Brouwer noted that "the same legal position applies in ... [a secular and a church marriage], the same dignity, the same honourableness, the same bond".[111] In Roman-Dutch law, the Roman law heritage is clearly illustrated in the works dealing with monogamy. Roman-Dutch law relied not only on Roman law, but also on Christian precepts and was likewise severely opposed to polygamy. Polygamy, or bigamy as it was interchangeably referred to, was classed in Roman-Dutch law as a crime of unchastity, immorality or lust. While Matthaeus[112] gave recognition to the fact that polygamy formed an integral part of certain cultures, Voet was so opposed to it that he accused God of connivance for allowing it.[113]

The Roman and Roman-Dutch attitudes towards polygamy filtered through to South African law with its civil-law heritage. The historical intolerance of anything outside the accepted norm of monogamy in marriage was mirrored in the non-recognition of African customary and Muslim marriages. Although African customary marriages were eventually officially recognised as valid marriages in 1998, the status of *de facto* polygynous African marriages is at present still tenuous.[114] Like Jewish marriages in the Roman Empire, Muslim marriages are today still not recognised in South African law.

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[1] South African has an uncodified, hybrid legal system, relying, apart from the Constitution, which is the supreme law of the land, on different sources of law such as legislation and precedent but also on common law and on African customary law. The South African common law consists of Roman-Dutch law, influenced by English common law and adapted by local legislation and judicial precedent. Furthermore, legal pluralism prevails: within a paradigm of state-law pluralism, the Roman-Dutch common law and constitutionally recognised African customary law are applied as independent (and theoretically parallel) systems of law.

[2] South African Law Commission *Harmonisation of the Common Law and the Indigenous Law (Customary Marriages)* Project 90, Issue Paper 3 (Oct. 1996) at vii. Until 1998, potentially polygynous marriages were invalid. In *Rex v. Mboko* 1910 T.S. 445 at 447 it was held that "polygamous marriages are inconsistent with the general principles of civilisation as recognised amongst civilised nations ... when a man marries under a system which allows polygamy, his marriage is polygamous, and therefore not recognised by this Court, whether he marries one wife or two"; cf., also, *Nalana v. Rex* 1907 T.S. 407 at 409. The general loathing of polygamy is clearly illustrated, e.g., in the decision of *Kaba v. Ntela* 1910 T.S. 964 at 967: the Court stated that according to s. 24 of Law 3 of 1876 of the *Zuid-Afrikaansche Republiek*, in the interest of morality, the buying of wives and polygamy were not permitted ("[t]ot bevordering der zedelijkheid wordt het aankoopen van vrouwen of veelwijverij onder de kleurlingen in deze Republiek door de wetten des lands niet erkend"), that "[w]ith us marriage is the union of one man with one woman, to the exclusion, while it lasts, of all others" (at 986); and accordingly an African customary marriage is against the "general principles of civilisation, because of its polygamous character", is thus void and "becomes from the narrow point of view of the law an illicit and, I am afraid I must add, an immoral cohabitation"(at 970).

[3] See the case discussion of *Malgas v. Gakawu* in "Native customs and the Colonial courts" (1891) 8 *Cape Law J.* 37-41 at 39 where the author noted that "to impose upon the Courts of a civilised Government the duty of trying cases relating to 'dowry,' in the widest sense of the term, would be the deliberate recognition of polygamy, and also the indefinite postponement of the time when native women shall be released from their present level of almost hopeless degradation".

[4] South African Law Commission *Harmonisation of the Common Law and the Indigenous Law (Customary Marriages)* Project 90, Report (Aug. 1998) in par. 2.3.10; *Seedat's Executors v. The Master (Natal)* 1917 A.D. 302.

[5] The consequences of Muslim marriages have at best been recognised on an *ad hoc* basis. During the 1990's, under a new constitutional dispensation, the courts displayed a more tolerant approach to Muslim marriages and focused on the divergent values of the multicultural South African society, in certain instances (e.g. a claim for loss of support, maintenance, succession) affording wives in Muslim marriages the same protection as that enjoyed by those in civil or Christian marriages: see, e.g., *Amod v. Multilateral Vehicle Accident Fund (Commisision for Gender Equality Intervening)* 1999 (4) S.A. 1319 (S.C.A.); *Ryland v. Edros* 1997 (2) S.A. 690 (C.) 711C; *Daniels v. Campbell* 2004 (5) S.A. 331 (C.C.); *Khan v. Khan* 2005 (2) S.A. 272 (T.); and *Hassam v. Jacobs* 2009 (5) S.A. 572 (C.C.). In the latter case in par. 16, the Constitutional Court made it clear that the case did not concern the constitutional validity of polygynous Muslim marriages and that it was unnecessary "to become entangled in the religious and cultural debates in this matter. It should also be emphasised that this judgment does not purport to incorporate any aspect of Sharia law into South African law".

[6] 1983 (1) S.A. 1006 (A.D.) at 1024. The Appellate Division based its decision against the validity of polygynous marriages, among others, on *Bronn v. Fritz Bronn's Executors* (1860) 3 *Searle* 313 at 319 in which Christian doctrine was advanced as the reason for non-recognition: "Now marriage is a condition Divine in its institution … it is only by the development of Christianity that the sacred and mysterious union has been clearly revealed to mankind, and has enjoined a strict observance of its requirements and one of the first of these requirements is … that polygamy is unlawful, and that marriage is only good when contracted with a man who is not already married to another woman." See, A.J. Kerr "Back to the problems of a hundred or more years ago: Public policy concerning contracts relating to marriages that are potentially or actually polygamous" (1984) 101 *South African L.J.* 445-456 at 451, and the sources referred to. Kerr argues that it was an incorrect assumption that Christian principles informed the non-recognition of polygamy in the South Africa. See, also, Charles R.M. Dhlamini "The Christian v the customary marriage" (1985) 102 *South African L.J*. 701-708. Walter Scheidel "Monogamy and polygyny" Princeton/Stanford working paper (2009), available at *https://www.princeton.edu/~pswpc/pdfs/scheidel/010903.pdf* at 7, is of the view that monogamy per se does not play a central role in early Christian writings, and the fact that St. Augustine (*On the Good of Marriage* 7) labelled it a "Roman custom" indicates that Christianity may simply have appropriated it as an element of mainstream Greco-Roman culture. By contrast, John Witte, in his expert report prepared for the Attorney-General of Canada, submitted to the Supreme Court of British Colombia (Vancouver Registry No. S-097767) (19 Jul. 2010) §§ 106-119 and 138-179, referring to the teachings of the early Church Fathers, holds that from its inception Christianity rejected polygamy and that this view persisted through the Middle Ages and is evident in medieval canon law.

[7] South African Law Reform Commission *Islamic Marriages and Related Matters* Project 59, Report (Jul. 2003).

[8] Act 120 of 1998.

[9] Constitution of the Republic of South Africa, 1996. Section 9(1) declares that "[e]very person shall have the right to equality before the law and to equal protection of the law", and s 9(2) provides that "[n]o person shall be unfairly discriminated against, directly or indirectly" on grounds of, inter alia, gender, sex or age.

[10] See I.P. Maithufi & G.M.B. Moloi "The current legal status of customary marriages in South Africa" (2002) *J. of South African Law* 599-611; G.J. van Niekerk "The courts revisit polygyny and the Recognition of Customary Marriages Act 120 of 1998" (2013) 28 *S.A. Public Law* 369-487; and the judicial decisions in *Sokhewu v. Minister of Police* [2002] J.O.L. 9424 (Tk.); *MG v. BM* 2012 (2) S.A. 253 (G.S.J.); *Mayelane v. Ngwenyama* 2013 (4) S.A. 415 (C.C.).

[11] D. 23.2.1; D. 25.2.1; D. 42.1.52; see Max Kaser *Das römische Privatrecht* vol. 1 (Munich, 1971) at 72-73, 310-311; M. Kaser & F.B.J. Wubbe *Romeins privaatrecht* (Zwolle, 1967) at 278; Barry Nicholas *An Introduction to Roman Law* (London, 1962) at 80; Émile Stocquart "Marriage in Roman Law" tr. Andrew T. Bierkan & Charles P. Sherman (1907) 16(5) *Yale L.J.* 303-327.

[12] The pre-eminence of the notion of *honeste vivere* in the development of marriage should then not be attributed to the influence of Christian doctrine. Likewise in Roman society, the legal protection of monogamous marriages cannot be attributed to the stimulus of Christianity.

[13] See the discussion by Gardiol van Niekerk & Duard Kleyn "*Honeste vivere*: Ulpian's *praeceptum iuris* as manifested in the Roman law of marriage" (2016) 2 *Studia iurisprudentia (UniversitatisBabes-Bolyai)* available at *http://studia.law.ubbcluj.ro* (accessed 12 July 2016). It played a role also with relation to the prohibition of donations between spouses: D. 24.1 and C. 5.16, esp. D. 24.1.3*pr.*; D. 24.1.32.13; D. 24.1.51; see, also, D. 39.5.31*pr.*; the *dos*: D. 24.3.20; and verbal contracts: D. 45.1.134pr: Van Niekerk & Kleyn at n. 62.

[14] Cf. Stocquart (n. 11) at 309.

[15] E.g., G. 1.63 (*Brev. alarici G. inst*. 4.7) expressly states that neither a man nor a woman was allowed to marry two or more persons at the same time: *...quia si adhuc constant eae nuptiae, per quas talis adfinitas quaesita est, alia ratione mihi nupta esse non potest, quia neque eadem duobus nupta esse potest, neque idem duas uxores habere.* (... because during the continuance of the marriage that produced the alliance there would be another impediment to the union, for a man cannot have two wives nor a woman two husbands.) See, also, D. 3.2.13.3-4. Interestingly, Justinian's Institutes refer only to polygyny: see *Inst*. 1.10.6-7. For the translation of the *Corpus iuris civilis* texts, I relied on the following sources: S.P. Scott *The Civil Law* (Cincinnati, 1932), available at *http://droitromain.upmf-grenoble.fr/*; Fred H. Blume "Annotated Justinian Code", available at *http://www.uwyo.edu/lawlib/blume-justinian/*; Alan Watson *The Digest of Justinian* 4 vols., available at *http://0-muse.jhu.edu.oasis.unisa.ac.za/book/6233.*

[16] In modern-day parlance "polygamy" refers to a cultural system that is lawfully practiced and where both (or several) spouses are aware of the fact that one of them, or both (or several) of them, are in an existing marriage when they marry each other. Bigamy, in turn, is a crime and presupposes that one of the spouses is unaware of the fact that the other spouse is already married. In Roman texts the terms are used interchangeably.

[17] See, e.g. D. 48.5.11(12).12; C. 6.57.5pr-1. In his *Annales* (xi 26-38; xii.1), Tacitus writes about Messalina, wife of the Emperor Claudius (A.D. 41-54) who had married her lover Silius. Even though Claudius was prepared to take her back, his freedman Narcissus nevertheless killed her; cf., also, Laura Betzig "Roman monogamy" (1992) 13 *Ethology and Sociobiology* 351-383 at 369-370.

[18] In this regard Stocquart notes ((n. 11) at 317; and see 318-319) that "*matrona*" or "*materfamilias*" had a very specific meaning, "exacting a two-fold condition for the wife; first, to have had a Roman citizen for a father; second, to have maintained an honorable and pure life, the dignity which her origin gave to her." See, further, the discussion by Van Niekerk & Kleyn (n. 13).

[19] In which Ulpian's *praecepta iuris* appear: *Ulpianus libro secundo regularum ... 1. Iuris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere.*

[20] Gloss "*honeste*" *ad* D. 1.1.10.1.

[21] See, generally, Laura Betzig "Roman polygyny" (1992) 13 *Ethology and Sociobiology* 309-349 and "Roman monogamy" (1992) 13 *Ethology and Sociobiology* 351-381; Suzanne Dixon "The marriage alliance in the Roman elite" (Winter 1985) *J. of Family History* 253-378 at 358; *contra* Stocquart (n. 11) at 320 who holds that any such violations of the law would have been met with a public outcry.

[22] Walter Scheidel "A peculiar institution? Greco-Roman monogamy in global context" (2009)14 *The History of the Family* 280-291 at 283; J.C. van Oven *Leerboek van romeinsch privaatrecht* (Leiden, 1948) at 455; Olankunbi O. Olasope "*Univira*: The ideal Roman matrona" (2009) 20 *Lumina* 1-18 at 6 refers to it as "successive polygamy". Dixon (n. 21) at 358 notes that even women made themselves guilty of "serial polygamy" and adultery.

[23] C.Th. 3.16.1 (A.D. 331) and see the rescript of A.D. 421 in C.Th. 3.16.2: Clyde Pharr *The Theodosian Code and Novels and the Sirmondian Constitutions* (New York, 1959; 1969 repr.). 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 355-356; Stocquart (n. 11) at 308-309; Hagith S. Sivan "Why not marry a Jew? Jewish-Christian marital frontiers in Late Antiquity" in Ralph W. Mathisen *Law, Society, and Authority in Late Antiquity* (Oxford, 2001) at 217; Dixon (n. 21) at 359 (and see, further, at 355-356) notes that until the third century B.C. divorce was not common and in fact frowned upon. It is only subsequently that it became casual and frequent among the upper-class, where marriages were arranged for political reasons. See, further, C. 5.17.8. "We direct that a lawful marriage may be entered into by consent, but cannot be dissolved without sending a bill of divorce. For regard for the children demands that a dissolution of the marriage should be more difficult."

[24] See James A. Brundage *Law, Sex, and Christian Society in Medieval Europe* (Chicago/London, 2009) at 35; O.F. Robinson *The Criminal Law of Ancient Rome* (Baltimore, Md., 1995) at 57; Witte (n. 6) in § 60.

[25] See Max Kaser *Das römische Privatrecht* vol. 1 (Munich, 1971) at 315. Marriage in Roman law was dependant on "ongoing consent" and accordingly polygamy or bigamy was unknown. When the *affectio maritalis* was established with a person other than the spouse, the *affectio maritalis* with the existing spouse was automatically terminated: Kuefler (n. 23) at 355. There appears to have been some difference of opinion about whether the second marriage automatically dissolved the first. That is apparent from Cicero's discussion of a real case. In his *De Oratore* (1.40.183) he held that the second "wife" should be regarded as a concubine if the first had not been divorced. His opinion of course implies that some measure of formality was required for divorce: *Quod usu memoria patrum venit, ut paterfamilias, qui ex Hispania Romam venisset, cum uxorem praegnantem in provincia reliquisset, Romae alteram duxisset neque nuntium priori remisisset, mortuusque esset intestato et ex utraque filius natus esset, mediocrisne res in contentionem adducta est, cum quaereretur de duobus civium capitibus et de puero, qui ex posteriore natus erat, et de eius matre, quae, si iudicaretur certis quibusdam verbis, non novis nuptiis fieri cum superiore divortium, in concubinae locum duceretur?* ("As to the case also, that happened in the memory of our fathers, when the father of a family, who had come from Spain to Rome, and had left a wife pregnant in that province, and married another at Rome, without sending any notice of divorce to the former, and died intestate, after a son had been born of each wife, did a small matter come into controversy, when the question was concerning the rights of two citizens, I mean concerning the boy who was born of the latter wife and his mother, who, if it were adjudged that a divorce was effected from a former wife by a certain set of words, and not by a second marriage, would be deemed a concubine?"; see, further, Stocquart (n. 11) at 322; and the case discussion of Bruce W. Frier & Thomas A.J. McGinn *A Casebook on Roman Family Law* (Oxford, 2004) at 161-162; *contra* Jane F. Gardner *Women in Roman Law and Society* (Bloomington/ Indianapolis, 1995) at 92.

[26] See Gardner (n. 25) at 93; Witte (n. 6) in § 60.

[27] D. 3.2.1, D. 3.2.13.1-4. See, also, Evans Grubbs *Law and Family in Late-Antiquity. The Emperor Constantine's Marriage Legislation* (Oxford, 1999) at 143, 173; A.H.J. Greenidge *Infamia. Its Place in Roman Public and Private Law* (London, 1894) at 128.

[28] Not only was the actual perpetrator visited with *infamia*, but the father who gave his daughter or someone in his power in such a marriage, too, became infamous. Interestingly, regarding bigamy, this Edict did not deal with women. Greenidge (n. 27) at 128 notes that the Edict deals with the intention to commit bigamy rather than the actual effect thereof: consequently a man could be guilty of bigamy even if there was a legal bar against the marriage.

[29] See, further, the discussion of Greenidge (n. 27) at 123ff.

[30] *Iulianus libro primo ad edictum. Praetoris verba dicunt: infamia notatur qui ab exercitu ignominiae causa ab imperatore eove, cui de ea re statuendi potestas fuerit, dimissus erit: qui artis ludicrae pronuntiandive causa in scaenam prodierit: qui lenocinium fecerit: qui in iudicio publico calumniae praevaricationisve causa quid fecisse iudicatus erit: qui furti, vi bonorum raptorum, iniuriarum, de dolo malo et fraude suo nomine damnatus pactusve erit: qui pro socio, tutelae, mandati depositi suo nomine non contrario iudicio damnatus erit: qui eam, quae in potestate eius esset, genero mortuo, cum eum mortuum esse sciret, intra id tempus, quo elugere virum moris est, antequam virum elugeret, in matrimonium collocaverit: eamve sciens quis uxorem duxerit non iussu eius, in cuius potestate est: et qui eum, quem in potestate haberet, eam, de qua supra comprehensum est, uxorem ducere passus fuerit: quive suo nomine non iussu eius in cuius potestate esset, eiusve nomine quem quamve in potestate haberet bina sponsalia binasve nuptias in eodem tempore constitutas habuerit.*

[31] See D. 48.5.11(12).12. See Gardner (n. 25) at 91-96; Frier & McGinn (n. 25) at 162.

[32] D. 48.5.11(12).12: *Mulier cum absentem virum audisset vita functum esse, alii se iunxit: mox maritus reversus est. Quaero, quid adversus eam mulierem statuendum sit. Respondit tam iuris quam facti quaestionem moveri: nam si longo tempore transacto sine ullius stupri probatione falsis rumoribus inducta, quasi soluta priore vinculo, legitimis nuptiis secundis iuncta est, quod verisimile est deceptam eam fuisse nihil vindicta dignum videri potest: quod si ficta mariti mors argumentum faciendis nuptiis probabitur praestitisse, cum hoc facto pudicitia laboretur, vindicari debet pro admissi criminis qualitate.* ("A woman, after she had heard that her absent husband had died, married another man; not long after, her husband returned. What steps should be taken against that woman? The reply was that the question raised was not so much one of law as of fact; for if a long time had elapsed without evidence of any *stuprum* [on her part] and she, led by false reports [into believing] that she was free from the earlier bond, contracted a lawful second marriage, the likelihood is that she was [genuinely] deceived, and there can appear to be nothing deserving punishment. But if the supposed death of her husband shall be proved to have provided an excuse for getting married, [then] since [her] action is offensive to chastity, she ought to be punished in accordance with the nature of the offense committed.")

[33] D. 24.2.8: Papinianus *libro secundo de adulteriis. Divus Hadrianus eum, qui alienam uxorem ex itinere domum suam duxisset et inde marito eius repudium misisset, in triennium relegavit*. And cf. Robinson (n. 24) at 57 n 53; Frier & McGinn (n. 25) at 162.

[34] Witte (n. 6) § 22; See Frier & McGinn (n. 25) at 38. Interestingly, in the Union of South Africa, too, the bridewealth was forfeited in the case of polygynous African marriages. In *Ngqobela v. Sihele* (10 S.C. 346 at 352), the Court declared: "[I]f, by native custom, 'dowry' cattle is paid to the woman's father on condition that upon her refusing to cohabit with the man any longer the latter shall be entitled to claim the cattle from the father, the claim cannot be enforced by our courts. In law there is a *par delictum*, and the claimant cannot prevail over the possessor." And see *Kaba v. Ntela* 1910 T.S. 964 at 969.

[35] C. 9.9.18: "... There is no doubt that he who has two wives at once is branded with infamy, for, in a case of this kind, not the operation of the law by which Our citizens are forbidden to contract more than one marriage at a time, but the intention, should be considered; and therefore he who pretended to be unmarried, but had another wife in the province, and asked you to marry him, can lawfully be accused of the crime of fornication ... You can obtain from the Governor of the province the return of all your property of which you deplore the loss on account of the fraudulent marriage, and which should be restored to you without delay." Brundage (n. 24) at 37 avers that the references to bigamy in this text could be attributed to interpolations in Justinian's Code.

[36] Theodor Mommsen *Römisches Strafrecht* (Leipzig, 1899) bk. 1, 121 n 3, bk. 4, 701; Brundage (n. 24) at 87, attributes the fact that polygamy was made a crime to Christian influence.

[37] Mommsen (n. 36) bk. 4, 701. Blume *ad* C. 5.5.2.

[38] *Imperator Constantinus . Uxor, quae in militiam profecto marito post interventum annorum quattuor nullum sospitatis eius potuit habere indicium atque ideo de nuptiis alterius cogitavit nec tamen ante nupsit, quam libello ducem super hoc suo voto convenit, non videtur nuptias inisse furtivas nec dotis amissionem sustinere nec capitali poenae esse obnoxia, quae post tam magni temporis iugitatem non temere nec clanculo, sed publice contestatione deposita nupsisse firmatur. 1 . Ideoque observandum est, ut, si adulterii suspicio nulla sit nec coniunctio furtiva detegitur, nullum periculum ab his quorum coniugio erant copulatae vereantur, cum, si conscientia maritalis tori furtim esset violata, disciplinae ratio poenam congruam flagitaret.* During the time of Constantine, adultery, magic and prostitution were lawful grounds for divorce and the penalty for adultery included death, exile and confiscation of property: Hagith (n. 23) at 217; Kuefler (n. 23) at 357 and see, generally, at 355-357; Brundage (n. 24) at 37. Henricus Brouwer, institutional writer on Roman-Dutch law, relied on this text to argue that the death penalty was the appropriate punishment for polygamy - see *infra* at nn. 76 ff.

[39] Max Kaser *Das römische Privatrecht* vol. 2 (Munich, 1975) at 164; D.H. Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* (Durban, 1977) at 95; Stocquart (n. 11) at 305.

[40] *Contra* Kerr (n. 6) at 451.

[41] It is interesting to observe that there are indications that in Ancient Egypt polygamy was not the norm. This is evident from surviving Egyptian marriage contracts on papyrus, available at *http://droitromain.upmf-grenoble.fr/* (accessed 1 Jul. 2016)): A contract dated 310 B.C., states: "[L]et it not be allowed to Heraclides to bring in another woman to the insult of Demetria, nor to beget children by another woman ..."; another from 13 B.C. reads: "... And from now on, Apollonius, son of Ptolemaeus, shall provide Thermion as his wife all necessaries ... and shall not mistreat her, nor throw her out, nor bring in another wife, or he shall directly forfeit the dowry increased by half with right of execution upon both the person of Apollonius, son of Ptolemaeus, and all his property as if by legal decision ... Thermion shall fulfil her duties towards her husband and their common life and shall not leave the house for a night or a day without the consent of Apollonius, son of Ptolemaeus, nor dishonour, nor injure their common home, nor consort with another man, or she – if guilty of any of these deeds – shall after trial, forfeit the dowry, and in addition the guilty party shall be liable to the prescribed fine ..."; and in the 2nd-3rd centuries A.D.: "... Chrysermos is to furnish [to Dionysia] her necessities and clothing and the other things in turn, from his property. And he is not to be allowed to introduce [another wife] in addition to her, - - - nor to outrage her in any [way] ..."; see, further, on Egyptian marriage contracts Judith Evans Grubbs (n. 27) 122 ff.

[42] Flavius Josephus *Antiquities of the Jews* 17.1.2 described the institution as "our ancestral custom that a man may have several wives at the same time" (this quotation from Scheidel (n. 6) at 5). See, further, Justin Martyr *Dialogue with Trypho* ch. 134: "If, then, the teaching of the prophets and of Himself moves you, it is better for you to follow God than your imprudent and blind masters, who even till this time permit each man to have four or five wives ..." Alexander Roberts & James Donaldson (eds.), available at *http://www.ccel.org/ccel/schaff/anf01.toc.html* (accessed 30 Jun. 2016). There are numerous biblical sources, also in the New Testament, e.g. Peter's sermon at Pentecost, to support the thesis that polygamy was practised by the Jews. See, generally, the extensive exposition of Witte (n. 6) §§ 63ff.

[43] C. 1.9.6 Emperors Valentinian, Theodosius and Arcadius to Cynegius, Praetorian Prefect: "No Jew shall marry a Christian woman, nor a Christian man a Jewess. And if anyone does anything of the kind, the act shall be considered in the nature of adultery, and liberty of accusation is given to everyone. Given at Thessalonica April 30 (388)." (=C.Th. 3.7.2 =C.Th. 9.7.5 [=*brev. alarici* 9.4.4]: Imppp. Valentinianus, Theodosius et Arcadius aaa. Cynegio pf. p. *Ne quis christianam mulierem in matrimonium iudaeus accipiat, neque iudaeae christianus coniugium sortiatur. Nam si quis aliquid huius modi admiserit, adulterii vicem commissi huius crimen obtinebit, libertate in accusandum publicis quoque vocibus relaxata*.

[44] See, generally, the discussion of Hagith (n. 23) at 208-219. According to Evans Grubbs, this prohibition was merely directed at Christian female weavers who had abandoned their jobs: Judith Evans Grubbs "Virgins and widows, show-girls and whores: Late Roman legislation on women and Christianity" in Mathisen (n. 23) 220-241 at 222-223.

[45] C. 1.9.7.

[46] Amnon Linder *The Jews in Roman Imperial Legislation* (Detroit, 1987) at 192 notes that the predominance of monogamy in the Western Jewish communities was a result of the influence of Christianity.

[47] See Adiel Schremer "How much Jewish polygyny in Roman Palestine?" (1997-2001) 63 *Proceedings of the American Academy for Jewish research* 181-223 at 183-186, 219-220, available on *JSTOR* at *http://www.jstor.org/stable/3622602?seq=1&cid=pdf-reference#references_tab_contents* (accessed 5 Jul. 2016) at 215; Linder (n. 46) at 88; 192.

[48] Nov. 12.3: *Sancimus igitur, de cetero, si quis illicitas et contrarias naturae, quas lex incestas et nefandas et damnatas vocat, contraxerit nuptias* ...; see, further, Witte (n. 6) § 64.

[49] Nov. 139.

[50] See C. 5.26.1[D. 25.7] "Emperor Constantine to the people. No one shall be permitted to have a concubine during marriage. Promulgated at Caesarea June 16 (326)".

[51] According to Stocquart (n. 11) at 320, a married man who took a concubine would have been guilty of adultery and bigamy.

[52] This largely accounted for the tendency towards infertility among the aristocracy: see Betzig (n. 17) at 353; 364-365. Monogamy may also be linked to the idea of the *univira* which, according to Dixon (n. 21) at 360, originated in the early property system; see the contrary view about the religious origins of the tradition of *univira* at (n. 64) below.

[53] Regarding the high regard in Roman society for the chastity or honour of the wife, see further, Betzig (n. 17) at 367-369. At 369 she notes that chastity was the feminine ideal, the chief virtue in women – a "good wife was *morigera*, subservient to her husband, a good widow was *univira*, committed to a dead one". The good wife's attributes of *pietas* (devotion or piety), *fides* (fidelity), and *pudicitia* (chastity) were preserved on Roman coins; cf., also, Jane F. Gardner & Thomas Weidman *The Roman Household. A Sourcebook* (London/ New York, 1996) at 54, 99.

[54] See the text at n. 14 *supra*.

[55] Nov. 12.1; the concept of chastity again appears in Nov. 12.3.

[56] Dixon (n. 21) at 358 attributes the moral decline to the increased wealth after the second Punic War of 218-201 B.C., noting that even women made themselves guilty of "serial polygamy" and adultery; cf., further, Scheidel (n. 6) at 4-5.

[57] Evans Grubbs (n. 27) at 55ff.

[58] *Ibid*.

[59] *Idem* at 57.

[60] *Roman Marriage* (Oxford, 1991) at 227-228; 235-236.

[61] See the discussion of Majorie Lightman & William Zeisel "*Univira*: An example of continuity and change in Roman society" (1977) 46(1) *Church History* 19-32; Gordon Williams "Some aspects of Roman marriage ceremonies and ideals" (1958) 48(1-2) *J. of Roman Studies* 16-29 at 23-25; cf., also, Treggiari (n. 60) at 230-232.

[62] Plautus *Mostellaria* in the Loeb ed. of *Plautus* vol. 3 (London, 1924 MXMXXIV) tr. Paul Nixon) at 305: *Solam ille me soli sibi suo sumptu liberavit / illi me soli censeo esse oportere opsequentem* (He spent his own money to set me free, just me, and just for himself. I feel I'm only doing what I ought in devoting myself to him, and just him) (lines 204-205); and then at 310 *Si tibi sat acceptum est fore tibi victum sempiternumi / atque illum amatorem tibi proprium futurum in vita /soli gerundum censeo morem et capiundas crines* (Well, if you have a guarantee that he'll be food for you eternally and be your own fond lover all your life, the thing for you is to put yourself at his sole disposal and … fix up your hair for the wedding) (lines 224-226). See, further, Williams (n. 61) at 229ff; cf., also, Betzig (n. 17) at 367-369.

[63] It is by exception only that this virtue could be attributed to men: see Williams (n. 61) at 23.

[64] The meaning of this term changed through Roman history. Until the late Republic, an *univira* was the woman who married as a virgin and died before her husband as *materfamilias*. The concept was later extended and referred to a woman who did not remarry after her husband's death: Lightman & Zeisel (n. 61) 19-32; Olasope (n. 22) at 2; cf., further, Betzig (n. 17) at 370.

[65] Williams (n. 61) at 23-24; Treggiari (n. 60) at 233; Lightman & Zeisel (n. 61) at 19-21.

[66] See, e.g., the recent decision of the South African Supreme Court of Appeal in *RH v. DE* 2014 (6) S.A. 436 (S.C.A.) and the references in it to Roman and Roman-Dutch law as regards adultery.

[67] [2005] 1 All S.A. 273 (S.C.A.) in par. 79; and see, further, the references to Roman and Roman-Dutch law materials.

[68] See, e.g., H.R. Hahlo *The South African Law of Husband and Wife* (Cape Town, 1969) at 32, esp. n.1 and the references there; François du Bois (ed.) *Wille's Principles of South African Law* 9 ed.(Cape Town, 2007) at 231.

[69] He lived from 1583-1645 and is regarded as one of the most outstanding jurists of all times and the father of modern international law. He wrote the first treatise on Roman-Dutch law, *Inleiding tot de hollandsche rechtsgeleerdheyd* which was printed in s'Gravenhage in 1631. See, generally, on Grotius, J.W. Wessels *History of the Roman-Dutch Law* (Grahamstown, 1908) at 262-293.

[70] The Constitution of the *Zuid-Afrikaansche Republiek*, 1858, read together with the Addenda to the Constitution as they appear in Law 1 of 1856 (Z.A.R.) determined that Van der Linden's *Koopman's handboek* would be the primary source of law of the republic, and Grotius's *Inleiding* and Simon van Leeuwen's law book (*Het rooms-hollands-regt*) would be the binding supplementary sources of the law: "Wanneer in genoemd boek [Koopman's handboek] over eenige zaak niet genoegzaam duidelijk of in het geheel niet wordt gehandeld, zal het Wetboek van Simon van Leeuwen en de Inleiding van Hugo de Groot verbindend zijn."

[71] The Constitution of the Orange Free State, 1854, read together with Ordinance 1 of 1856 (O.F.S.) determined that the principal law of the state would be Roman-Dutch law that applied in the Cape Colony prior to the introduction of English judges (in 1828) and that the main sources of this law would be the text books of Voet, Van Leeuwen, Grotius, de Papegaaij, Merila (sic) Lijbrecht, Van der Linden and Van der Reese and the authorities quoted by them.

[72] With the approval of Grotius, an annotated edition of the work by Groenewegen, appeared in 1644.

[73] See his *Praelectiones iuris hodierni ad hugonis grotii introductionam hollandicam ad* Gr. 1.5.2.

[74] See S.J. Fockema Andreae & S.J. van Apeldoorn *Inleiding tot de hollandsche rechts-geleertheid beschreven bij Hugo de Groot* vol. 2 (3 ed., Arnhem 1926) *ad* Gr. 1.5.2.

[75] *Ibid*.

[76] He lived from 1625-1683.

[77] (Amsterdam, 1665).

[78] In par. [79]; see, also, par. [119].

[79] *Nuptiae Justiniani Imperatori definiuntur, viri & mulieris conjunctio individuam vitae consuetudinem continens …*; *De iur. conn*. 2.28 2. One finds a similar text in Johannes Christenius's *De causis matrimonialibus dissertationes* (Arnhem, 1663) Diss. 3.1: referring to Justinian's text in *Inst*. 1.9, he comments that *matrimonium iustum unius maris & unius feminae cohabitatione constare, ad excludam Polygamiam, & bigamiam, quae nuptiarum nomen non merentur.*

[80] *De iur. conn*. 2.28 3.

[81] *Idem* 2.5.20.

[82] *Idem* 2.5.22.

[83] *Ibid*.

[84] He nevertheless notes that at that stage nobody had received the death penalty, only lashes and banishment: *De iur. conn*. 2.5.27.

[85] He lived from 1601-1654.

[86] This work was edited and translated into English by M.L. Hewitt & B.C. Stoop and published as *On Crimes. A Commentary on Books XLVII and XLVIII of the Digest by Antonius Matthaeus J.C.* vol. 1 (Pretoria, 1987); vol. 2 (Pretoria, 1993).

[87] *Quod adulterii prohibito perpetua feurit, cum apud alias gentes, tum apud gentem Israelitarum; prohibito polygamiae non fuerit perpetua. Nam praeterquam quod Indi, Persae, Æthiopes ac totius propemodum Asiae atque Africae populi greges uxorum habuerint … etiam in Israelitarum gente Deus Opt. Max. polygiam toleravit; Nunquam profecto toleraturus, si adulterium esset ductio plurium uxorum.*

[88] Tr. Hewett & Stoop (n. 86).

[89] This is confirmed by art. 121 of the Criminal Ordinance of Charles V of 1540. Matthaeus discusses the death penalty for this kind of *stuprum* further in *De crim.* 48.3.5.8.

[90] He lived from 1738-1816.

[91] Leiden, 1800.

[92] B. Beinart & P. van Warmelo (eds.) vol. 2 Wynberg, 1972.

[93] A person who is betrothed cannot be guilty of polygamy.

[94] Also, *Thes.* 1.5.2 th. 62.

[95] *Ibid*.

[96] *Ibid*: where parties are *bona fide* (presuming a spouse is dead) no punishment follows. The first spouse then has a discretion whether he or she wants the first marriage to continue. If not, the court may declare the first marriage dissolved. In this regard *Cornelis van Bijnkershoek* (1673-1743) *Quaestiones iuris privati* 2.16. 9 (tr. R.A. Whitaker, Pretoria, 1987) writes that a woman whose husband is missing in action may contract a second marriage upon the consent of a magistrate. Should the first husband turn up, he should have the choice whether he wanted his marriage to revive.

[97] In *Thes.* 1.5.2 th. 63 he elaborates on the punishments in the province of Zeeland.

[98] See, also, Johannes Voet, *Commentarius ad pandectas* vol. 2 (Geneve, 1769) 23.5.1.

[99] *Jure novissimo autem, cum adulterium non amplius in mulieri sit capitale … dicendum quoque est polyandriam morte non puniri* …

[100] *Prael.* th. 62. See, also, Voet, *Comm.* 23.2.1 and 48.5.7: He does not deal with penalties in detail. Referring to Groenewegen's *De legibus abrogatis ad* C. 5.5.2, he states that in modern law a perpetrator would be flogged or held up to public scorn and then banished, but that in terms of in terms of the Criminal Ordinance of Charles V art. 121, such parties should receive capital punishment as adulterers: *ultima supplicii poena masculis & foeminis, tanquam adulteris proposita sit*. See, also, Simon van Groenewegen van der Made *Tractatus de legibus abrogatis* (Amsterdam, 1669) ad C. 5.5.2.

[101] He lived 1756-1835.

[102] Amsterdam, 1806.

[103] The Constitution of this Republic (see n. 70 *supra*) determined that "Het Wetboek van Van der Linden blijft (voor zoover zulks niet strijdt met den Grondwet, andere wetten of Volksraads-besluiten), het wetboek in dezen Staat."

[104] See n. 71 *supra*.

[105] *Van der Linden's Manual Commonly Known as The Institutes* (1884, Cape Town, 1920 ed.).

[106] At 125.

[107] Also George T. Morice, a barrister at the Middle Temple in London, and later an advocate of the provincial courts of the Cape of Good Hope, the Transvaal and Orange Free State, translated and annotated this work. It appeared as *Legal, Practical and Mercantile Manual: For the use of judicial officers, practitioners, merchants, and all who desire a general view of legal knowledge* (2 ed. Cape Town, 1922). At 269 Morice stated that in South Africa the crime was known as "bigamy" and that sexual intercourse was not necessary to constitute the crime.

[108] *Koopmans handboek* 1.3.1.

[109] *Idem* 1.3.6.1.

[110] *Idem* 2.7.3.

[111] *De jur. conn.* 2.27.20.

[112] See the text at n. 86.

[113] "[P]olygamy was tolerated by God among the fathers of the Old Testament with a certain connivance, or at least was not visited with noteworthy penalties, though all the same it is in very truth opposed to the Divine commands" (*praeceptis divinis*): *Comm.* 23.5.1 tr. Percival Gane *The Selective Voet being the Commentary on the Pandects by Johannes Voet* vol. 4 (Durban, 1956).

[114] See the text at n. 10.